



ISSN : 1875-4120  
Issue : (Provisional)  
Published : April 2015

This article will be published in a future issue of TDM (2015). Check website for final publication date for correct reference.

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## Evaluating the Advantages and Drawbacks of Emergency Arbitrators by E. Sussman and A. Dosman

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## Evaluating the Advantages and Drawbacks of Emergency Arbitrators

*Edna Sussman and Alexandra Dosman, New York Law Journal*

March 30, 2015

Commercial parties choose to resolve their disputes by international arbitration for many reasons, including greater confidentiality, a neutral forum, and increased control over the selection of decision-makers. Until recently, however, parties were required to go to national courts to request interim measures of protection—such as security, asset freezes, or orders for the protection of evidence—before the constitution of an arbitral tribunal.

In response to a perceived need for a mechanism for awarding interim relief within the arbitral system itself (rather than national courts), in 2006 the International Centre for Dispute Resolution (ICDR) incorporated emergency arbitrator proceedings into its rules. In the following nine years, almost every major international arbitration institution has followed suit.<sup>1</sup> Emergency arbitrator provisions are now the norm, including for new entrants in the field.<sup>2</sup> Were these amendments a response to a genuine need for emergency relief in international arbitration? Are emergency arbitrators being used, and are their decisions enforceable?

A review of information from the arbitral institutions reveals that parties are, in fact, using emergency arbitrator mechanisms, and that decisions of emergency arbitrators are generally rendered within very short time frames. The case law from U.S. courts—including the high-profile *Yahoo! v. Microsoft*—indicates decisions by emergency arbitrators are likely to be enforced. Given these factors, in certain circumstances the use of emergency mechanisms within the arbitral system will be preferable to going to a national court for interim relief.

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<sup>1</sup> In 2007, the Institute for Conflict Prevention and Resolution (CPR); in 2010, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the Singapore International Arbitration Centre (SIAC); in 2011, the Australian Centre for International Commercial Arbitration; in 2012, the Court of Arbitration of the International Chamber of Commerce (ICC); in 2013, the American Arbitration Association (AAA) and the Hong Kong International Arbitration Centre (HKIAC); in 2014, the London Court of Arbitration (LCIA), the CPR for its international rules, and JAMS; in 2015, the China International Economic and Trade Arbitration Commission (CIETAC). However, the move to include emergency arbitrator procedures is not universal. The Vienna International Arbitration Center made a considered decision not to offer such procedures as part of their rules, in part because of the view that decisions issuing from that process would not be enforceable as arbitral awards.

<sup>2</sup> See The rules of the Kuala Lumpur Regional Centre for Arbitration, the Kigali International Arbitration Centre, and the Lagos Court of Arbitration.

## A Trend That Has Become the Norm

The recent proliferation of emergency arbitrator mechanisms has its roots in innovations dating back some time. In 1999, the American Arbitration Association (AAA) made an opt-in emergency arbitrator process available with its Optional Rules for Emergency Measures of Protection. In 1990, the Court of Arbitration of the International Chamber of Commerce (ICC) began offering a similar optional ("opt-in") mechanism for pre-arbitral tribunal proceedings, under its Rules for a Pre-Arbitral Referee Procedure. The ICC Pre-Arbitral Referee Procedures (which are still available) have not proved popular, with only 14 cases in their first 24 years of existence.<sup>3</sup>

In contrast to these precursor mechanisms, the modern wave of emergency arbitrator rules apply by default—they are "opt out" rather than "opt in." Almost all of the emergency arbitrator rules apply prospectively, to arbitration agreements entered into after the relevant rules came into force. One exception is the SCC, which elected to make the emergency arbitrator provisions applicable to all SCC arbitrations *commenced* after Jan. 1, 2010, regardless of when the arbitration agreement was signed.<sup>4</sup>

The most obvious characteristic of emergency arbitrator proceedings is the speed at which they are to be established and completed. The rules surveyed provide for the appointment of an arbitrator by the institution within one day (ICDR, SCC, SIAC, CPR), two days (ICC, HKIAC), or three days (LCIA) of receipt of the application and payment of fees. Under the ICDR, ICC and SIAC Rules, the emergency arbitrator must set a procedural schedule for the arbitration within two days of appointment. The time limits for rendering an award range from five days (SCC) to 14 days (LCIA) to 15 days (ICC, HKIAC). The SIAC, CPR and ICDR Rules do not specify a time limit for rendering an award, but require decisions as expeditiously as possible.

All emergency arbitrator procedures call for the appointment of a sole emergency arbitrator by the institution. (The CPR Rules are unique in also recognizing the possibility that parties may jointly designate an emergency arbitrator.) The institutions appoint either from a list of emergency arbitrators or a non-list method. The ICC, for example, selects emergency arbitrators following discussion between the court and the Secretariat regarding the qualities required for each case; a shortlist is drawn up and an arbitrator is chosen from among those with availability who report no (or de minimus) conflicts. Location is also a factor. In contrast to its normal rule, the ICC Emergency Arbitrator Rules allow for nationals of the same state as one or more of the parties to serve as emergency arbitrator. All of the rules require the same standard of impartiality and independence for emergency arbitrators as for arbitrators in non-emergency proceedings;

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<sup>3</sup> Andrea Carlevaris and José Ricardo Feris, "Running in the ICC Emergency Arbitrator Rules: The First Ten Cases," ICC International Court of Arbitration Bulletin, Vol. 25, No. 1 (2014).

<sup>4</sup> In the domestic U.S. context, the JAMS Rules incorporating emergency arbitrator procedures appear to apply to arbitrations "filed and served after July 1, 2014"—implying that they are not limited to arbitration *agreements* entered into after that date. (Rule 2(c)). The JAMS international rules, last updated in 2011, do not provide for emergency arbitration, but an update is expected shortly that will likely include such a provision.

and all provide for an expedited challenge procedure.

### **Emergency Arbitration in Action**

Information from public sources and from direct inquiries of arbitral institutions indicates that emergency arbitration procedures are being used in a reasonable number of cases. And the original premise has, so far, borne out: Interim relief has been awarded or denied within extraordinarily short time frames. What remains unclear, however, is whether a consensus is forming (or can form) about the legal standards that apply to an emergency arbitrator's deliberations.

Since 2006, the ICDR has registered 49 requests for emergency relief. Of those, the applicant was successful in obtaining full or partial emergency measures in almost half of the cases (24); the applicant was unsuccessful in 14 cases. Eight of the 49 cases settled, two were withdrawn, and one is still pending. At the ICDR, the average time for the rendering of an emergency decision is 21 days. The flexibility afforded by the rules to the arbitrator in not providing for a deadline by which a decision has to be rendered allows the arbitrator to tailor the process to the needs of the particular case.

Under its 2007 Rules for Non-Administered Arbitrations, CPR has received five requests for the appointment of a Special Arbitrator (as emergency arbitrators are denoted by the CPR). Two requests were denied, one request was granted, one request was withdrawn, and one resulted in agreed relief. JAMS has received six applications, only three of which went to a decision. One then settled and two are ongoing.

At the SCC, 13 emergency arbitrator applications had been registered as of Dec. 31, 2014, of which two were in the context of investment treaty claims. All 13 went to a decision by the emergency arbitrator. One decision was rendered in the form of an award, by request of the parties. Interim relief was granted in three of the 13 cases. The SCC rules require a decision to be rendered within five days of transmission of the file to the emergency arbitrator. The five-day deadline to render a decision has been met in eight of the 13 cases; extensions in five other cases were granted upon request of the arbitrator; and all decisions have been rendered within 12 days.

SIAC has received 42 applications. Of those 42, at least 11 applications were denied, eight were granted, and four were withdrawn. No official data on settlement is available, but the institution is aware of "quite a few" cases in which the matter settled shortly after an emergency arbitrator's award or order. At SIAC, the average time for the issuance of an interim order is 2.5 days; and the average time for an award has been 8.5 days from when the adjudicator first hears from the parties.<sup>5</sup>

The ICC has received 15 applications to date, of which at least four were granted, four were denied, and two were withdrawn or settled (information is lacking on five cases). At least three cases were terminated by agreement before the constitution of the arbitral tribunal and one was

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<sup>5</sup> Vivekananda N., "The SIAC Emergency Arbitrator Experience," available at [www.siag.org.sg](http://www.siag.org.sg), at 4.

terminated shortly after. As of 2014, all emergency orders had been rendered within the 15 day deadline prescribed by the ICC Emergency Arbitrator Rules.<sup>6</sup>

The HKIAC has received two applications under its emergency arbitrator proceedings, but both were withdrawn prior to a determination on whether or not to award interim relief (one proceeded to a costs award).

The AAA has received 15 requests for emergency arbitration under its October 2013 rules. A decision was issued by the emergency arbitrator in four cases; three cases were withdrawn; five settled; six remain pending before a later-constituted tribunal; and one resulted in a final award.

Neither the LCIA nor the CPR has received any applications under the new rules effective as of Oct. 1, 2014 and Dec. 1, 2014, respectively.

### **Broad Powers**

Emergency arbitrators have broad powers to consider and determine their jurisdiction, to establish the procedure of the expedited application, and to order interim relief to the same extent as could a regular arbitral tribunal under the applicable arbitration agreement.<sup>7</sup> Interim measures may include orders to maintain the status quo while an arbitration proceeds, to protect the arbitral process, to preserve assets or to preserve evidence.

The law of the contract is not generally seen as controlling on the question of whether and which interim measures may be granted. Commentators and emergency arbitrators have, to date, preferred the view that interim relief is procedural in nature, and therefore not bound by the constraints of the law applicable to the contract itself.<sup>8</sup> This view has been endorsed by at least one New York court, with the result that an ICDR arbitrator was empowered to order an interim measure that the court itself would not be able to grant.

In *CE International Resources Holdings v. S.A. Mineral Ltd. Partnership*, the 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.<sup>9</sup> 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

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<sup>6</sup> Carlevaris and Feris, ICC Emergency Arbitrator, *supra* note 3.

<sup>7</sup> ICDR Rules, Article 6(4); SIAC Rules, Schedule I, 6; ICC Rules, Appendix V, Article 6(3); LCIA Rules, Article 9A, 9.8; CPR Rules, Rule 14.9. The jurisdiction of emergency arbitrators may be more limited than that of the arbitral tribunal. For example, the ICC rules explicitly limit the application of emergency proceedings to the signatories to the arbitration agreement (or their successors).

<sup>8</sup> Emergency arbitrators remain subject to mandatory procedural laws of the seat that apply to the issuance of interim relief by arbitrators. For example, several jurisdictions appear to limit or eliminate the powers of arbitrators to issue injunctive relief (Quebec; Italy).

<sup>9</sup> *CE International Resources Holdings v. S.A. Mineral Ltd. Partnership*, 2012 WL 6178236 176158 (S.D.N.Y. Dec. 10, 2012). (This was not an emergency arbitrator case.)

freezing orders. The court upheld the arbitrator's award of interim relief on the basis of the arbitral rules chosen by the parties (which allow the tribunal to "take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property") and the public policy favoring the enforcement of arbitration agreements.<sup>10</sup>

### Varying Legal Standard

The test to be applied by emergency arbitrators in determining whether interim relief should be awarded is notably absent from most international arbitration rules. Instead, the rules state that emergency arbitrators may grant interim relief that is "urgent" (ICC, HKIAC), "necessary" (ICDR, SIAC, CPR), or "appropriate" (SCC).<sup>11</sup> Rules for domestic U.S. arbitrations provide more guidance. For example, under the AAA's Commercial Rules, the applicant must show that "immediate and irreparable loss or damage shall result in the absence of emergency relief and that such party is entitled to such relief." (Rule 38(e).) Similarly, the JAMS Rules provide that "the Emergency Arbitrator shall determine whether the Party seeking emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief ..." (Rule 2(c)(iv).)

In determining the legal test, emergency arbitrators have been guided by the applicable arbitration law, standards used in local courts, and international practice. The urgency of the matter, the requirements of irreparable harm and a balancing of the harm among the parties have been widely applied. But the identification of the standard to be applied and the strength of the case on the merits that must be presented have not been uniform among emergency arbitrators.

In SCC decisions alone, emergency arbitrators have referred to the Swedish Arbitration Act and the Swedish judicial code, and have described the standard as "reasonable probability of success on the merits," "prima facie case," "reasonable possibility," "serious claim," and "probable cause." One emergency arbitrator noted that there was a "universal consensus" with respect to the requirements: a prima facie case; urgency; and irreparable harm or serious or actual damage in the absence of interim relief.<sup>12</sup> Similarly, in SIAC cases, the tests applied have ranged from a "real probability" of success to a "good arguable case" test.<sup>13</sup>

In one ICDR case the emergency arbitrator applied a four-part test: a risk of irreparable harm; good prospects of success on the merits, no other remedy would be adequate; and any harm from

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<sup>10</sup> Id.

<sup>11</sup> The HKIAC Rules Article 23(3) and 23(4) set out the type of temporary measure and the relevant factors to be considered. However, Article 23 applies only to decisions by the "arbitral tribunal," which excludes emergency arbitrators (Article 3.6: "References in the Rules to the "arbitral tribunal" include one or more arbitrators. Such references do not include an Emergency Arbitrator as defined at para. 1 of Schedule 4.")

<sup>12</sup> Johan Lundstedt, "SCC Practice: Emergency Arbitrator Decisions, 1 January 2010-31 December 2013."

<sup>13</sup> Vivekananda N., "The SIAC Emergency Arbitrator Experience," at 3.

wrongful injunctive relief could be compensated by damages.<sup>14</sup> In another, the parties agreed that the applicant must show "irreparable harm absent the requested relief, a likelihood of success on the merits of its claims, and a balance of hardships in its favor."<sup>15</sup>

It is too soon to tell whether a consensus will form as to the legal standard employed by emergency arbitrators in international arbitration. One way forward—reportedly used regularly by ICDR emergency arbitrators in the absence of party agreement—is to apply the standards set out in the UNCITRAL Model Law on International Commercial Arbitration for interim measures issued by the duly appointed tribunal.<sup>16</sup> The Model Law test has three elements: (1) likelihood of irreparable harm (i.e., not reparable by money damages); (2) harm that substantially outweighs the harm to the party against whom the measure is granted; and (3) a "reasonable possibility" of success on the merits. Whether such a standard may also be applied in domestic arbitrations is an open question. In practice, it may yield the same results as the Second Circuit standard, which requires either (a) a likelihood of success on the merits, or (b) a sufficiently serious question going to the merits of the claim to make them fair ground for litigation."<sup>17</sup>

### **Are Emergency Decisions Enforceable?**

Decisions issued by emergency arbitrators are, by their nature, interim. The rules of each arbitral institution are clear that the arbitral tribunal, once constituted, may modify, terminate or annul the decision of the emergency arbitrator.<sup>18</sup> The statistics from the arbitral institutions and anecdotal evidence suggest that parties often voluntarily comply with emergency arbitral awards or orders. But in the case of a recalcitrant party, are decisions by emergency arbitrators enforceable in court?

As a general rule, U.S. courts do not have the power to review interlocutory (non-final) decisions by arbitral tribunals. However, U.S. courts have the power to enforce interim awards to support the integrity of the arbitral process: "Without the ability to confirm such interim awards, parties would be free to disregard them, thus frustrating the effective and efficient resolution of disputes

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<sup>14</sup> Guillaume Lemenez and Paul Quigley, "The ICDR's Emergency Arbitrator Procedure in Action," *Dispute Resolution Journal* (August/October 2008) at 5.

<sup>15</sup> Order of the Emergency Arbitrator dated July 31, 2013 in *Irvine Scientific Sales Company v. Microbix Biosystems*, 986 F. Supp. 2d 1187 (D. Mont. 2013) (order submitted and available on PACER).

<sup>16</sup> United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (UNCITRAL Model Law). See Grant Hanessian, "Emergency Arbitrators" in L. Newman & R. Hill, eds., *The Leading Arbitrators' Guide to International Arbitration* (Juris, 2014).

<sup>17</sup> *Otoe-Missouria Tribe of Indians v. New York State Dept. of Financial Services*, 769 F.3d 105, 110 (2d Cir. 2014).

<sup>18</sup> Many institutions' rules provide that the decision of the emergency arbitrator may take the form of either an order or an award. Under the ICC Rules, however, the emergency arbitrator is limited to issuing an order; the decision will not undergo scrutiny by the ICC Court of Arbitration.

that is the hallmark of arbitration."<sup>19</sup> U.S. courts have also confirmed interim injunctive awards on the basis that they address issues that are separate, distinct and severable from the resolution of the underlying merits of the dispute.<sup>20</sup> Although these cases have arisen in the context of interim measures issued by regularly-appointed arbitrators, the same rationales apply to interim measures issued by emergency arbitrators.

Indeed, the Southern District of New York recently confirmed an award issued by an emergency arbitrator under the rules of the AAA (the parties had "opted in" to the AAA's 1999 Optional Rules for Emergency Measures of Protection). In *Yahoo! v. Microsoft*,<sup>21</sup> Judge Robert P. Patterson considered Yahoo's motion to vacate an emergency arbitration award that had granted an injunction in Microsoft's favor. After an emergency arbitral proceeding that involved witness testimony, briefing, and an oral hearing, the emergency arbitrator issued an order requiring Yahoo to continue to perform its obligations under the parties' contract. Having reviewed the parties' arbitration agreement, the arbitral rules and applicable law, the court denied the motion to vacate and confirmed the award, even though due to the nature of the case the order was tantamount to final relief, noting 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."<sup>22</sup>

Other U.S. cases have supported the orders of the emergency arbitrator.<sup>23</sup> Indeed, 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 resolve what interim measure was appropriate.<sup>24</sup>

In the one known case in which a U.S. court declined to review a decision of an emergency arbitrator, it did so in support of the arbitral process. In that case, the losing party went to court to seek to vacate a decision of an emergency arbitrator. The court noted that under its circuit law, "temporary equitable orders calculated to preserve assets or performance needed to make a potential final award meaningful ... are final orders that can be reviewed for confirmation and enforcement by district courts under the [Federal Arbitration Act]."<sup>25</sup> In this case, this rationale did not apply: The party seeking review wished to undo an order, not enforce it. The court declined to review the case for vacatur on the basis that it was not intended to be final and thus in

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<sup>19</sup> *Companion Property and Casualty Insurance Company v. Allied Provident Insurance*, Case No. 13-cv-7865, 2014 WL 4804466 at \*3 (S.D.N.Y. Sept. 26, 2014) (and cases cited therein)

<sup>20</sup> *Publicis Communications v. True North Communications*, 206 F.3d 725 (7th Cir. 2000).

<sup>21</sup> 983 F. Supp. 2d 310 (S.D.N.Y. 2013).

<sup>22</sup> *Id.*, citing *Southern Seas Nav. v. Petroleos Mexicanos*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985).

<sup>23</sup> *Draeger Safety Diagnostics v. New Horizon Interlock*, 2011 WL 653651 (E.D. Mich. Feb. 11, 2011); see also *Blue Cross Blue Shield of Michigan v. Medimpact Healthcare Systems*, 2010 WL 2595340 (E.D. Mich. June 24, 2010).

<sup>24</sup> *Pre-Paid Legal Services v. Kidd*, 2011 WL 5079538 (E.D. Okla. Oct. 26, 2011).

<sup>25</sup> *Chinmax Medical Systems, Inc. v. Alere San Diego*, 2011 WL 2135350 (S.D. Ca. May 27, 2011) (internal citation omitted).



essence left the order in place and effectively enforced it.<sup>26</sup>

Although the case law is sparse, parties to emergency arbitration proceedings in the United States have good reason to believe that the resulting decisions will be enforced.

### **Courts or Tribunals?**

Emergency arbitrator systems appear to be working and provide a useful, and sometimes crucial, alternative, especially in the international context. But they will not be appropriate in all cases. In order to address that concern, all of the rules surveyed maintain the possibility of applications to national courts concurrently with the invocation of emergency arbitrator proceedings.

National courts will be the preferred venue when relief is required *ex parte*. With few exceptions, the emergency arbitrator rules surveyed do not allow for emergency relief on an *ex parte* basis: Notice is required to the responding party.<sup>27</sup> While the rationale for this policy is clear—fairness and enforceability concerns—the lack of an *ex parte* route may obviate the utility of emergency arbitrator proceedings, such as when the initiation of proceedings is itself expected to trigger a dissipation of assets. In addition, where emergency relief requires a third party to be bound (such as a bank), national courts will be the venue of choice.

Emergency arbitration has, in the last 10 years, become a standard feature of international arbitration. It offers key advantages—a neutral forum; a swift decision; increased confidentiality—and the limited data available shows that some parties are using this new tool. Jurisprudence from U.S. courts also shows reason for optimism that decisions of emergency arbitrators will be enforced.

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This article first appeared in the March 30, 2015 issue of the New York Law Journal, a publication of ALM Media Properties.

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<sup>26</sup> In a similar vein, in 2003 the Paris Court of Appeal declined to review an award granted by a Referee under the ICC's Pre-Arbitral Referee procedures. The losing party there sought to annul decisions of the Referee. The Paris court found that the Referee was not acting as an "arbitrator" and that therefore his decisions did not qualify as arbitration awards, meaning that they could not be subject to set-aside proceedings. Judgment of April 29, 2003, Docket No. 2002 / 05147, Court of Appeal of Paris, First Chamber, §C.

<sup>27</sup> Under Article 26(3) of the Swiss Rules of International Arbitration, arbitral tribunals have the power, in "exceptional circumstances," to grant interim relief *ex parte*.