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"Emergency! Is There an Arbitrator in the Building?!" - The Practical Utility of Emergency Arbitrator Provisions

APRAG Paper - Article 1

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 of a party to arbitral proceedings to decide 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 amongst 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. Prior to their use, 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, and application to national courts oftentimes took equally as long (if not longer). In this way, emergency arbitrator provisions have added a new practical dimension to the way parties' disputes may be progressed.

2. Emergency Arbitrator Provisions in the Asia-Pacific - From Application to Enforceability

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 Australian Centre for International Commercial Arbitration (**ACICA**) Rules amended in 2011 now expressly provide for the appointment of emergency arbitrators in Schedule 2. The Rules of the International Chamber of Commerce (**ICC**) also incorporate provisions for the appointment of emergency arbitrators. In Singapore, the Singapore International Arbitration Centre (**SIAC**) Rules, last amended in

April of this year, also contain express emergency arbitrator provisions in Schedule 1. Most recently, the Hong Kong International Arbitration Centre (**HKIAC**) has published its new Rules, which shall enter into force on 1 November of this year and which also contain emergency arbitrator provisions.

The London Court of International Arbitration (**LCIA**) Rules is one of the sets of rules which provides for the expedient formation of the arbitral tribunal but which is yet to include emergency arbitrator provisions. However, it is anticipated that they, too, will follow suit and include emergency arbitrator provisions in the near future.

ACICA has incorporated provisions for the appointment of emergency arbitrators in its Rules since 1 August 2011, whereas the ICC, whose Rules do provide a more detailed procedural regime for emergency arbitrators (mostly with respect to application timeframes and particulars), only brought its emergency arbitrator provisions into force on 1 January 2012.

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 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) (**IAA**) (or, for example, the UK's *Arbitration Act 1996* (UK)). While there is a paucity of either Australian or UK jurisprudence to confirm this view, a purposive approach - which recognises 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 in finalising 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. Under both sets of rules, the arbitrator will be selected to the extent possible from ACICA's or the ICC's panel of arbitrators, based on 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.

The power of the emergency arbitrator under both the ACICA and ICC Rules applies to all arbitrations conducted under the respective set of rules unless the parties expressly opt out of it in writing. 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 which includes the reasons upon which it is based, the date 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.

An outline of the key features of the emergency arbitrator provisions from each of these institutional rules is provided in Table 1 below:

Rules of Institution	**ACICA**	**ICC**
Relevant Emergency Arbitrator Provisions	• Rule 3 of Appendix A (Emergency Arbitrator Fee) • Rules 1-7 of Schedule 2	• Article 29 • Articles 1-8 of Appendix V
Date of Commencement of Emergency Arbitrator Provisions	1 August 2011	1 January 2012
Timing of Application	With or after notice	Before or after request filed
Time for Appointment (Target)	Within one business day	Within two days
Decision Time (Target)	Five business days	15 days
Form of Decision	Award, Order	Order
Cost of Procedure	AU$12,500	US$40,000
Opt Out?	Yes	Yes

Table 1 - Outline of key features of emergency arbitrator provisions from the ACICA and the ICC Rules

Similar procedures are provided pursuant to Schedule 1 of the SIAC Rules (2013). 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.

As to Hong Kong, the 2008 HKIAC Rules did not contain any provisions regarding emergency arbitrators. The HKIAC's 2013 Rules will now 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 have the same effect as an interim measure and is binding on the parties. The new HKIAC Arbitration Rules differ from the ICC Rules, in that the emergency arbitrator can only consider applications for interim relief between the service of the Notice of Arbitration and the constitution of the tribunal. Under the HKIAC Rules, and the ACICA Rules, the emergency arbitrator's mandate ceases once the tribunal is constituted.

The new dispositions are introduced on the Schedule 4 of the Rules, which will be effective by 1 November 2013, and enable the parties to appoint an emergency arbitrator within two days of HKIAC's acceptance of an emergency application. Acceptance of an emergency application 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 so decides, 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.

3. Are Emergency Arbitrator Provisions Really Useful?

Despite their recent popularity, many arbitration practitioners have looked upon the emergency arbitrator provisions which have begun to emerge in revised editions of institutional rules with a measurable level of doubt. Some practitioners have claimed to have identified a potential 'follow the leader' trend and have questioned the actual efficacy of such provisions. In particular, the bases of these concerns have revolved around the following two questions:

a) what, exactly, is the definition and nature of a matter of 'emergency' which might necessitate emergency relief and the appointment of an emergency arbitrator?

b) Does the market actually have much practical use for emergency arbitrators?

Flow on questions have also centred around the enforceability of the emergency arbitrator's decisions. These have been addressed under heading 2 above.

With regard to the question of what an 'emergency' situation is, Rule 3.5 in Schedule 2 of the ACICA Rules stipulates that the party requesting an emergency arbitrator to issue an emergency interim measure is required to show that:

1. irreparable harm is likely to result if the emergency interim measure is not ordered;

2. 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

3. there is reasonable possibility that the requesting party will succeed on the merits.

By Rule 1.3 in Schedule 2 of the ACICA Rules, the requesting party is also required to provide details of:

1. the nature of the relief sought;

2. the reasons why such relief is required on an emergency basis; and

3. the reasons why it is entitled to such relief.

The requirements of Rule 1.3 above are quite rudimentary. However, the use of the phrase "irreparable harm" in Rule 3.5 above calls for the appointment of an emergency arbitrator and the issuance of emergency relief only where there exists an unavoidable and rather dire situation. Some examples of such situations might involve one party wishing 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 3 in Appendix V of the ICC Rules is in line with Rule 1.3 of the ACICA Rules and simply provides that an application for the appointment of an emergency arbitrator shall contain:

1. a description of the circumstances giving rise to the application and of the underlying dispute referred or to be referred to arbitration, and

2. the reason 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 than the ACICA Rules as 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 clause 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 emergency arbitrator appointing authority under the ICC Rules, is afforded more discretion when deciding whether the circumstances require 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 arbitration and worthy of formalised 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. Other major international arbitration institutions, such as SIAC, have reported low usage of the emergency arbitrator provisions in their rules.[1]

While the conclusion from such results at first blush might be that the users of international arbitration simply do not have any use for emergency arbitrators, it must be recalled that the provisions' incorporation into the rules of arbitration institutions in Asia (and, for that matter, worldwide) has been a recent advent. Thus, the counter-argument is that international arbitration practitioners and their respective parties have not yet warmed to the concept - and until they do, it could be reasonably expected that the levels of emergency arbitrator provisions usage would remain low. It is suspected that such a take-up will occur organically, and 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 party relations are amicable to begin with, will such an application cause any tension, and if tension already exists, will such an application make matters considerably worse?

[1] By February 2011, three applications under the SIAC emergency arbitrator provisions had been received and accepted.

Interim Measures in International Arbitration - Just a 'Band-Aid' Solution?

APRAG Paper - Article 2

1. Availability and Enforceability of Interim Measures

Interim measures, also known as "temporary measures of protection" or "conservatory measures," are orders directed at the preservation of the status quo until a decision on the merits of the dispute is rendered. They are temporary in nature and are designed to ensure that the parties to a dispute suffer minimum damage during the arbitral proceedings, through to the final settlement of the dispute and enforcement of any eventual award. Ultimately, interim measures are "intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought from the court [or tribunal] having jurisdiction as to the substance of the case."[1]

In order for interim measures to be successfully applied by an arbitral tribunal, however, they must be enforceable in the jurisdiction in which the relevant assets reside, or where the relevant conduct is occurring. While the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) has been effective at harmonising national practice in relation to enforcing foreign arbitral awards, its application to interim measures is controversial. Thus, there is no uniform approach to enforcing foreign interim measures. The 2006 amendments to the Model Law do address the issue of enforcing foreign interim measures, as discussed below, and to some extent this is resulting in some harmonisation of international practice as more and more nations adopt the amended Model Law. To date, however, only 12 jurisdictions have amended the Model Law as amended in 2006, so progress in this regard is gradual.

1.1 Extra-territorial Enforcement of Interim Measures in Australia

Prior to 2010, the position in Australia was that interim measures ordered by tribunals seated outside of Australia were generally not enforceable by Australian courts. In *Resort Condominiums v Bolwell*[2] the Supreme Court of Queensland strongly denied application of the New York Convention to a so-called interim award, holding that such relief was of a merely "interlocutory and procedural nature"[3] since it purported neither to finally resolve disputes between nor finally resolve the legal rights of the parties. The court differentiated between interim relief on one hand and "awards" for the purposes of the New York

[1] *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco Line* C-391/95 [1998] ECR I-7091, 7133.

[2] *Resort Condominiums International Inc v Bolwell and Resort Condominiums (Australasia) Pty Ltd* [1995] 1 Qd R 406.

[3] Ibid 415.

Convention on the other which, in the opinion of the Court, determined rights. While some uncertainty remained, the position in Australia seemed to be that the New York Convention would not apply to interim orders.

In 2010, Australia adopted the 2006 amendments to the Model Law. This brought with it a sophisticated legal framework for the provision and enforcement of interim measures. An important feature of the Model Law in this respect is its extra-territorial operation. Article 1(2) of the Model Law prescribes which provisions of the Model Law apply extra-territorially. Among the provisions that are specified to apply even when the place of arbitration is not within Australia are Arts 17H-J. These articles relate to, respectively, the recognition and enforcement of interim measures, the grounds for refusing recognition or enforcement of interim measures, and the availability of court-ordered interim measures. In addition to Art 1(2), Art 17H(1) specifically provides that:

> *An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17I [grounds for refusing recognition and enforcement]*.

The practical effect of this is that interim measures can be enforced by Australian courts, regardless of the seat of arbitration. For example, if a tribunal seated in Singapore issues an interim order requiring that an Australian party must preserve certain assets in Sydney, that order could be enforced against the Australian party by Australian courts.

It should be noted that in addition to the interim measures available under the Model Law, Australia's IAA explicitly provides for two additional types of interim measures: orders relating to obtaining evidence and orders relating to security for costs. The IAA sets out the scope of these interim measures and provides that the provisions of the Model Law apply in relation to an order under this section in the same way as they would apply to an interim measure under the Model Law.[4]

As identified in Art 17H(1), the court's powers to recognise and enforce interim measures that were issued in foreign countries is subject to Art 17I. Article17I provides that enforcement of an interim measure can *only* be refused where:

- Art 17I(1)(i) and Art 17I(1)(b)(ii): it is incompatible with the requirements for enforcing a foreign award under Art 36(1)(a)(i)-(iv) or Art 36(1)(b)(i)-(ii);
- Art 17I(1)(ii): the tribunal's decision with respect to the provision of security in connection with the interim measure issued by the tribunal has not been complied with;

[4] *IAA* ss 23J(3) and 23K(3).

- Art 17I(1)(a)(iii): the interim measure has been terminated by the tribunal or, where so empowered, the court of the State in which the arbitration takes place; or

- Art 17I(1)(b)(i): the interim measure is incompatible with the powers conferred upon the court. The court may, however, reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures.

In addition to the enforcement of tribunal-ordered interim measures, Australian courts are also empowered to hear applications from parties in relation to court-ordered interim measures. Here, the court has the same power to issue interim measures as it does in relation to curial proceedings.[5] The court must exercise this power in accordance with its own procedures in consideration of the specific features of international arbitration.[6] As noted above, in circumstances where emergency arbitrator provisions are not available, this can be the only option for parties wishing to have interim measures implemented prior to the constitution of the arbitral tribunal.

1.2 Extra-territorial Enforcement of Interim Measures in the UK

The situation in the United Kingdom is quite different to that in Australia. While the court is empowered to enforce interim measures that are issued by tribunals seated within the UK, it has no power to enforce interim measures issued by tribunals that are not seated within the UK. Court-ordered interim measures, however, are available to support arbitrations that are seated either within the UK or outside of it.

The only procedure by which courts may enforce interim measures in the UK is the procedure set out in s 42 of the *Arbitration Act 1996* (UK), which provides that the court may make an order requiring a party to comply with a peremptory order made by the tribunal. A peremptory order is an order that the tribunal makes after a party fails to comply with an order or direction of the tribunal.[7] The peremptory order is an order to the same effect as the initial order, with a time frame imposed by the tribunal.[8] If the party fails to comply with the peremptory order, then an application may be made to the court to enforce the peremptory order. Section 2(1) of the *Arbitration Act 1996* (UK) provides that the provisions of the act will apply only to arbitrations seated in England, Wales or Northern Ireland. While some provisions are excepted from this general rule, there is no exception for s 42.

Section 44 of the *Arbitration Act 1996* (UK) is, on the other hand, exempt from the general rule restricting application of the act to England, Wales and Northern Ireland. Section 2(3) of the act provides

[5] Model Law, Art 17J.

[6] Ibid.

[7] *Arbitration Act 1996* (UK) s 41(5).

[8] Ibid.

that s 44 applies even where the seat of the arbitration is abroad, but that the court may refuse to exercise its power if it is of the opinion that the fact that the arbitration is seated abroad makes it inappropriate to do so. Mustill and Boyd note that:[9]

> *The court would no doubt refuse to exercise its powers in such a case if a court of the seat of the arbitration had corresponding powers, or if the court's powers were likely to be unenforceable in the country of the seat.*

Section 44 provides that the court may make certain orders in support of arbitral proceedings. These orders are limited to:[10]

> *(a) the taking of the evidence of witnesses;*
>
> *(b) the preservation of evidence;*
>
> *(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—*
>
> *(i) for the inspection, photographing, preservation, custody or detention of the property, or*
>
> *(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;*
>
> *and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;*
>
> *(d) the sale of any goods the subject of the proceedings;*
>
> *(e) the granting of an interim injunction or the appointment of a receiver.*

In making such an order, the court is to act only if or to the extent that the arbitral tribunal (or arbitral institution) has no power or is unable for the time being to act effectively.[11] This is not a difficult threshold to satisfy in terms of arbitrations seated abroad, where the tribunal will have no power to have its interim orders enforced in the UK.

[9] Lord Mustill and Stewart C Boyd, *Commercial Arbitration* (2001 Companion Volume to the second edition, Butterworths) 324.

[10] *Arbitration Act 1996* (UK) s 44(2).

[11] Ibid s 44(5).