

Turn away no more;
Why wilt thou turn away?
The starry floor,
The watery shore,
Is given thee till the break of day.

– William Blake, *Songs of Innocence and Experience*

SONGS OF INNOCENCE AND EXPERIENCE: TEN YEARS OF EMERGENCY ARBITRATION

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Until relatively recently, parties to international arbitration agreements had no recourse to arbitration to preserve the status quo, conserve assets or evidence, or seek other provisional relief until a tribunal had been established in a particular case – a process that, in the best of circumstances, took weeks after submission of a “request for arbitration” or “notice of arbitration.” One of the principal advantages of international arbitration – party participation in the selection of the decision-maker – precluded the possibility of immediate relief prior to the constitution of a tribunal. To obtain provisional measures in such circumstances, parties were required to resort to national courts.

And thus international disputes that the parties agreed to have resolved by international arbitrators rather than national courts were sometimes effectively decided by a national court’s decision on the request for interim relief. If the court denied the request for interim relief, the applicant might decide that there was no point in commencing or continuing with the arbitration – either because it had no realistic possibility to obtain an effective remedy if it ultimately prevailed in the arbitration or because it was persuaded by the national court’s skepticism about the likelihood it would succeed on the merits of its underlying claims (in most jurisdictions, national courts are required to make some merits evaluation on a request for interim relief). Similarly, if the national court granted the request and commented favorably on the merits of the applicant’s case, the responding party might seek to settle the matter. In such circumstances, the national court had effectively decided the case: international arbitration delayed was quite literally international arbitration denied.

In response to these concerns, and greatly facilitated by universal acceptance of e-mail as a reliable means of communication, over the last ten years most major arbitration institutions have implemented rules and procedures to provide parties

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with an “emergency arbitrator” to decide requests for interim or conservatory relief prior to appointment of the arbitral tribunal. In such cases, the parties surrender their interest in selection of the decision-maker to the institution in order to resolve disputes too urgent to await a regularly constituted tribunal. This remarkable innovation has now become standard in rules governing international arbitrations. As a relatively new development, some of the tensions between theory and reality in emergency arbitration are only now coming into focus.

Ten years in, and with at least 175 emergency arbitration cases worldwide through August 2016,¹ what have we learned? After a brief survey of the development of emergency arbitration provisions, we address five key questions. What are the common features across institutional rules on emergency arbitration, and what sets different rules apart? Is emergency arbitration being used, and is it fulfilling the promise of swift relief? Are the legal standards for granting relief being consistently applied? Are decisions by emergency arbitrators enforceable? And, crucially, how does emergency arbitration change the strategic landscape for practitioners and parties?

I. FROM INNOVATION TO NORM

The emergency arbitration regimes in place today have their roots in rule innovations dating to the 1990s. In 1990, the Court of Arbitration of the International Chamber of Commerce (“ICC”) introduced its Rules for a Pre-Arbitral Referee Procedure. The provisions were optional: parties were required to affirmatively “opt in” in order for the referee procedure to apply. The ICC Pre-Arbitral Referee Procedures failed to find popular favor, with only 14 cases in their first 24 years of existence.²

In the mid-1990s, the World Intellectual Property Organization (“WIPO”) considered adopting Emergency Relief Rules that would be included in the recommended arbitration clause for WIPO arbitration. In the recommended clause, parties would agree to resolve their disputes in accordance with the WIPO Arbitration Rules “in conjunction with the WIPO Emergency Relief Rules.”³ The rules would also have allowed *ex parte* emergency relief where “notice to the Respondent would involve a real risk that the purpose of the procedure would be defeated.”⁴ However, the proposed rule changes were not adopted.⁵

¹ See the case numbers reported by leading arbitral institutions in Section III(A), below.

² Andrea Carlevaris & José Ricardo Feris, *Running the ICC Emergency Arbitrator Rules: The First Ten Cases*, 25(1) ICC INT’L CT. OF ARB. BULL. 25, 27 (2014).

³ Richard Allan Horning, *Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules (In Toto)*, 9 AM. REV. INT’L ARB. 155, 170 (1998).

⁴ *Id.* at 174.

⁵ WIPO has since updated its arbitration rules to incorporate emergency arbitration as a default (opt out) procedure available in “arbitrations conducted under Arbitration Agreements entered on or after June 1, 2014.” WIPO ARBITRATION RULES (2014), Art. 49(a).

In 1999, the American Arbitration Association (“AAA”) adopted Optional Rules for Emergency Measures of Protection as part of its Commercial Arbitration Rules. These did not apply by default; only if the parties opted in could the AAA appoint an emergency arbitrator with a mandate to prevent immediate and irreparable loss or damage.⁶

The first institution to incorporate “opt out” emergency arbitrator provisions into its rules was the international division of the AAA, the International Center for Dispute Resolution (“ICDR”). In the ICDR’s 2006 rule revisions, emergency arbitration was available by default – although parties could of course elect to not apply the emergency arbitration provisions (set out at Article 37 of the 2006 ICDR Rules).⁷

In the course of the next ten years, virtually all leading arbitral institutions followed suit, with the result that the availability of emergency arbitration is now the norm. The following institutions have either amended their rules or adopted special rules providing for emergency arbitration: the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”)⁸ and the Singapore International Arbitration Centre (“SIAC”)⁹ in 2010; the Court of Arbitration of the International Chamber of Commerce (“ICC”)¹⁰ and the Swiss Chambers’ Arbitration Institution¹¹ in 2012; the Hong Kong International Arbitration Centre (“HKIAC”)¹² in 2013; the London Court of Arbitration (“LCIA”)¹³ and the International Institute for Conflict Prevention & Resolution (“CPR”)¹⁴ in 2014; the China International Economic and Trade Arbitration Commission (“CIETAC”)¹⁵ in 2015. Regional centers and new entrants in the field have likewise adopted or incorporated emergency arbitrator provisions into their rules.¹⁶

⁶ AMERICAN ARBITRATION ASSOCIATION COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (1999), OPTIONAL RULES FOR EMERGENCY MEASURES OF PROTECTION, O-1 to O-8.

⁷ Now ICDR RULES (2014), Art. 6.

⁸ SCC RULES (2010), Art. 32(4) and Appendix II.

⁹ SIAC RULES (2010), revised in 2013 and 2016, now Rule 31 and Schedule 1.

¹⁰ ICC RULES (2012), Art. 29 and Appendix V.

¹¹ SWISS RULES (2012), Art. 43.

¹² HKIAC RULES (2013), Art. 23.1 and Schedule 4.

¹³ LCIA RULES (2014), Art. 9B.

¹⁴ CPR RULES (2014), Rule 14.

¹⁵ CIETAC RULES (2015), Art. 23 and Appendix III. However, interim relief is reserved to Chinese courts in most circumstances. Michael Dunmore, *The Use of Emergency Arbitration Provisions*, GLOBAL ARB. NEWS (Sept. 10, 2015), <http://globalarbitrationnews.com/use-emergency-arbitration-provisions>.

¹⁶ See, e.g., the rules of the Mexico City National Chamber of Commerce (“CANACO”) (2008), the Netherlands Arbitration Institute (“NAI”) (2010), the Australian Centre for International Commercial Arbitration (“ACICA”) (2011), the Kigali International Arbitration Centre (2012), and the Kuala Lumpur Regional Centre for Arbitration (“KLRCA”) (2013).

Notable exceptions are the Vienna International Arbitral Centre, which in its 2013 rule revisions declined to incorporate emergency arbitrator provisions,¹⁷ and the leading Brazilian institutions.¹⁸ It should also be noted that the UNICTRAL Rules – often applicable in *ad hoc* international arbitration cases – do not provide for emergency arbitration.

II. EMERGENCY ARBITRATION IN THEORY: INSTITUTIONAL RULES COMPARED

The emergency arbitration provisions of the leading institutional rules share core common features that distinguish them from non-emergency proceedings. In addition, although on most points the rules of the various arbitral institutions are similar, certain institutions' rules diverge on key points such as the scope of application of the rules and the availability of relief *ex parte* (without notice to the responding party).

A. Common Features

1. Strong Institutional Role at the Outset

The arbitral institution plays several critical roles in the emergency arbitration process, most notably at the outset. First, several institutions will perform a “gatekeeper” function, excluding emergency applications when they are clearly inadmissible (such as when there is no agreement to arbitrate, or the agreement to arbitrate is governed by a version of the rules that did not provide for emergency arbitration).¹⁹

Under the ICC Rules, the President of the Court of Arbitration conducts a preliminary screening to decide whether the emergency arbitrator provisions apply. The “gateway” decision of the President of the Court considers whether: the arbitration agreement was signed on or after January 1, 2012 (when the new rules incorporating the emergency arbitrator provisions came into effect); the parties (or their successors) are signatories to the arbitration agreement; the parties did not opt out of the emergency arbitrator provisions; and the parties did not agree on another pre-arbitral procedure for obtaining conservatory, interim or similar measures.²⁰ At the ICDR, applications for emergency relief have been

¹⁷ This was reportedly in part due to concerns about enforceability (discussed in detail in Part IV below). Franz T. Schwartz & Christian W. Konrad, *The Revised Vienna Rules – An Overview of Some Significant Changes (and a Preview of the New Austrian Arbitration Law 2014)*, 31(4) ASA BULL. 797, 807 n.52 (2013).

¹⁸ See, e.g., the rules of the Mediation and Arbitration Center of the Chamber of Commerce Brazil-Canada (“CAM-CCBC”), the Chamber of Business Arbitration – Brazil (“CAMARB”) and the AMCHAM Arbitration and Mediation Center.

¹⁹ ICC RULES, Appendix V, Art. 1(5); SIAC RULES, Schedule 1, Art. 3; SWISS RULES, Art. 43(2).

²⁰ ICC RULES, Art. 29(5),(6); see also Carlevaris & Feris, *supra* note 2, at 28-29. The ICC Rules clarify that “[t]he Emergency Arbitrator Provisions are not intended to prevent

rejected by the institution as clearly inadmissible under the rules.²¹ Under the SCC Rules, the SCC Board will not appoint an emergency arbitrator “if the SCC manifestly lacks jurisdiction over the dispute.”²² Under the SIAC Rules, the President of the Court has the power to determine if SIAC “should accept the application” for emergency relief.²³

Second, all emergency arbitrator procedures call for the appointment of a sole emergency arbitrator by the institution.²⁴ This represents a significant departure from one of reasons often given by parties for choosing international arbitration: the ability to participate in the choice of decision-maker. The availability of the arbitrator will be crucial, as the emergency proceedings will by their nature occur quickly and intensely. All of the rules require the same standard of impartiality and independence for emergency arbitrators as for arbitrators in non-emergency proceedings; and all provide for an expedited challenge procedure, again to be determined by the institution.

2. *Very Expedited Process*

Emergency arbitrator provisions envisage the appointment of an arbitrator by the institution within one day (ICDR, SCC, SIAC, CPR), two days (ICC, HKIAC), three days (LCIA) or “as soon as possible” (Swiss Rules) of receipt of the application and payment of fees. Under ICDR, ICC and SIAC Rules, the emergency arbitrator must set a procedural schedule for the arbitration within two days of appointment. Potential applicants are encouraged to contact the institutions in advance of making a formal application so as to alert them to the possibility of emergency proceedings and to allow the institution to prepare to appoint an emergency arbitrator (should the application pass the “gateway” review).²⁵

The time limits for rendering an award (running from the date of transmission of the file to the emergency arbitrator) range from five days (SCC) to 14 days (LCIA) to 15 days (ICC, HKIAC, Swiss Rules). The SIAC, CPR and ICDR Rules do not specify a time limit for rendering an award, but require decisions as

any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter.... Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or waiver of the arbitration agreement.” Art. 29(7).

²¹ Correspondence with ICDR representative, on file with the authors.

²² SCC RULES, Appendix II, Art. 4(2).

²³ SIAC RULES, Schedule I, Art. 3.

²⁴ ICC RULES, Appendix V, Art. 2(1); SIAC RULES, Schedule 1, Art. 3; SCC RULES, Appendix II, Art. 1; ICDR RULES, Art. 6(2); SWISS RULES, Art. 43(2).

²⁵ LCIA Notes on Emergency Procedures, Sec. 4.2, ¶ 36, available at <http://www.lcia.org/adr-services/lcia-notes-on-emergency-procedures.aspx>.

expeditiously as possible. The arbitral institutions report that these timelines are generally respected.²⁶

3. *Full Powers (and Limitations) with Respect to Interim Relief*

Emergency arbitrators have the same powers – and limitations – as regularly constituted tribunals with respect to awarding interim relief. Under all of the rules, emergency arbitrators have broad powers to consider and determine their jurisdiction, to establish the procedure of the expedited application, and to order interim relief (subject always to the arbitration agreement).²⁷ As examples of types of interim relief requested, ICC emergency arbitration tribunals have heard requests for measures to protect the enforceability of the award, measures to maintain the status quo, measures to protect property or evidence, anti-suit injunctions, security, and attachment of property.²⁸

Importantly, however, emergency arbitrators remain bound by any applicable mandatory laws governing the ability of arbitral tribunals to grant interim measures. For example, one authority notes that “in Italy, China, Quebec, and Argentina. . . local legislation provides that the granting of provisional measures is reserved exclusively to the local courts, which are authorized to issue provisional relief in aid of arbitration.”²⁹

4. *Regular Tribunal Is Not Bound*

Once the arbitral tribunal is constituted, it is not bound by the decisions of the emergency arbitrator. The tribunal may elect to confirm, modify or dissolve the emergency arbitrator’s decision.³⁰ As discussed below, however, the slate is not wiped clean: factual and legal submissions made during the course of the emergency proceedings will remain in the record of the arbitration, and subject to

²⁶ Leng Sun Chan S.C. & Weiyi Tan, *Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief*, 6(2) CONTEMP. ASIA ARB. J. 349, 351 (2013); Johan Lundstedt, *SCC Practice: Emergency Arbitrator Decisions 1 January 2010 – 31 December 2013*, available at http://www.sccinstitute.com/media/29995/scc-practice-2010-2013-emergency-arbitrator_final.pdf; Lotta Knapp, *SCC Practice: Emergency Arbitrator Decisions Rendered 2014*, available at <http://www.sccinstitute.com/about-the-scc/legal-resources/articles>; Raja Bose & Ian Meredith, *Emergency Arbitrator Procedures: A Comparative Analysis*, 5 INT’L ARB. L. R. 186, 192 (2012).

²⁷ ICC RULES, Appendix V, Art. 6(3); ICDR RULES, Art. 6(4); LCIA RULES, Art. 9B, 9.8; SIAC RULES, Schedule I; SCC RULES, Appendix II, Art. 1(2).

²⁸ Presentation by José Ricardo Feris, Deputy Secretary General, ICC International Court of Arbitration, “Emergency Arbitrator Under ICC Rules of Arbitration,” ICC Institute Masterclass for Arbitrators – New York (February 24, 2016), on file with the authors; Carlevaris & Feris, *supra* note 2, at 34-35.

²⁹ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1951-52 (2009).

³⁰ ICC RULES, Art. 29(3); ICDR RULES, Art. 6(5); LCIA RULES, Art. 9.11; SCC RULES, Schedule II, Art. 9(5) (“An Arbitral Tribunal is not bound by the decision(s) and reasons of the Emergency Arbitrator”); SIAC RULES, Schedule I, Art. 10; Swiss Rules, Art. 43(8).

later review by the regular tribunal. Any misrepresentations at the emergency arbitration stage are very likely to damage the party's position later in the proceedings.³¹ Under all the institutional rules, the emergency arbitrator's power ceases upon constitution of the tribunal.³² Typically, any relief ordered by the emergency arbitrator ceases to be binding after 90 days if no tribunal is constituted or referred the case.³³

5. *Concurrent Access to Courts*

Recognizing that emergency arbitration may not be appropriate or sufficient in all cases – particularly if *ex parte* action is required or assets or evidence are in the hands of third parties – arbitration rules allow parties to elect to seek interim measures from a national court prior to the commencement of emergency arbitrator proceedings.³⁴

B. *Divergent Features*

1. *Application of Emergency Arbitrator Provisions*

The SCC and Swiss Rules differ from other rules in applying emergency arbitration procedures to arbitrations *commenced* after the effective date of the rules first providing for emergency arbitration, rather than to arbitration agreements entered into after that date. Regardless of when the arbitration agreement was signed, emergency arbitration is available by default in all

³¹ Grant Hanessian, *Emergency Arbitrators*, in *THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION* 353 (Lawrence W. Newman & Richard D. Hill eds., 3d ed. 2014).

³² ICDR RULES, Art. 6(5); SIAC RULES, Schedule 1, Art. 10; SCC RULES, Appendix II, Art. 1(1), HKIAC RULES, Schedule 4, Art. 20 (subject to Art. 13, which provides that the emergency arbitrator may make an emergency decision “even if in the meantime the file has been transmitted to the arbitral tribunal”); KLRCA RULES, Schedule 2, Art. 14(a); ICC RULES, Appendix V, Art. 6(8) (terminating the emergency arbitrator's authority to modify, terminate, or annul the emergency order upon the transmission of the file to the arbitral tribunal).

³³ SIAC RULES, Schedule 1, Art.10; SCC RULES, Appendix II, Art. 9(4)(iv); KLRCA RULES, Schedule 2, Art. 15(a); HKIAC RULES, Schedule 4, Art. 19(d). The NAI Rules do not contain a provision explicitly terminating the emergency arbitrator's power.

³⁴ *See, e.g.*, LCIA RULES, Art. 9.12: “Article 9B shall not prejudice any party's right to apply to a state court or other legal authority for any interim or conservatory measures before the formation of the Arbitration Tribunal; and it shall not be treated as an alternative to or substitute for the exercise of such right. During the emergency proceedings, any application to and any order by such court or authority shall be communicated promptly in writing to the Emergency Arbitrator, the Registrar and all other parties.” Under the ICC Rules, once emergency arbitrator proceedings have begun, recourse to judicial authorities is limited to “appropriate circumstances.” ICC RULES, Art. 29(7).

arbitrations commenced after January 1, 2010 under the SCC Rules,³⁵ and after June 1, 2012 under the Swiss Rules.³⁶ Emergency arbitration provisions do not apply under the ICC and LCIA Rules if the arbitration agreement was concluded before the date on which the Rules came into force.³⁷ While the emergency relief provisions of the 2006 ICDR Rules also applied only to agreements entered into after the Rules' effective date, emergency arbitration provisions apply to all cases under the current ICDR Rules.³⁸

2. *Timing of Emergency Application*

Most arbitral rules require that the emergency arbitration application be submitted after or with the notice of arbitration or request for arbitration. Under the ICC, Swiss, and SCC Rules, however, a party may make a request for emergency application prior to the submission of a notice of arbitration or request for arbitration. The notice/request is then required to be submitted within ten days (ICC, Swiss) or 30 days (SCC),³⁹ failing which the emergency arbitration proceedings will be terminated and, if a decision of the emergency arbitrator has been rendered, it will cease to be binding.⁴⁰

3. *Availability of Relief Ex Parte*

The issue of *ex parte* interim relief – that is, before having heard both sides' positions on the request – is highly controversial in international arbitration⁴¹ and most arbitral rules do not permit it. The Swiss Rules are unusual in allowing for an emergency arbitrator to grant interim relief *ex parte*. In marked contrast to other jurisdictions, “the overwhelmingly predominant view” among Swiss practitioners is that the arbitral tribunal has the power to issue *ex parte* orders.⁴²

Under the Swiss Rules, an arbitral tribunal may, in exceptional circumstances, grant *ex parte* interim relief in the form of a “provisional order.”⁴³ This power to

³⁵ The preamble to the SCC Rules in force as of January 1, 2010 provides: “Under any arbitration agreement referring to the [SCC Rules] the parties shall be deemed to have agreed that the following rules, or such amended rules, in force on the date of the... filing of an application for the appointment of an Emergency Arbitrator, shall be applied unless otherwise agreed by the parties.”

³⁶ SWISS RULES, Sec. I, Art. 1(3).

³⁷ ICC RULES, Art. 29(6); LCIA RULES, Art. 9.14.

³⁸ Compare Art. 37 of the 2006 ICDR RULES and Art. 6 of the current ICDR RULES.

³⁹ ICC RULES, Appendix V, Art. 1(3), 1(6); SWISS RULES, Art. 43(3); SCC RULES, Appendix II, Art. 9(4)(iii).

⁴⁰ SCC RULES, Appendix II, Art. 9(4)(iii).

⁴¹ BORN, *supra* note 29, at 2017-18.

⁴² Christopher Boog & Bertrand Stoffel, *Preliminary Orders and the Emergency Arbitrator: Urgent Interim Relief by an Arbitral Decision Maker in Exceptional Circumstances*, TEN YEARS OF SWISS RULES OF INTERNATIONAL ARBITRATION – ASA SPECIAL SERIES NO. 44 at 71, 73-74 (2014).

⁴³ SWISS RULES, Art. 26(3).

order *ex parte* relief applies equally to an emergency arbitrator appointed under the Swiss Rules.⁴⁴ The request for interim measures must be communicated to the other parties “at the latest together with the provisional order,” and the other parties are then “immediately granted an opportunity to be heard.”⁴⁵

An arbitral decision made *ex parte* has serious drawbacks, most importantly potential lack of enforceability in national courts. Under the New York Convention, recognition and enforcement of an arbitral award may be refused when “[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.”⁴⁶ And, while *ex parte* preliminary orders are contemplated under the UNCITRAL Model Law, they “shall not be subject to enforcement by a court.”⁴⁷ In the main, national courts, rather than emergency arbitrators, will be the preferred venue when relief is sought *ex parte*, such as when the initiation of proceedings is itself expected to trigger a dissipation of assets. Enforcement issues are considered at Part IV *infra*.

4. Application to Investor-State Arbitration Disputes

Although the majority of arbitration cases brought by investors against states under bilateral or multilateral treaties take place under the auspices of the International Centre for the Settlement of Investment Disputes (“ICSID”), some treaties allow for claims to be brought under institutional rules such as the ICC or SCC Rules. Within the ICSID system, it is possible to request expedited relief, but there is no provision for emergency arbitration.⁴⁸ Similarly, the ICC excluded investor-state arbitration cases from the scope of its emergency arbitrator provisions.⁴⁹

In contrast, there is no such exclusion in the SCC Rules, and SCC emergency arbitration has been invoked in several investor-state cases. The first two cases

⁴⁴ *Id.* Art. 43(1). The emergency arbitrator’s decision “shall have the same effects as a decision” on interim measures by a regularly constituted arbitral tribunal. *Id.* Art. 43(8).

⁴⁵ *Id.* Art. 26(3).

⁴⁶ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V(1)(b), June 10, 1958, 21 U.S.T. 2157 [hereinafter New York Convention].

⁴⁷ The UNCITRAL Model Law, at Article 17B(1), provides: “Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.”

⁴⁸ Under the ICSID Convention Arbitration Rules (2006), a party may request provisional measures “[a]t any time after the institution of the proceeding” and “[t]he Tribunal shall give priority to the consideration of a request” for provisional measures. Chapter V, Rule 39(1),(2). Unusually, Rule 38 of the ICSID Rules gives the exclusive right to grant interim measures to the arbitral tribunal – with no possibility of recourse to national courts – unless the parties have expressly agreed otherwise.

⁴⁹ Report of the ICC Commission on Arbitration and ADR, *States, State Entities and ICC Arbitration* at ¶ 51: “One of the purposes of Article 29(5) of the 2012 ICC Rules was to exclude investment arbitration from the scope of emergency arbitrator proceedings.”

involved claims of expropriation of the investor's assets.⁵⁰ In both cases, the SCC appointed an emergency arbitrator within 24 hours of the application and the emergency arbitrator rapidly established a procedural timetable. The respondent in at least one of the cases argued – unsuccessfully – that the emergency arbitrator provisions were not available because at the time the relevant treaty was signed, the SCC Rules did not provide for emergency arbitration. Emergency relief was granted in one of the cases and denied in the other.⁵¹ Another case, discussed in detail below, resulted in emergency relief being granted against Ukraine, which did not participate in the emergency proceedings.⁵² In the most recent pair of cases, two emergency arbitrators reached opposite conclusions on whether emergency relief was warranted to protect foreign investors' shareholdings in a Moldovan bank.⁵³

The use of emergency arbitration in cases involving states is an area to watch closely. In addition to the issue of application of the rules, these cases raise questions such as the role of “cooling off” periods in investment treaties and other conditions precedent to arbitration.⁵⁴ Draft rules for investor-state arbitration recently published by the Singapore International Arbitration Centre for public comment, provide for emergency arbitration only if the parties “expressly agree”⁵⁵ – signaling a preference for the “opt-in” approach for this category of disputes.

III. EMERGENCY ARBITRATION IN PRACTICE: TEN YEARS OF EXPERIENCE

Although data remains relatively sparse, after ten years of emergency arbitrator cases, patterns are beginning to emerge. Emergency arbitration is indeed

⁵⁰ Knapp, *supra* note 26, in which the two cases are identified as SCC Emergency Arbitrations (2014/053) and (2014/183). The first case was later revealed to be *TSIKInvest LLC v. The Republic of Moldova*, SCC Emergency Arbitration No. EA (2014/053), and the second *Evrobalt LLC v. The Republic of Moldova*, SCC Emergency Arbitration No. EA (2014/183).

⁵¹ *Id.*

⁵² Eric Luke Peterson, *New Details Emerge About Use of Emergency Arbitrators in Investment Treaty Cases*, IAREPORTER (Oct. 8, 2015); see Section IV *infra*.

⁵³ Compare *Evrobalt LLC v. The Republic of Moldova*, Award on Emergency Measures (May 30, 2016), SCC Emergency Arbitration EA (2016/082) and *Kompozit LLC v. The Republic of Moldova*, Emergency Award on Interim Measures (June 14, 2016), SCC Arbitration EA (2016/095), both discussed in Section III(B) *infra*.

⁵⁴ In 2015, the ICC Commission on Arbitration and ADR established a Task Force on Emergency Arbitrator Proceedings, co-chaired by Diana Paraguacuto-Maheo and Marnix Leijten, which will consider these issues, among others.

⁵⁵ DRAFT SIAC INVESTMENT ARBITRATION RULES (updated Jan. 15, 2016), at 26.4: “If the parties expressly agree on the application of the emergency arbitrator provisions set forth in Schedule 1, a party in need of emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1.” Available at <http://www.siac.org.sg/69-siac-news/469-public-consultation-on-draft-siac-investment-arbitration-rules>.

being used by parties – tallying reports by arbitral institutions, there have been at least 175 emergency arbitrator proceedings worldwide as of August 2016 – and the institutions are, for the most part, delivering on the promise of rapid relief. Moreover, it appears that approximately half of the applications in which an emergency arbitrator was appointed resulted in some relief granted to the claimant or an agreement between the parties terminating the emergency arbitrator proceeding. Although emergency arbitrators have apparently applied a broad spectrum of legal standards to determine whether emergency relief is warranted, there appears to be growing support for an “international” legal standard rather than reliance on the standards for such relief applicable in national court proceedings.

A. *Emergency Arbitration Is Being Used and Is Providing Recourse*

In the ten years since emergency arbitration became available under its rules, the ICDR has admitted 59 applications for emergency relief.⁵⁶ Of the 59 applications, the applicant was successful in obtaining full or partial emergency measures in just over half of the cases (30); the applicant was unsuccessful in 14 cases. Nine of the 59 cases settled, four were withdrawn, and two are pending.⁵⁷ The mean time for the rendering of a decision is about three weeks; the median is approximately two weeks.⁵⁸

SIAC received and accepted 50 applications for emergency arbitration procedures between July 1, 2010 and August 1, 2016.⁵⁹ Of those 50, 22 applications were granted in full, four were granted in part, and four resulted in orders by consent. In 14 cases, applications for emergency measures were rejected; in six cases, the applications were withdrawn.⁶⁰ Decisions have been rendered in as little as two days, with the average being eight to ten days.⁶¹

As of August 2016, the ICC had received 39 requests since the incorporation of emergency arbitration provisions in the 2012 Rules.⁶² As of February 2016, ICC emergency arbitrators had made orders in 24 cases.⁶³ Requests for emergency relief were dismissed in 59% of those orders, granted in full in 14%, and granted

⁵⁶ Correspondence with ICDR Assistant Vice President, on file with the authors (current to Aug. 2016).

⁵⁷ *Id.*

⁵⁸ Hanessian, *supra* note 31, at 348, and March 2016 correspondence with ICDR Assistant Vice President, on file with the authors.

⁵⁹ Correspondence with SIAC Deputy Registrar, on file with the authors; *see also* SIAC Statistics as of Oct. 1, 2015, available at <http://www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics>.

⁶⁰ *Id.*

⁶¹ SIAC, *The Emergency Arbitrator and Expedited Procedure in SIAC: A New Direction for Dispute Resolution in Asia*, 12(10) ASIAN-MENA COUNSEL 39 (2015).

⁶² Correspondence with ICC Managing Director and Counsel, on file with the authors.

⁶³ Feris presentation, *supra* note 28.

in part in 27%.⁶⁴ What types of measures are being requested? In 35% of cases, the application was for the preservation of the status quo; 20% concerned anti-suit injunctions; 20% requested that the respondent refrain from calling on a letter of credit; and 20% concerned other measures.⁶⁵

At the SCC, 14 emergency arbitrator applications had been registered through March 1, 2016,⁶⁶ with at least two more applications filed between March and August 2016.⁶⁷ All 16 went to a decision by the emergency arbitrator. At least one decision was rendered in the form of an award on the request of the parties. Interim relief was granted or partially granted in five of the 16 cases.⁶⁸ The SCC Rules require a decision to be rendered within five days of transmission of the file to the emergency arbitrator, subject to extension.⁶⁹ The vast majority of emergency awards have been rendered in five or six days; the longest time to reach a decision has been 12 days.⁷⁰

Six applications for emergency relief were received under the Swiss Rules since their introduction in 2012. Notably, in two of the six cases, the applicant requested *ex parte* interim measures; the *ex parte* relief was granted in one case and denied in the other.⁷¹ All six cases complied with the 15-day deadline for rendering emergency relief.⁷² One newsworthy application – by a racecar driver against the Swiss Formula One Team – saw an emergency order granted in the driver's favor. The emergency proceedings were followed by expedited proceedings under the Swiss Rules (yielding an award for the driver), successful enforcement proceedings in Australia and, on the eve of the Melbourne Grand Prix, a financial settlement between the two parties.⁷³

⁶⁴ *Id.*

⁶⁵ Northern and Central European and Latin American parties have, so far, been the most frequent users of ICC emergency arbitration, with parties from those areas constituting 30% and 26% of the total, respectively. North American parties figured in 16% of cases, African parties in 10%, Southern European in 10%, Asian parties in 8%. Feris presentation, *supra* note 28.

⁶⁶ Kristin Campbell-Wilson, SCC Deputy Secretary General, *Six Years of Emergency Arbitrator Proceedings Under the SCC Rules*, presentation delivered at SCC and FAI joint morning seminar, Helsinki, January 21, 2016, on file with the authors; *see also* Knapp, *supra* note 26.

⁶⁷ *Evrobalt LLC v. The Republic of Moldova*, SCC Emergency Arbitration EA (2016/082) (commenced May 24, 2016) and *Kompozit LLC v. The Republic of Moldova*, SCC Arbitration EA (2016/095) (commenced June 9, 2016).

⁶⁸ Campbell-Wilson, *supra* note 66 and *Evrobalt* and *Kompozit* cases.

⁶⁹ SCC RULES, Appendix II, Art. 8(1).

⁷⁰ Campbell-Wilson, *supra* note 66 and *Evrobalt* and *Kompozit* cases.

⁷¹ Correspondence with Senior Legal Counsel of the Swiss Chambers' Arbitration Institution, on file with the authors.

⁷² *Id.* In one case, the parties agreed to suspend the proceedings for several days; these days were not counted in the 15 day time frame.

⁷³ Christoph Müller & Sabrina Pearson, *Waving the Green Flag to Emergency Arbitration under the Swiss Rules: The Sauber Saga*, 33(4) ASA BULL. 808, 818 (2015); correspondence with Swiss Chambers' Arbitration Institution in March 2016.

As of August 2016, HKIAC had received six applications for emergency arbitrator proceedings, of which four resulted in a decision by the emergency arbitrator.⁷⁴ In one case, the application was withdrawn and the emergency arbitrator issued a costs award; in two cases, the emergency arbitrator issued a consent order recording an agreement between the parties. In the remaining case, the emergency arbitrator declined to grant the request for emergency measures.

As of August 2016, the LCIA had not yet received any applications under its rules, which incorporated emergency arbitrator provisions for arbitration agreements entered into after October 1, 2014.⁷⁵

B. Emergency Arbitrators Are Applying a Variety of Standards, Trending to Application of an “International Standard”

One of the first questions facing parties and arbitrators in an emergency proceeding is determining what the applicant must show in order to be granted the requested interim relief. Beyond the core requirement that the relief be “urgent” (ICC and HKIAC Rules) or “necessary” (ICDR and SIAC Rules), most institutional rules do not provide guidance on the legal standard.⁷⁶

Information available to date suggests that rather than strictly applying the standards for interim relief at the courts of the seat of arbitration or those suggested by the law applicable to the substance of the dispute, emergency arbitrators are taking guidance from international standards. Emergency arbitrators tend not to see themselves as bound by standards applied in national laws, but rather invoke a broad discretion to determine whether interim relief is warranted as “necessary.”⁷⁷

International sources that have guided emergency arbitrators include the UNCITRAL Model Law, the 2006 version of which requires that a party requesting interim measures show:

- (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

⁷⁴ Correspondence with HKIAC Managing Counsel, on file with the authors.

⁷⁵ Correspondence with LCIA Deputy Registrar, on file with the authors.

⁷⁶ The ACICA Rules are unusual in specifying that the party requesting interim measures shall satisfy the Emergency Arbitrator that: (a) irreparable harm is likely to result if [the measure] is not ordered; (b) such harm substantially outweighs the harm that is likely to result to the party affected by [the measure] if [the measure] is granted; and (c) there is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the liberty of decision of the Arbitral Tribunal in making any subsequent determination.” ACICA RULES (2016), Schedule 1, Art. 3.5.

⁷⁷ Presentation by José Ricardo Feris, *supra* note 28, referring to ICC Case No. 12361.

not affect the discretion of the arbitral tribunal in making any subsequent determination.⁷⁸

Although the language used is not consistent, emergency arbitrators have considered factors that fall into the three broad categories set out in the UNCITRAL Model Law: (1) the adequacy of the case on the merits (*prima facie* case, likelihood of success); (2) the nature of the potential harm (grave, serious, irreparable); and (3) the balance of harms (proportionality).⁷⁹

With respect to the first category, emergency arbitrators under the SCC Rules have used varying language, applying standards of “reasonable probability of success on the merits,” “prima facie case,” “reasonable possibility,” “serious claim,” and “probable cause.”⁸⁰ In SIAC cases, the tests applied have ranged from a “real probability” of success to a “good arguable case” test.⁸¹ Emergency arbitrators under the ICDR Rules have considered whether there were “good prospects of success on the merits”⁸² or “a likelihood of success on the merits.”⁸³

⁷⁸ United National Commission on International Trade Law, MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985, with amendments as adopted in 2006). The UNCITRAL Model Law sets out four subcategories of interim relief: “An interim measure is any temporary measure, whether in the form of an award or in another form, 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 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, current or imminent harm or 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 MODEL LAW, Art. 17(2). For applications to preserve evidence, these requirements apply “only to the extent the arbitral tribunal considers appropriate.” UNCITRAL MODEL LAW, Art. 17A(2).

⁷⁹ Public interest factors – often considered in U.S. proceedings for interim relief—appear not to have been applied in published emergency arbitrator decisions to date. The Canadian test, set out in *R.J.R.-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, is closer to the Model Law standard: (1) a serious issue to be tried (does a preliminary assessment of the plaintiff’s claim disclose a serious issue to be tried on its merits?); (2) irreparable harm (would the applicant suffer irreparable harm if the injunction is not granted?); and (3) balance of convenience (which of the parties would suffer the greater harm from the granting or refusing of the injunction pending a decision on the issue?).

⁸⁰ Lundstedt, *supra* note 26.

⁸¹ Vivekananda, *The SIAC Emergency Arbitrator Experience*, at *3, available at <http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/338-the-siac-emergency-arbitrator-experience> [last accessed March 23, 2016].

⁸² Guillaume Lemenez & Paul Quigley, *The ICDR’s Emergency Arbitrator Procedure in Action*, DISPUTE RESOLUTION J. 5 (Aug./Oct. 2008).

⁸³ The parties in this case agreed on the standards to be met by the applicant: a showing of “irreparable harm absent the requested relief, a likelihood of success on the merits of its claims, and a balance of hardships in its favor.” Order of the Emergency Arbitrator dated July 31, 2013 in *Irvine Scientific Sales Company, Inc. v. Microbix*

Balancing this is a desire not to award relief that would in effect decide the merits of the case. At least one ICC tribunal expressed concern that there be no prejudgment of the merits at the stage of a request for interim relief.⁸⁴

Under the second category, emergency arbitrators have applied a range of potential harms, including “risk of irreparable or substantial harm to one of the parties” and “risk of irreparable harm to the jurisdiction of the arbitral tribunal” by ICC emergency arbitrators.⁸⁵ At least four SCC emergency arbitrator applications were refused due to insufficiency in the element of irreparable harm.⁸⁶ An emerging point of controversy is the meaning of “adequately reparable by an award of damages” under the UNCITRAL test (emphasis added). In a pair of SCC cases, emergency arbitrators reached opposite conclusions on whether the suspension of shareholder rights and forced divestiture of shares constituted harms adequately reparable by damages. In *Evrobalt LLC v. The Republic of Moldova*, the emergency arbitrator denied the request for emergency relief, concluding that such harms were “purely economic” and could “be made good by an award of damages.”⁸⁷ In contrast, in *Kompozit LLC v. The Republic of Moldova*, the emergency arbitrator adopted a more flexible approach, citing with approval an earlier tribunal’s observation that “[t]he possibility of monetary damages does not necessarily eliminate the possible need for interim measures.”⁸⁸ The emergency arbitrator proceeded to find that “the Claimant has established that it is very likely that it will suffer a harm, if the Respondent is not prevented from cancelling the Shares.”⁸⁹

U.S. courts have recognized that the standards to be applied by arbitrators to evaluate requests for relief may be different from those in the national court of the seat of arbitration. This has the critical result that (if permitted by the applicable institutional rules and the arbitration agreement) arbitral tribunals may fashion relief that courts would not be able to grant. In at least one U.S. case, broad arbitral interim measures have been enforced even though those measures would not have been available in litigation before a court in the place of arbitration.

In *Rocky Mt. Biologicals, Inc., CE International Resources Holdings LLC*,⁹⁰ a Montana court considered a request to set aside an order granted by an emergency arbitrator sitting under the ICDR Rules in New York. The respondent had argued that the New York rules of civil procedure applied, under which a third party

Biosystems, Inc., 986 F.Supp.2d 1187 (D. Mont. 2013) (order submitted and available on PACER; one of the authors of this article served as the emergency arbitrator).

⁸⁴ Presentation by José Ricardo Feris, *supra* note 28, referring to ICC Case No. 11740.

⁸⁵ Presentation by José Ricardo Feris, *supra* note 28.

⁸⁶ Lundstedt, *supra* note 26; Knapp, *supra* note 26.

⁸⁷ *Evrobalt LLC v. The Republic of Moldova*, Award on Emergency Measures (May 30, 2016), SCC Emergency Arbitration EA (2016/082), ¶¶ 51, 52.

⁸⁸ *Kompozit LLC v. The Republic of Moldova*, Emergency Award on Interim Measures (June 14, 2016), SCC Arbitration EA (2016/095), ¶ 88.

⁸⁹ *Id.* ¶ 89.

⁹⁰ 986 F. Supp. 2d 1187 (D. Mont. 2013). One of the authors of this article served as the emergency arbitrator.

would have been required to join the arbitration as a “necessary party.” The emergency arbitrator considered – and rejected – this argument. In refusing to interfere with the emergency arbitrator’s order, the Montana court recognized the parties’ selection of the ICDR Rules as the choice of the “rules under which the arbitration will be conducted,” and rejected the argument that New York civil procedure laws applied.

Similarly, in *CE International Resources Holdings v. S.A. Mineral Ltd. Partnership*, a New York court considered whether an ICDR arbitrator had the power to order pre-judgment security and a Mareva-style injunction freezing a party’s assets during the pendency of the arbitration.⁹¹ New York law does not permit a plaintiff to obtain pre-judgment security in an action for money damages, and under well established case law neither federal nor state courts are empowered to award Mareva-style freezing orders. However, noting that the ICDR Rules chosen by the parties empowered the arbitral tribunal to “take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property,” the court enforced the freezing orders.⁹²

IV. AFTER THE EMERGENCY ARBITRATION: ENFORCEABILITY

For obvious reasons, it is important that parties can be confident that an award or order issued by an emergency arbitrator ultimately will be enforceable in national courts. Emergency arbitrators’ decisions are interim by nature: regularly constituted tribunals may modify, terminate, or annul the decisions of the emergency arbitrator.⁹³ National courts may consider the decisions of the emergency arbitrators not to be final awards, and therefore unenforceable under the New York Convention.

Different methods of addressing the uncertainty surrounding (and sometimes undermining) emergency arbitration awards have emerged over the years. Some countries have amended domestic legislation purposefully to allow for enforcement and implementation of emergency arbitrator decisions.

Singapore and, more recently, Hong Kong have adopted legislative amendments to enforce emergency arbitral awards and orders. The Singapore International Arbitration (Amendment) Act 2012 came into force on June 1, 2012. The Act included an amendment changing the statutory definition of arbitral tribunal to include “an emergency arbitrator appointed pursuant to the rules of

⁹¹ 2012 WL 6178236 (S.D.N.Y. Dec. 10, 2012). This was a request for interim measures granted by a regularly constituted arbitral tribunal, rather than by an emergency arbitrator.

⁹² *Id.* at *5.

⁹³ Institutional rules usually provide that the decision of the emergency arbitrator may take the form of either an order or an award. *See, e.g.*, ICDR RULES, Art. 6.4; SIAC RULES, Schedule 1, Art. 8; LCIA RULES, Art. 9B, 9.11. The ICC Rules limit emergency arbitrators to issuing “orders,” and the ICC Court of Arbitration will not scrutinize them. ICC RULES, Art. 29(2). The New York Convention governs its signatories’ recognition and enforcement of arbitral “awards,” saying nothing about “orders.”

arbitration agreed to.”⁹⁴ An explanatory statement accompanying the legislation specifically stated that its objective was to ensure that orders and awards by emergency arbitrators were enforceable by the Singapore courts in the same way as those issued by regularly constituted arbitral tribunals.⁹⁵

Similarly, Hong Kong amended its arbitration law effective July 19, 2013. The amendment gave effect to relief provided by emergency arbitrators, and allowed parties to enforce emergency relief obtained outside of Hong Kong in Hong Kong courts.⁹⁶ Commentators have suggested that it would be advantageous to have similar statutory changes in other jurisdictions.⁹⁷

A court in India has recently utilized a “hybrid” approach to enforce emergency arbitration decisions. In 2014, HSBC sought to enforce in India an order obtained from a SIAC emergency arbitrator in Singapore.⁹⁸ The Bombay High Court found in favor of HSBC, reasoning that Singapore law governed the arbitration agreement as the parties had chosen Singapore as the seat of arbitration. The Indian Arbitration Act only allows for enforceability of final awards, but the Bombay High Court indirectly enforced the emergency arbitrator’s order by providing similar relief to that provided by the emergency arbitration award.⁹⁹ This approach appears to confirm that Singapore’s new provisions support enforceability even beyond Singapore’s borders.

⁹⁴ International Arbitration (Amendment) Act 2012, Sec. 2(a).

⁹⁵ [http://www.parliament.gov.sg/sites/default/files/International%20Arbitration%20\(Amendment\)%20Bill%2010-2012.pdf](http://www.parliament.gov.sg/sites/default/files/International%20Arbitration%20(Amendment)%20Bill%2010-2012.pdf). In a case decided under the prior law, *PT Pukuafa Indah and others v. Newmont Indonesia Ltd*, [2012] SGHC 187, the Singapore High Court held that it did not have jurisdiction to set aside an interlocutory order because an interlocutory order is not an “award” under the International Arbitration Act.

⁹⁶ Hong Kong added a new part 3A to its Arbitration Ordinance entitled “Enforcement of Emergency Relief,” adding a definition of an emergency arbitrator and providing for enforcement of relief awarded by an emergency arbitrator. Part 3A, Section 22B(1), provides that emergency relief, whether granted in or outside Hong Kong by an emergency arbitrator, is enforceable, with leave of the court, in the same manner as an order or direction of a court with the same effect. Section 22B(2) adds that a court will only grant leave to enforce emergency relief granted outside Hong Kong if it is satisfied that the nature of the emergency relief is such that it could have been granted in Hong Kong.

⁹⁷ See, e.g., Amir Ghaffari & Emmylou Walters, *The Emergency Arbitrator: The Dawn of a New Age?*, 33 ARB. INT’L 153, 157-58 (advocating amendment of the English Arbitration Act 1996 to recognize emergency arbitrator awards). Note, however, that not all jurisdictions are supportive of enforcement. In China, for example, only courts may grant interim relief. See Dunmore, *supra* note 15.

⁹⁸ HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd. and others, Arbitration Petition No. 1062/2012, Judgment of Jan. 22, 2014, cited in Paata Simside, *Indirect Enforceability of Emergency Arbitrator’s Orders*, KLUWER ARBITRATION BLOG (Apr. 15, 2015), <http://kluwarbitrationblog.com/2015/04/15/indirect-enforceability-of-emergency-arbitrators-orders>. The subsequent appeal was disposed of on July 31, 2014. Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., Appeal No. 196/2014, Resolution of July 31, 2014.

⁹⁹ *Id.*

Case law in the United States is sparse, but parties to emergency arbitration proceedings have good reason to believe that resulting decisions will be enforced in U.S. courts based on the existing legal framework.

In the U.S., the ICDR's emergency arbitrator provisions have been the subject of judicial review as to whether "orders" are enforceable as "awards" and whether the temporary nature of emergency arbitrator decisions permit them to be enforced in accordance with the finality requirements of the U.S. Federal Arbitration Act ("FAA") and the New York Convention. The ability of U.S. courts to enforce interim awards supports the integrity of the arbitral process. As one U.S. court has said, "Without the ability to confirm such interim awards, parties would be free to disregard them, thus frustrating the effective and efficient resolution of disputes that is the hallmark of arbitration."¹⁰⁰

Historically, U.S. courts have rejected a formalistic distinction between "orders" and "awards" in enforcing interim measures by regularly constituted arbitral tribunals. In *Publicis Communication v. True North Communications*,¹⁰¹ the Seventh Circuit Court of Appeals held that because an "order" by a UNCITRAL Rules panel sitting in London granting an interim measure was intended finally to dispose of the issues decided, it was enforceable, notwithstanding the fact that the FAA and the New York Convention provide for enforcement of an "award" and do not discuss enforcement of an "order." The *Publicis Communication* court held that "although the Federal Arbitration Act uses the word 'award' in conjunction with finality, courts go beyond a document's heading," thus delving into its "substance and impact" to determine whether it is final – and, therefore, enforceable.¹⁰² The court's decision further stated that "finality should be judged by substance and effect, not by superficial technicalities."¹⁰³ Federal appellate courts in the Ninth, Fourth, and Second Circuits have reached the same result.¹⁰⁴

Other U.S. cases have supported the decisions of emergency arbitrators in different ways. One court issued a temporary restraining order to preserve the status quo but stayed the action pending arbitration, expressly leaving it to an emergency arbitrator to consider appropriate interim measures.¹⁰⁵ In *Draeger*

¹⁰⁰ *Companion Property and Casualty Insurance Company v. Allied Provident Insurance*, No. 13-cv-7865, 2014 U.S. Dist. LEXIS 136473, at *8 (S.D.N.Y. Sept. 26, 2014) (and cases cited therein).

¹⁰¹ 206 F.3d 725 (7th Cir. 2000).

¹⁰² *Id.* at 729.

¹⁰³ *Id.* at 730.

¹⁰⁴ *Pacific Reinsurance Management Corp.*, 935 F.2d 1019 (9th Cir. 1991); *Arrowhead Global Solutions v. Datapath Inc.*, 166 Fed. Appx. 39 (4th Cir. 2006) ("arbitration panels must have the power to issue temporary equitable relief ... and district courts must have the power to confirm and enforce that equitable relief as 'final' in order for the equitable relief to have teeth"); *Banco de Seguros del Estado v. Mutual Marine Office*, 344 F.3d 255 (2d Cir. 2003).

¹⁰⁵ *Pre-Paid Legal Services v. Kidd*, No. CIV-11-357-FHS, 2011 U.S. Dist. LEXIS 123888 (E.D. Okla. Oct. 26, 2011).

Safety Diagnostics, Inc. v. New Horizons Interlock, a district court granted a petition to confirm an interim arbitration award for emergency relief. Acknowledging that the interim award was not final, the court nevertheless enforced the award because “an interim award that finally and definitively disposes of a separate independent claim may be confirmed notwithstanding the absence of an award that finally disposes of all the claims that were submitted to arbitration.”¹⁰⁶ These cases represent not only a flexible approach to dealing with what often amounts to semantics, but also a deference to emergency arbitration’s growing place in the legal system.

In the one known case in which a U.S. court declined to review a decision of an emergency arbitrator, the effect of the arbitrator’s order was left undisturbed. In the 2011 case *Chinmax Medical Systems v. Alere San Diego Inc.*,¹⁰⁷ a California federal court was asked to vacate the order of an ICDR emergency arbitrator – the first emergency arbitrator decision apparently challenged in a U.S. court. The *Chinmax* court noted that the emergency arbitrator stated that his order was temporary and was issued to “remain in effect pending review of the full arbitration tribunal, once appointed, and thereafter as the tribunal may order.”¹⁰⁸ The court also noted that the emergency arbitrator provisions of the ICDR Rules provided, “Once the tribunal has been constituted, the tribunal may reconsider, modify or vacate the interim award or order of emergency relief issued by the emergency arbitrator.” On this basis, the court held that the emergency arbitrator’s order was not a final order, was therefore not subject to review by the court, and could not be vacated. Thus, in leaving the order in place, the court effectively enforced it. The U.S. party apparently did not cross-move to seek enforcement of the order.

Finally, with respect to U.S. practice, in *Yahoo!, Inc. v. Microsoft Corp.*¹⁰⁹ the parties had agreed in their contract (by which they agreed to combine search engines internationally) to use the domestic American Arbitration Association’s then-optional Emergency Arbitration rules.¹¹⁰ The parties’ arbitration clause allowed for the emergency arbitrator to compel and award interim injunctive or emergency relief, as well as specific performance.

Microsoft commenced arbitration against Yahoo, and invoked the emergency arbitrator procedures. Following two full days of evidentiary hearings, the emergency arbitrator issued an award¹¹¹ finding that Yahoo was in breach of

¹⁰⁶ No. 11-50160, 2011 U.S. Dist. LEXIS 14414, at *8 (E.D. Mich. Feb. 14, 2011) (internal citations omitted).

¹⁰⁷ No. 10 cv 2467 WQH (NLS), 2011 WL 2135350 (S.D. Cal. May 27, 2011).

¹⁰⁸ *Id.* at *7.

¹⁰⁹ 983 F. Supp. 2d 310 (S.D.N.Y. 2013).

¹¹⁰ These have now been incorporated into the AAA Commercial Arbitration Rules, and are binding with regard to disputes arising from arbitration agreements made after October 1, 2013.

¹¹¹ The title of the arbitrator’s decision is not stated by the court and the document itself was filed under court seal and is unavailable. The court, and apparently the parties in their submissions to the court, referred to the decision as an “arbitration award.”

contract and that the “urgency of the transition [to Microsoft’s search engine] establishes the emergency required by the Emergency Rules.”¹¹² The arbitrator found “irreparable harm to Microsoft”¹¹³ and ordered Yahoo “restrained and enjoined from continuing any pause [in its contractual performance and] commanded to use all efforts” to complete its transition to the Microsoft search engine in the places at issue by specific dates.¹¹⁴

One day after the emergency arbitrator’s award, Yahoo brought an action in federal court in New York to vacate the award, arguing that the arbitrator had effectively granted permanent relief and the phrase “interim injunctive or emergency relief” in the contract limited the emergency arbitrator to granting relief that was temporary in nature. The court deferred to the arbitrator’s findings regarding irreparable harm and likelihood of success on the merits and denied the motion to vacate, confirming the award even though due to the nature of the case the order was tantamount to final relief. The court noted that “if an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made.”¹¹⁵ The decision further stated that “there is a more than colorable basis for finding that the Arbitrator was authorized to grant the relief that was awarded.”¹¹⁶

With respect to investor-state cases, the authors are aware of one successful enforcement of an emergency arbitration award against a state, although the case remains on appeal. In January 2015, JKX and two of its subsidiaries brought a claim under the Energy Charter Treaty (“ECT”) based on Ukrainian state measures that increased royalties on gas production by more than 25%. An SCC emergency arbitrator rendered an award, severely limiting the royalties Ukraine could impose on gas production. Ukraine unsuccessfully fought enforcement of the award on several grounds, and in June 2015 a District Court in Kyiv upheld the award’s enforcement, ruling that it was governed by the New York Convention, the ECT, and the SCC Rules. “In other words, the Pecherskyi Court treated the EA decision no different[ly] than any other foreign arbitral award.”¹¹⁷ On appeal, however, the Court of Appeal held in September 2015 that the award could not be enforced on grounds of public policy.¹¹⁸ In February 2016, the

¹¹² 983 F.Supp.2d at 314.

¹¹³ *Id.*

¹¹⁴ *Id.* at 315.

¹¹⁵ *Id.* at 319 (citing *Southern Seas Nav. v. Petroleos Mexicanos*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985)).

¹¹⁶ *Id.* at 316.

¹¹⁷ Dmytro Galagan, *Enforcement of the JKX Oil & Gas Emergency Arbitrator Award: A Sign of Pro-arbitration Stance in Ukraine?* KLUWER ARBITRATION BLOG (July 27, 2015), <http://kluwerarbitrationblog.com/2015/07/27/enforcement-of-the-jkx-oil-gas-emergency-arbitrator-award-a-sign-of-pro-arbitration-stance-in-ukraine>.

¹¹⁸ Olena Perepelynska, “Enforceability of Emergency Arbitrator Awards in Ukraine,” *CIS Arbitration Forum* (Dec. 7, 2015), <http://www.cisarbitration.com/2015/12/07/enforceability-of-emergency-arbitrator-awards-in-ukraine>.

Specialized Higher Court of Ukraine for Civil and Criminal Cases cancelled the September 2015 resolution of the Kyiv City Court of Appeal and remitted the case to the court of appeal for reconsideration.¹¹⁹

V. STRATEGIC IMPLICATIONS

The emergency arbitrator process is an intense period of activity for all concerned: institutions, arbitrators, counsel, and parties.

For the institutions, appointment of an emergency arbitrator within 24 or 48 hours requires substantial allocation of senior staff resources to identify and contact an arbitrator and to confirm the arbitrator's availability and willingness to devote a significant amount of time immediately to the matter. For the arbitrator, it is imperative to engage with the parties right away: many rules require issuance of a scheduling order within a day or two of the appointment. Since the emergency arbitrator typically will have only the applicant's papers at the time of the scheduling order, generally the arbitrator will organize a telephone conference to learn the views of the parties about the matters in dispute and focus everyone on the issues that must be decided: jurisdiction of the arbitrator, the nature of the relief sought, and the reasons the party requesting the relief requires it on an emergency basis and is entitled to it under the contract and applicable law.¹²⁰

For counsel and parties, it is critical to prepare for a quick, intense process that may well decide the parties' dispute. As in national courts, where cases are often resolved as a result of preliminary injunction decisions, the decisions of emergency arbitrators may have similar consequences.¹²¹

It is particularly critical for counsel to consider in advance of the application the issues that must be determined in an emergency arbitrator proceeding. The applicant must set forth the factual and legal basis for both the emergency relief and the underlying case – and, most critically, explain why the request cannot await constitution of a tribunal. The factual basis for the relief typically is set out in witness statements or affidavits. The party requesting such relief has the obvious advantage of being able to prepare its papers well in advance of the request. The party opposing the request must be prepared to respond very quickly, certainly within a week, on all matters to be considered by the emergency arbitrator. Witnesses must be made available on very short notice to work with counsel on factual submissions and witness statements, and to testify by telephone, videoconference or, as has sometimes been the case in emergency arbitrator proceedings, in person.

¹¹⁹ JKX Oil & Gas PLC, Poltava Gas B.V. and Poltava Petroleum Company JV, SCC No. EA/2015/002, Resolution in the Name of Ukraine (Feb. 24, 2016), *available at* <http://www.italaw.com/sites/default/files/case-documents/italaw7391.pdf>.

¹²⁰ See, e.g., ICDR RULES, Art. 6(3); ICC RULES, Appendix V, Art. 1(3).

¹²¹ See Raja Bose & Ian Meredith, *Emergency Arbitration Procedures*, 5 INT'L ARB. L. REV. 186, 188-90 (2012) (describing four SIAC emergency arbitrator cases and noting that two of them settled following the emergency arbitrator decision).

Notwithstanding the challenges counsel face in presenting complex factual information quickly, it must be remembered that all factual representations will be subject to later review by the regularly constituted tribunal. There is nothing temporary or provisional about factual representations made by a witness – or, for that matter, counsel – during an emergency arbitrator proceeding. If a significant misrepresentation in a witness statement is discovered in the main proceedings it will be little excuse that the statement was hastily prepared under the pressures of an emergency proceeding. However much counsel might anticipate that opportunities for effective cross-examination in an emergency arbitrator proceeding may be limited, the temptation to “fill in” a witness’s personal knowledge to meet the needs of arguments for or against the requested emergency relief must be resisted. If the matter proceeds to a tribunal, the opposition is sure to highlight inconsistent statements made to the emergency arbitrator, particularly on factual matters material to the decision to grant or deny the requested emergency relief.

Although it is common for the emergency arbitrator to hold telephone conferences and hearings with counsel during the course of the proceedings, it appears that only a small number of emergency arbitrator proceedings have included evidentiary hearings at which witnesses are heard. There have been in-person evidentiary hearings before ICC and ICDR emergency arbitrators,¹²² and the authors are aware of at least one case in which the cross-examination was conducted by telephone conference. The increasing availability of videoconferencing certainly increases the opportunity for a more effective remote cross-examination of witnesses than is possible by telephone. Obviously, in an international case with parties from different countries it may be difficult for the emergency arbitrator to require counsel and parties to travel substantial distances on very short notice for in-person evidentiary hearings. The SCC, with its very short time limits for emergency arbitrator decisions, apparently has not held any in-person hearings. The logistical difficulties in arranging evidentiary hearings on short notice is obvious given the location of the parties to the SCC emergency arbitration proceedings (each case was seated in Sweden): China, Cyprus, Finland, Georgia, Germany, Israel, Lithuania, Netherlands, Norway, Russia, Sweden, Switzerland, Turkey and United States.¹²³

In many emergency arbitrator proceedings, key factual differences may not be apparent to the arbitrator until response papers have been submitted and telephone hearings scheduled. It would be expected that most emergency arbitrators would make every effort to avoid deciding disputed factual determinations unnecessary to the request for relief.

¹²² See discussions *supra* of *Yahoo!, Inc. v. Microsoft Corp.*, 983 F. Supp. 2d 310 (S.D.N.Y. Oct. 21, 2013) and *Chinmax Medical Systems vs. Alere San Diego Inc.*, Case No. 10cv2467 WQH (NLS), 2011 WL 2135350 (S.D. Cal. May 27, 2011).

¹²³ See Lundstedt, *supra* note 26.

Like all arbitrators, an emergency arbitrator may order relief only with respect to signatories to the arbitration agreement or their successors.¹²⁴ This of course limits the effectiveness of interim relief generally in arbitration, as any award or order will not bind a third party, such as a financial institution holding party assets. Not surprisingly, in two SCC emergency arbitrations in which the applicant sought relief against a party not bound by the arbitration agreement, the emergency arbitrator concluded that it lacked jurisdiction over the third parties.¹²⁵ This does not, however, mean that decisions of emergency arbitrators – like decisions of arbitrators generally – may not significantly affect the commercial interests of third parties.¹²⁶

* * * *

Recourse to national courts will remain the preferred route for interim relief in certain circumstances. Truly immediate relief, or applications that must be made without notice to the other party in order to be effective, will generally require use of national courts. In addition, where the interim relief requires compulsory action by third parties, national courts may well prove more efficient: emergency arbitration remains arbitration, and is thus a creature of consent without jurisdiction over non-parties to the arbitration agreement.

In addition, the enforceability of emergency arbitrator orders and awards in many jurisdictions has yet to be tested, and it may be prudent to apply to a national court if the matter concerns assets or threatened harm in a country other than the arbitration situs. Also, a party may perceive a tactical advantage in seeking interim relief from a court – particularly a court in its own country – rather than from an international arbitrator (emergency or otherwise).

All of that said, emergency arbitrator provisions address a longstanding weakness of international arbitration by providing an immediate, efficient process to resolve applications for interim relief prior to the constitution of the arbitral tribunal. The emergency arbitrator experience to date demonstrates that these procedures can be applied effectively to even the most complex of matters, as in the *Yahoo v. Microsoft* case. In any event, it is clear that parties that have agreed to arbitrate under rules providing for emergency arbitrator procedures must fully consider, and prepare for, the possibility of such proceedings.

¹²⁴ ICC RULES, Art. 29(5).

¹²⁵ See Lundstedt, *supra* note 26.

¹²⁶ See *Microbix Rocky Mt. Biologicals, Inc. v. Microbix Biosystems, Inc.*, 986 F. Supp. 2d 1187 (D. Mont. 2013) (court declined third party's request to vacate ICDR emergency arbitrator decision), discussed *supra* note 83 and accompanying text.

