

THE EMERGENCE OF EMERGENCY ARBITRATIONS

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Abstract

Emergency arbitration is a recent innovation in international arbitration. This paper discusses the importance of interim relief in international arbitration, the development of arbitral institutions' attempts to provide parties with effective interim relief, and discusses emergency arbitration provisions in leading institution rules. This paper also discusses enforcement of emergency arbitrator decisions, describes a recent case study under the SIAC Rules in which the author was the emergency arbitrator, and considers whether parties should tailor emergency arbitration provisions in their commercial agreements.²

I. INTRODUCTION

The emergence of emergency arbitrations to decide interim measures of protection as an alternative to court-ordered interim relief, or awaiting constitution of the arbitral tribunal, is a recent development in international arbitration, and is a reflection of parties' desire for disputes to be dealt with expeditiously, in a consistent forum, and to provide effective protection from imminent irreparable harm.

Seven leading arbitral institutions have recently published emergency arbitration provisions, the International Chamber of Commerce ('ICC'),³ the Singapore International Arbitration Centre ('SIAC'),⁴ the London Court of International Arbitration ('LCIA'),⁵ the Australian Centre for International Commercial Arbitration ('ACICA'),⁶ the International Centre for Dispute Resolution ('ICDR'),⁷ the Stockholm Chamber of Commerce ('SCC'),⁸ and the Hong Kong International Arbitration Centre ('HKIAC').⁹

This paper discusses the development of emergency arbitrations, provides an overview of the key provisions of the leading institutional rules, discusses the alternatives to emergency arbitration, and

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² This paper was originally published in the *Arbitrator & Mediator Journal* in December 2015, and has been updated to reflect amendments to the SIAC Rules which came into effect on 1 August 2016.

³ Effective from 1 January 2012, as part of the ICC's update of its Rules of Arbitration of the International Chamber of Commerce.

⁴ Effective from 1 April 2013, as part of SIAC's 5th edition of the Arbitration Rules of the Singapore International Arbitration Centre, and updated from 1 August 2016 as part of SIAC's 6th edition of the rules.

⁵ Effective from 1 October 2014, as part of the LCIA's update of its Rules of Arbitration.

⁶ Effective from 1 August 2011, as part of ACICA's Arbitration Rules, incorporating the emergency arbitrator provisions, and continued as part of ACICA's latest edition of its rules, effective from 1 January 2016.

⁷ Effective from 1 May 2006, as part of the ICDR's International Arbitration Rules.

⁸ Effective from 1 January 2010, as part of the SCC's Arbitration Rules.

⁹ Effective from 1 November 2013, as part of the HKIAC's Administered Arbitration Rules.

assesses enforceability of emergency arbitrators' decisions. The author also discusses a case study of an emergency arbitration under the SIAC Rules in which the author was appointed as the emergency arbitrator. In conclusion, the paper considers whether parties should tailor emergency arbitration provisions in their commercial agreements.

II. DEVELOPMENT OF EMERGENCY ARBITRATIONS

Interim measures operate as temporary orders to preserve a factual or legal situation so as to safeguard rights pending the award on the substantive issues in dispute, and are not intended to pre-judge the outcome of the proceedings. The need for interim relief in international arbitrations is not new, and arises from the special features of international commerce, such as assets located in multiple jurisdictions, the ability to transfer assets across borders, and the potential for evidence to be placed beyond the reach of the arbitral tribunal.

Arbitral tribunals have wide powers to order interim relief under the *lex arbitri* of all recognised seats of arbitration, and under leading institutional arbitration rules. However, difficulties arise during the period in which an arbitral tribunal is being constituted, and a party requires immediate interim relief. There are many situations where this can arise, for example:

- calling of an on-demand performance bond;
- likelihood of a party expropriating intellectual property;
- a state controlled entity requiring a party to abandon an investment; or
- likelihood of a party dissipating important relevant evidence.

The ready availability of interim relief can therefore operate to protect assets to ensure a successful party can benefit from a subsequent arbitral award.

The ICC was the first arbitral institution to provide a remedy by its mechanism for emergency relief contained in its '*Rules for a Pre-Arbitral Referee Procedure*', published in 1990, which provided for the appointment of a referee within eight days, and provision of an order for interim relief within 30 days of receipt of the file by the referee. The American Arbitration Association ('AAA') followed suit in 1999 by its '*Optional Rules for Emergency Measures of Protection*', which provided for an emergency arbitrator to be appointed within one business day, and award of interim relief if '*irreparable loss or damage*' could be shown.

The difficulty with both the ICC and AAA procedures was that parties had to agree to these provisions separately from their agreement to the ICC or AAA Rules respectively. This has led to the latest suite of institutional emergency arbitration provisions being incorporated directly into institutional arbitration

rules themselves. Parties, by agreeing to arbitrate under the institutional rules thereby agree to be bound by the emergency arbitration provisions unless they expressly opt out.

III. ALTERNATIVES TO EMERGENCY ARBITRATION

A party has two alternatives to seeking interim relief in an emergency arbitration, first, await formation of the arbitral tribunal, or secondly, an application to court for interim relief.

The arbitral tribunal has the power to order interim relief under all leading institutional arbitral rules, and under the *lex arbitri* of the recognized seats of arbitration.¹⁰ The advantages of awaiting formation of the arbitral tribunal are that the tribunal is likely to be more familiar with the proceedings and subject matter in dispute, and therefore, it is likely to be more efficient and cost effective for the tribunal to consider all issues between the parties, including interim relief. Secondly, it overcomes one of the issues concerning enforcement of emergency arbitrator's decisions as to whether the emergency arbitrator is a fully-fledged arbitral tribunal.

However, as noted above, the major difficulty is the time between a party filing a notice or request for arbitration, and constitution of the tribunal. The minimum time for constitution of a three-person tribunal under most institutional rules is likely to be in the order of 35 to 60 days, and more usually, between 60 and 90 days. Appointment of a sole arbitrator clearly takes less time, and an appointment can theoretically be made within seven days of filing a notice or request. However, arbitral institutions are unlikely to appoint a sole arbitrator without the respondent having first submitted its response or answer, since institutions typically consider the nature of the dispute and / or any comments by the respondent on the appointment of an arbitrator in considering a suitable appointment.

The LCIA Rules include an expedited procedure for appointing the arbitral tribunal in cases where a party can establish '*exceptional urgency*' by reducing any time periods in the arbitration agreement or otherwise agreed by the parties.¹¹ Parties' have frequently used the LCIA procedure, with 20 applications in 2010,¹² and there will remain situations where a party will initiate this procedure in preference to emergency arbitration.

The HKIAC and SIAC Rules also contain expedited arbitration procedures applicable to cases where the amount in dispute does not exceed HK\$25m and S\$5m respectively, or '*in cases of exceptional urgency*'.

¹⁰ For example, in Singapore, s12(1) of the Singapore *International Arbitration Act* (Cap 143A), and Art 17 of the 1985 edition of the Model Law, contained in First Schedule of the Act, and in Australia, Arts 17 and 17A of the 2006 amendments to the Model Law, contained in Schedule 2 of the *International Arbitration Act 1974* (Cth).

¹¹ Art 9A of the LCIA Rules, introduced in the 1998 edition of the Rules.

¹² James Hosking, Erin Valentine, and David M Lindley, 'Emergency Measures of Projection: Creeping Consensus or a Passing Fancy', <<http://www.chaffetzlindsey.com>>.

pursuant to which the respective institution may shorten any time limits under the Rules.¹³ There may be suitable disputes and circumstances where a party would apply for the expedited procedures under the respective Rules for the purpose of obtaining early appointment of a sole arbitrator to obtain interim relief.

Nonetheless, awaiting constitution of the arbitral tribunal, whether a three-person tribunal or sole arbitrator, is clearly not a safe option in circumstances where a party requires emergency interim relief as a consequence of likely imminent and irreparable harm, or dissipation of assets or evidence.

The second alternative to emergency arbitration is to apply to a relevant court for interim relief. The availability of such a remedy depends upon courts having the power to order interim relief under national arbitration laws. Article 9 of the 1985 edition of the UNCITRAL Model Law ('Model Law') makes it clear that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection, and for a court to grant such measure. Article 17J of the 2006 Model Law gives the court wide powers to order interim relief.¹⁴ These Model Law provisions are often supplemented by further widely drafted powers in national arbitration laws.¹⁵

Whilst courts of the arbitral seat are likely to have the power to order interim relief under national laws, interim measures are more likely to be required in the jurisdiction of the parties or their assets. It is essential therefore for parties to assess the powers and track-records of the courts in these jurisdictions on applications for interim relief.

There are a number of advantages to applying to national courts for interim relief rather than the arbitral tribunal itself. First, the arbitral tribunal's power to award interim relief is not always certain, and depends on the provisions of the agreement, any agreed arbitral rules, and the *lex arbitri* of the seat of arbitration. Secondly, any interim relief ordered by an arbitral tribunal must be enforced by national courts, and a party obtaining an order from a court avoids the need for the additional step of court proceedings for enforcement. Thirdly, an arbitral tribunal, as a body created by contract, has no power to issue interim relief against third parties, whereas national courts can do so. Fourthly, parties can generally apply for interim relief in national courts on an *ex parte* basis, whereas such applications are not appropriate in arbitration proceedings. Fifthly, there may also be circumstances where a party has no option but to apply to national courts for interim relief, for example, in some States only the courts can

¹³ Art 5.2(a) of the SIAC Rules, and Art 41(2)(c) of the HKIAC Rules.

¹⁴ Art 17J of the 2006 edition of the Model Law (forming part of the Australian *International Arbitration Act 1974* (Cth)) specifies that a 'court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts.'

¹⁵ For example, s12A of the Singapore *International Arbitration Act* (Cap 143A).

order specific types of interim relief. Sixthly, courts in some jurisdictions require the posting of security as part of ordered interim relief, whereas security is discretionary under arbitration rules.

The major disadvantages of applying to national courts are lack of confidentiality, in some jurisdictions the courts will not grant relief if the arbitral tribunal has the power to do so, and in some jurisdictions applications may be time-consuming, costly, and unpredictable in outcome.

All of the institutional rules make it clear that the emergency arbitrator provisions or applications for interim relief are not intended to prevent a party from seeking interim relief from a competent court prior to or after any application under the emergency arbitration provisions.¹⁶

IV. COMPARISON OF THE INSTITUTIONAL RULES FOR EMERGENCY ARBITRATION

Introduction

Although there are differences in detail among emergency arbitration provisions in the leading institutional rules, each provide for a procedure for the speedy and efficient resolution of applications for interim relief, comprising broadly of an application for urgent interim relief, appointment of an emergency arbitrator within one or two days, the emergency arbitrator quickly establishing a procedure and timetable for the application, expedited written and / or oral submissions on the application, and an expedited decision by the emergency arbitrator.

Timing and Content of Application

The institutions vary as to the required timing for applications for interim relief in emergency arbitration. The SIAC, ICDR, and ACICA Rules require a party to apply for emergency relief concurrent with or following a notice of arbitration, but prior to constitution of the arbitral tribunal.¹⁷

The LCIA, ICC, SCC, and HKIAC Rules are more flexible. The LCIA and HKIAC Rules require a party to apply for appointment of an emergency arbitrator prior to the constitution of the arbitral tribunal, but do not require a party to have first submitted a request for arbitration.¹⁸ Similarly, the ICC Rules allow an applicant to apply for emergency relief under the emergency arbitration provisions prior to the file being transmitted to the arbitral tribunal, and prior to submitting a request for arbitration, but if a request for

¹⁶ Art 29(7) of the ICC Rules, Art 30(3) of the SIAC Rules, Art 32(5) of the SCC Rules, Art 22 of Schedule 4 of the HKIAC Rules, Art 6(7) of the ICDR Rules, Art 7(1) of Schedule 2 of the ACICA Rules, and Art 9(12) of the LCIA Rules.

¹⁷ Art 1 of Schedule 1 of the SIAC Rules, Art 6(1) of the ICDR Rules, and Arts 1.1 and 1.2(b) of Schedule 2 of the ACICA Rules.

¹⁸ Arts 9B(4) and 9B(5) of the LCIA Rules. Art 9B(5) makes it clear that the applicant, in its application, need only submit a copy of a request 'if made by the Claimant'. Art 1 of Schedule 4 of the Rules.

arbitration is not submitted within 10 days of the secretariat's receipt of the application, the president is obliged to terminate the emergency arbitration proceedings.¹⁹

The SCC is of the view that requiring a party to first file a request for arbitration is unnecessary, and limits the usefulness of the provisions without providing any advantages.²⁰

The differences between the two approaches may be explained in part by the form of notices and / or requests for arbitration in each case. Notices of arbitration under institutional rules such as the SIAC and ACICA Rules are generally intended to provide a limited amount of essential information, to be followed subsequently by a statement of claim, whereas requests for arbitration under the ICC Rules have traditionally provided much more detail on the substance of a party's claim, and can take considerably longer to prepare.

With respect to the content of applications, the applicant under all institutional rules must establish the following essential elements:²¹

- (1) the nature of the relief sought; and
- (2) the reasons why the relief sought is required on an emergency basis.

Both the ICC and HKIAC Rules also require the application to set out the reasons why interim relief 'cannot await the constitution of the tribunal',²² which commentators have suggested is an essential requirement under all institutional rules, construed in the context of the rules as a whole.²³ Applications must also be accompanied with the relevant arbitral institution administration and emergency arbitrator fees.

Only the LCIA Rules allows a party to make an application to an emergency arbitrator on an *ex parte* basis.²⁴ In light of one of the grounds for denying enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') being that a party was denied a reasonable opportunity to be heard, it seems likely that enforcement of *ex parte* emergency arbitrator

¹⁹ Art 29 of the ICC Rules, and Arts 1(6) and 2(2) of Appendix V.

²⁰ SCC, 'Draft New Rules with Notes', Appx II, Art 1, <<http://www.sccinstitute.com>>.

²¹ Art 1 of Schedule 1 of the SIAC Rules, Art 3 of Appendix V of the ICC Rules, Art 6(1) of the ICDR Rules, Art 9B(5) of the LCIA Rules, Art 1(3)(c) of Schedule 2 of the ACICA Rules, Art 2 of Appendix II of the SCC Rules, and Art 2 of Schedule 4 of the HKIAC Rules.

²² Art 3(e) of the ICC Rules, and Art 2(d) of Schedule 4 of the HKIAC Rules.

²³ Fabio G Santacroce, 'The Emergency Arbitrator: A Fully-fledged Arbitrator Rendering an Enforceable Decision?', *Arbitration International*, (2015) 31, 2, at p213.

²⁴ Art 9B(7) of the LCIA Rules.

decision will be denied,²⁵ assuming an emergency arbitrator's decision is an 'award' for the purposes of the New York Convention.

A number of the institutional rules provide for the institution to first determine whether the application should be accepted.²⁶ The ICC Rules also expressly set out the circumstances in which the emergency arbitration provisions do not apply, being (a) the arbitration agreement under the Rules was concluded before the date the Rules came into effect, (b) the parties have agreed to opt out of the emergency arbitration provisions, or (c) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.²⁷

Appointment of Emergency Arbitrator

All of the institutional rules provide for the emergency arbitrator to be appointed expeditiously. The ICC Rules provides for the president to appoint an emergency arbitrator '*within as short a time as possible, normally within two days from the Secretariat's receipt of the Application*'.²⁸ The SIAC Rules stipulate that the president shall '*seek to appoint an Emergency Arbitrator within one day*' of receipt of the application.²⁹ Similarly, the HKIAC Rules stipulate a similar time period as the SIAC Rules.³⁰ The SCC, ICDR, and ACICA Rules are consistent with the SIAC Rules in stipulating the shortest time periods for appointment, expressed respectively as, '*the Board shall seek to appoint an Emergency Arbitrator within 24 hours*', within '*one business day*', and '*ACICA shall use its best endeavours to appoint...within 1 business day*' of the application.³¹

The expedited timelines for appointment of an emergency arbitrator places some pressure on arbitral institutions to identify and appoint an appropriately qualified emergency arbitrator with immediate availability over the forthcoming 3 to 14 days to conduct the proceedings expeditiously.

All of the institutional rules provide for challenges to emergency arbitrators under the usual criteria of justifiable doubts of impartiality or lack of independence, but the timelines are expedited, varying from one to three days from notice of the appointment of the emergency arbitrator. The ICDR has reported

²⁵ Art V(1)(b) of the New York Convention.

²⁶ Art 1(5) of Appendix V of the ICC Rules, Art 3 of Schedule 1 of the SIAC Rules, and Art 9B(6) of the LCIA Rules. Art (2) of Appendix II of the SCC Rules provides that an emergency arbitrator will not be appointed if the SCC manifestly lacks jurisdiction over the dispute.

²⁷ Art 29(6) of the ICC Rules.

²⁸ Art 2(1) of Appendix V of the ICC Rules.

²⁹ Art 3 of Schedule 1 of the SIAC Rules, which is reduced from the time period stipulated in Art 3 of Schedule 1 of the fifth edition of the SIAC Rules, which is expressed in terms of '*one business day*'.

³⁰ Art 5 of Schedule 4 of the HKIAC Rules.

³¹ Art 4(2) of Appendix II of the SCC Rules, Art 6(2) of the ICDR Rules, and Art 2(1) of Schedule 2 of the ACICA Rules.

four challenges to emergency arbitrators to date, resulting in one instance where an arbitrator was removed.³²

Similarly, most of the institutional rules expressly provide for the emergency arbitrator's authority to rule on his or her own jurisdiction.³³

All of the institutional rules stipulate the criteria for the temporal limit of an emergency arbitrator's jurisdiction and powers, formulated respectively as ceasing upon constitution of the arbitral tribunal,³⁴ or upon the arbitral file being transmitted to the tribunal.³⁵ Notwithstanding these procedures, there is no risk of an emergency arbitrator losing his or her jurisdiction prior to issuing his or her order or award, since the formal appointment of the arbitral tribunal and the transmission of the file to the arbitral tribunal are matters solely within the power of the institutions.

Most of the institutional rules also specify the circumstances in which an emergency arbitrator's decision ceases to be binding, for example, if the arbitral tribunal is not constituted within 90 days of his or her decision, when the tribunal makes a final award, arbitration is not commenced within a specified time, if the claim is withdrawn, or acceptance of a challenge against the emergency arbitrator.³⁶

All of the institutional rules, with the exception of the LCIA Rules, stipulate that the emergency arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless the parties agree.³⁷ The ICC Rules go further and prohibits the emergency arbitrator acting as an arbitrator in any arbitration relating to the dispute.³⁸ In any event, it seems unlikely that an unsuccessful party in an application for interim relief would agree to appointment of the emergency arbitrator as a sole arbitrator or member of the arbitral tribunal.

³² James Hosking, Erin Valentine, and David M Lindley, 'Emergency Measures of Protection: Creeping Consensus or a Passing Fancy', <<http://www.chaffetzlindsey.com>>.

³³ Art 6(2) of Appendix V of the ICC Rules, Art 7 of Schedule 1 of the SIAC Rules, Art 11 of Schedule 4 of the HKIAC Rules, Arts 9(13) and 23(1) of the LCIA Rules, and Art 6(3) of the ICDR Rules.

³⁴ Art 10 of Schedule 1 of the SIAC Rules, Art 5(1) of Schedule 2 of the ACICA Rules, Art 9B(4) of the LCIA Rules, Arts 1 and 20 of Schedule 4 of the HKIAC Rules, and Arts 6(1) and 6(5) of the ICDR Rules.

³⁵ Art 1(2) of Appendix II of the SCC Rules. Art 2 of Appendix V the ICC Rules provides that an emergency arbitrator appointed prior to the file being transmitted to the arbitral tribunal retains the power to make an order within the time period under the Rules. Similarly, Art 13 of the HKIAC Rules provides that an emergency arbitrator may make his or her decision, even if the file has been transmitted to the tribunal.

³⁶ Art 6 of Appendix V of the ICC Rules, Art 10 of Schedule 1 of the SIAC Rules, Art 9(4) of Appendix II of the SCC Rules, Art 19 of Schedule 4 of the HKIAC rules, and Art 4(3) of Schedule 2 of the ACICA Rules.

³⁷ Art 6 of Schedule 1 of the SIAC Rules, Art 6(5) of the ICDR Rules, Art 21 of Schedule 4 of the HKIAC Rules, Art 4(4) of Appendix II of the SCC Rules, and Art 2(3) of Schedule 2 of the ACICA Rules.

³⁸ Art 2(6) of Appendix V of the ICC Rules.

Emergency Arbitration Procedure

All of the institutional rules allow the emergency arbitrator wide discretion as to the conduct of emergency arbitration proceedings, for example, the ICC Rules provide as follows:³⁹

‘The emergency arbitrator shall conduct the proceedings in the manner which the emergency arbitrator considers to be appropriate, taking into account the nature and urgency of the Application. In all cases, the emergency arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.’

All institutional rules provide for a seat of the emergency arbitration proceedings, which will generally be the same as the substantive proceedings, and which therefore requires the emergency arbitrator to comply with any mandatory provisions of the *lex arbitri*.

SIAC has amended Art 21.1 (previously art 18.1) to ‘*delocalise*’ the SIAC Rules to remove Singapore as the default seat where the parties have not agreed the seat, and replaced this with the arbitral tribunal determining the seat, having regard to all the circumstances of the case. However, with respect emergency arbitrations, where parties have not agreed the seat, Art 4 of Schedule 1 has been added to provide that seat of the proceedings for emergency interim relief shall be Singapore, without prejudice to the tribunal’s determination of the seat under Art 21.1.

In light of the usual requirement that the emergency arbitrator is obliged to give each party a reasonable opportunity to present its case, emergency arbitrators are required to balance the urgency of the application, and the timelines for issuing his or her decision, with due process.

The ICC, SIAC and ICDR Rules all require the emergency arbitrator to establish a schedule for consideration of the application.⁴⁰ For example, both the SIAC and ICDR Rules require the emergency arbitrator to do so ‘*as soon as possible*’, but in any event ‘*within two business days*’ and ‘*within two days*’ of the emergency arbitrator appointment respectively.⁴¹ In all cases of emergency arbitration applications, emergency arbitrators are likely to hold a meeting with the parties, by telephone or video conference or in person,⁴² as soon as practicable after his or her appointment to establish procedural steps and a timetable.

There is a practical issue with respect to an opposing party refraining from proceeding with the action complained of in any application for interim relief during the time period required by the emergency

³⁹ Art 5(2) of Appendix V of the ICC Rules.

⁴⁰ Art 5(1) of Appendix V of the ICC Rules, Art 7 of Schedule 1 of the SIAC Rules, and Art 6(3) of the ICDR Rules.

⁴¹ SIAC has amended Art 7 of Schedule 1 of the SIAC Rules to reduce this time period from ‘*within two business days*’ to ‘*within two days*’.

⁴² SIAC has amended Art 7 of Schedule 1 of the SIAC Rules to provide the establishment by the Emergency Arbitrator of a schedule for consideration of the application for emergency interim relief may provide for proceedings by video conference, in addition to telephone conference or on written submissions.

arbitrator to decide the application. The author, in one of the proceedings in which he acted as emergency arbitrator under the SIAC Rules, issued an order to maintain the status quo pending the emergency arbitrator's decision on the merits of the application. In the author's view, this is within the scope of the emergency arbitrator's powers under the various rules, simply by the nature of the procedure. However, SIAC has amended the SIAC Rules to provide that the emergency arbitrator's power includes making preliminary orders pending any hearing, telephone or video conference, or written submissions by the parties.⁴³ Anecdotal evidence is that emergency arbitrators regularly made such orders under the previous 5th edition of the SIAC rules, but this amendment formalises the emergency arbitrator's power to do so.

Emergency Arbitrators' Decisions

In light of the nature of applications for interim relief, all of the institutional rules require the emergency arbitrator to make his or her decision expeditiously. The ICC, SIAC, HKIAC, LCIA, and SCC Rules all require the decision to be made within a fixed time period. The ICC and HKIAC Rules require an emergency arbitrator to make a decision '*no later than 15 days from the date on which the file was transmitted to the emergency arbitrator*'.⁴⁴ The LCIA Rules provide that the decision shall be made '*as soon as possible, but no later than 14 days following the Emergency Arbitrator's appointment*'.⁴⁵ Similarly, the SIAC Rules required the emergency arbitrator to make his or her decision '*within 14 days*' of the date of the emergency arbitrator's appointment.⁴⁶ The SCC and ACICA Rules specify the shortest time periods, being '*no later than 5 days*', and '*not later than 5 business days*', respectively from the date upon which the application was referred to the emergency arbitrator.⁴⁷

The ICDR Rules do not specify time periods or criteria for the timing of an emergency arbitrator's decision. However, it is implicit from the nature of the relief sought, and the terms of the provisions overall, that an emergency arbitrator is obliged to issue his or her decision in the shortest time possible. In all cases, fixed time periods can be extended by the arbitral institution, upon request by the emergency arbitrator, or by agreement of the parties.

The SIAC refers to an average time of eight to ten days from the date of the application for orders or awards issued by emergency arbitrators after having heard the parties' cases.⁴⁸ The average time for

⁴³ Art 8 of Schedule 1 of the SIAC Rules.

⁴⁴ Art 6(4) of Appendix V of the ICC Rules, and Art 12 of Schedule 4 of the HKIAC Rules.

⁴⁵ Art 9(B)(8) of the LCIA Rules.

⁴⁶ Art 9 of Schedule 1 of the SIAC Rules, amended from the fifth edition, which did not specify a fixed time period.

⁴⁷ Art 8(1) of Appendix II of the SCC Rules, and Art 3(1) of Schedule 2 of the ACICA Rules.

⁴⁸ SIAC, 'The Emergency Arbitrator and Expedited Procedure in SIAC: A New Direction for Arbitration in Asia', *Asian-Mena Counsel*, (2015) 12, 4, at p39.

emergency arbitrators to issue decisions under the ICDR Rules is 25 days,⁴⁹ and the SCC report an average time of five to six days for decisions under its emergency arbitration provisions.⁵⁰

As would be expected, all of the institutional rules specify that the decision of the emergency arbitrator must be in writing, and provided with reasons, except that under the SIAC Rules and the HKIAC Rules the emergency arbitrator is required only to provide '*summary reasons*'.⁵¹

The institutional rules also give the emergency arbitrator jurisdiction to modify or vacate his or her order or award for good cause or upon reasoned request.

All of the institutional rules expressly provide for the emergency arbitrator's decision to be binding upon the parties, and for the parties to undertake to comply with the decision.⁵² For example, the SIAC Rules provide as follows:⁵³

'The parties agree that an order or Award by an Emergency Arbitrator pursuant to this Schedule 1 shall be binding on the parties from the date it is made, and undertake to carry out the interim order or Award immediately and without delay.'

However, an emergency arbitrator's decision on interim relief is not final, and all of the institutional rules provide expressly for the arbitral tribunal's power to reconsider, modify or vacate any interim award or order issued by the emergency arbitrator.⁵⁴

The LCIA,⁵⁵ SIAC,⁵⁶ HKIAC,⁵⁷ SCC,⁵⁸ ICDR,⁵⁹ and the ACICA⁶⁰ Rules all give the emergency arbitrator discretion as to the form of his or her decision, whether an '*award*' or procedural order. The provisions in institutional rules for the institutions' scrutiny of awards apply equally to awards issued by emergency arbitrators, and the emergency arbitrator and the institution will need to take account of the time required

⁴⁹ As of 1 March 2015. See Sarah Zagata Vasani, 'The Emergency Arbitrator: Doubling as an Effective Option for Urgent Relief and an Early Settlement Tool', May 2015, <<http://www.kslaw.com>>.

⁵⁰ Lotta Knapp, 'Five Years of Emergency Arbitrator Proceedings Under the SCC Rules', 6 March 2015, <<http://www.sccinstitute.com>>.

⁵¹ Art 6(3) of Appendix V of the ICC Rules, Art 8 of Schedule 1 of the SIAC Rules, as amended from the fifth edition of the SIAC rules, Art 14 of Schedule 4 of the HKIAC Rules, Art 8(2) of Appendix II of the SCC Rules, Art 6(4) of the ICDR Rules, and Art 9B(9) of the LCIA Rules.

⁵² Art 12 of Schedule 1 of the SIAC Rules, Art 29(2) of the ICC Rules, Arts 4(1) and (2) of Schedule 2 of the ACICA Rules, Art 6(4) of the ICDR Rules, and Arts 9(1) and (3) of Appendix II of the SCC Rules. Art 26.8 of the LCIA Rules refers only to '*every award*' being final and binding on the parties, and for the parties to carry out any award immediately and without delay (Art 26(8)).

⁵³ Art 12 of Schedule 1 of the SIAC Rules.

⁵⁴ Art 10 of Schedule 1 of the SIAC Rules, Art 29(3) of the ICC Rules, Art 6(5) of the ICDR Rules, Art 9(2) of Appendix II of the SCC Rules, Art 9B(11) of the LCIA Rules, Art 19(a) of Schedule 4 of the HKIAC Rules, and Art 5(2) of Schedule 2 of the ACICA Rules.

⁵⁵ Art 9(B)(8) of the LCIA Rules.

⁵⁶ Art 8 of Schedule 1 of the SIAC Rules.

⁵⁷ Art 12 of Schedule 4 of the HKIAC Rules.

⁵⁸ Art 8 of Appendix II of the SCC Rules.

⁵⁹ Art 6(4) of the ICDR Rules.

⁶⁰ Art 3(3) of Schedule 2 of the ACICA Rules.

for review of awards to comply with the timetable for issuing an award to the parties. Only the ICC Rules stipulate that the decision of the emergency arbitrator is an ‘Order’, rather than an award,⁶¹ and therefore, the award scrutiny provisions under the ICC Rules are not applicable.

SIAC amended the SIAC Rules in its latest edition to provide that no emergency arbitrator’s order or award shall be made by the emergency arbitrator until it has been approved by the SIAC Registrar as to its form.⁶² This formalized SIAC’s practice of the Registrar reviewing all emergency arbitrators’ orders or awards as to form prior to issuance.

Treatment of Costs of Emergency Arbitration Proceedings

The institutional rules all stipulate provisions for costs of administration and emergency arbitrator’s fees separate from the costs and fees associated with the substantive proceedings, as set out in the table below.

Table: Institution Administration Costs and Emergency Arbitrator’s Fees*

Institution	Institution Administration Costs	Emergency Arbitrators Fees
ICC	US\$10,000	US\$30,000
LCIA	£8,000	£20,000 (non-refundable)
SIAC	S\$5,000 for overseas parties and S\$5,350 for Singapore parties	Capped at S\$25,000, with a cap on fees and expenses of S\$30,000
ICDR	No additional fee	Fees charged on a time basis at the emergency arbitrator’s hourly rate
ACICA	A\$2,500	A\$10,000
SCC	EUR3000	EUR12,000
HKIAC	HK\$45,000	HK\$205,000

*In all cases, the institutions administrative costs and emergency arbitrator’s fees may be increased by the institution taking into account the nature of the case, and the amount of work performed by the emergency arbitrator.

The institutional rules take three broad approaches to the arbitrator’s determination of the allocation of costs of the emergency arbitration proceedings, comprising of the institution administration costs and emergency arbitrator’s fees and expenses, and the parties’ legal and other costs. The first approach, adopted in the SCC and LCIA Rules, is for the applicant to pay the costs of the emergency arbitration, and for the arbitral tribunal to apportion costs of the emergency arbitration proceedings in its final award.⁶³

⁶¹ Art 29(2) of the ICC Rules, and Art 6(1) of Appendix V of the ICC Rules.

⁶² Art 9 of Schedule 1 of the SIAC Rules.

⁶³ Art 10(3) of Appendix II of the SCC Rules, and Art 9B(10) of the LCIA Rules.

The second approach, adopted in the ICC, HKIAC, and ICDR Rules, is for the emergency arbitrator to fix the costs of the emergency arbitrator proceedings, and to decide which of the parties shall bear the costs, or in what proportion they shall be borne by the parties.⁶⁴

The third approach, adopted in the SIAC and ACICA Rules, is for the costs associated with the emergency arbitration proceedings to be ‘initially apportioned’ by the emergency arbitrator, except that under the SIAC Rules, the emergency arbitrator is obliged to do so, whereas under the ACICA Rules, the emergency arbitrator has a discretion to do so.⁶⁵ The second and third approaches are subject to the arbitral tribunal’s adjustment of allocation of costs in its final award.

SIAC has also clarified the position regarding the Emergency Arbitrator’s power to award costs in its latest edition of the SIAC Rules. Article 13 of Schedule 1 has been amended to provide that the costs associated with the application “may” initially be apportioned by the emergency arbitrator, whereas the emergency arbitrator was previously obliged to do so.

There are advantages and disadvantages to the three approaches. In the author’s view, the third approach is preferable, since this approach takes advantage of the emergency arbitrator’s knowledge of the manner in which the parties conducted the emergency arbitration proceedings, and yet does not allow for payment of costs prior to the arbitral tribunal having the opportunity to finally determine the application for interim relief.

Emergency Arbitration Statistics

The statistics provided by the various arbitral institutions indicate there has been a moderately good take up of applications for emergency arbitrations, as set out in the table below.

Table: Arbitral Institution Statistics on Applications for Emergency Arbitration

	ICC ⁶⁶	SIAC ⁶⁷	ICDR ⁶⁸	SCC ⁶⁹
Applications	14	47	49	13
Successful Applications	–	28 ⁷⁰	24	3

⁶⁴ Art 7(3) of Appendix V of the ICC Rules, Art 15 of Schedule 4 of the HKIAC Rules, and Art 6(8) of the ICDR Rules.

⁶⁵ Art 13 of Schedule 1 of the SIAC Rules, and Art 6(3) of Schedule 2 of the ACICA Rules. Note that this is a change from the 5th edition of the SIAC rules, which, at Art 10 of Schedule 1, obliged the emergency arbitrator to initially apportion costs.

⁶⁶ As at 31 December 2015, SIAC Annual Report, 2015.

⁶⁷ As at 6 March 2015, <<http://www.siac.com>>.

⁶⁸ As of 1 March 2015. See Sarah Zagata Vasani, ‘The Emergency Arbitrator: Doubling as an Effective Option for Urgent Relief and an Early Settlement Too’, May 2015, <<http://www.kslaw.com>>.

⁶⁹ As at the end of 2014. See Lotta Knapp, ‘Five Years of Emergency Arbitrator Proceedings Under the SCC Rules’, 6 March 2015, <<http://www.sccinstitute.com>>.

⁷⁰ Includes orders by consent and granted in part.

The statistics indicate some variability among the institutions, and it has been suggested that this indicates parties prefer court ordered interim relief in some jurisdictions.⁷¹ It has also been suggested that the process of parties contacting institutions, particularly the ICDR and ICC, with the intention of filing an application and notice of arbitration has resulted in early settlement of disputes prior to filing.⁷² In the author's view, the variability of take-up among institutions is likely to be a result of a number of factors, including the recent introduction of the procedures.

V. SUBSTANTIVE REQUIREMENTS FOR GRANT OF RELIEF

The standard to be applied by an arbitral tribunal on the substantive requirements for granting interim relief depends upon the *lex arbitri* and the terms of the arbitration rules. The 1985 edition of the Model Law gives the tribunal the power to order interim relief, but does not otherwise prescribe any substantive requirements.⁷³ In contrast, the 2006 amendments to the Model Law provide that a party requesting an interim measure shall satisfy the arbitral tribunal that:⁷⁴

- (1) 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
- (2) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

The HKIAC Rules also set out in Article 23(4) an identical test to the 2006 Model Law for the arbitral tribunal to apply as a relevant factor in applications for interim relief.⁷⁵ Although Article 23(4) applies only to an '*arbitral tribunal*', as distinct from an emergency arbitrator,⁷⁶ in light of the wide discretion afforded to an emergency arbitrator on procedure, emergency arbitrators under the HKIAC Rules are likely to follow Article 23(4) in applications for emergency relief.

⁷¹ Kate Wilford, 'Emergency Arbitrators: A Passing Trend', 29 January 2014, <http://www.hlarbitrationlaw.com>.

⁷² As of 1 March 2015. See Sarah Zagata Vasani, 'The Emergency Arbitrator: Doubling as an Effective Option for Urgent Relief and an Early Settlement Tool', May 2015, <<http://www.kslaw.com>>.

⁷³ Art 17 of the 1985 UNCITRAL Model Law gives an arbitral tribunal wide discretion to grant relief '*the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute*'.

⁷⁴ Art 17A, adopted in Australia in the *International Arbitration Act 1974* (Cth) in 2010.

⁷⁵ Art 23(4) of the HKIAC Rules.

⁷⁶ Art 3.6 of the HKIAC Rules makes it clear that reference in the Rules to '*arbitral tribunal*' does not include an '*Emergency Arbitrator*'.

The ACICA Rules also set out the test for relief to be applied by an emergency arbitrator in identical terms to the 2006 Model Law, which also reflects the *lex arbitri* in Australia.⁷⁷

The requirements set out in Articles 17A(1)(a) and (b) of the Model Law 2006, and the HKIAC and ACICA Rules respectively, are similar in some respects to the usual common law standard of establishing the grant of an interlocutory injunction, comprising of (a) a serious question to be tried, (b) without an injunction, he or she will suffer irreparable harm for which damages will not be an adequate compensation, and (c) the balance of convenience favours the grant of such relief.

Arbitral tribunals may be tempted to apply the criteria in Articles 17A(1)(a) and (b) as though they are equivalent to the usual common law standard. However, the author notes that in a recent New Zealand decision, applying equivalent criteria in exercising the courts' power to grant interim measures under Section 17B(1) of the New Zealand *Arbitration Act* 1996, the court suggested that aspects of the test under Articles 17A(1)(a) and (b) may be different from the common law test for an injunction.⁷⁸

With the exception of the HKIAC and ACICA Rules, all of the institutional rules leave it to the discretion of the tribunal, whether an emergency arbitrator or the tribunal itself, on the substantive requirements for the granting of interim relief, other than the essential matters relating to urgency referred to above.

In jurisdictions where the 1985 Model Law has been adopted, this gives rise to the question of which law or principles should be considered by a tribunal or an emergency arbitrator in deciding substantive requirements, the governing law, the law of the seat, or some other option?

Commentators contend that transnational standards should be applied in applications for interim relief, with such standards to be found in determinations made in international arbitrations.⁷⁹ There is wide acceptance, evidenced in ICC published awards, that tribunals require satisfaction of at least the conditions to grant interim protection measures included in the 2006 Model Law amendments referred to above.⁸⁰

In light of the current practice in international arbitration, and the evidence of a growing harmonization of the substantive test to be applied in applications for interim relief, most emergency arbitrators are likely to

⁷⁷ Art 3(5) of Schedule 2 of the ACICA Rules.

⁷⁸ The test under Section 17B(1) of the New Zealand *Arbitration Act* 1996, equivalent to Art 17A(1)(a) and (b) of the Model Law, was applied in the New Zealand High Court decisions in *Safe Kids in Daily Supervision v McNeil* ([2012] 1 NZLR 714) and *Solid Energy New Zealand Ltd v HWE Mining Pty Ltd* (NZHC, August 2010). In the former, the court considered the serious question to be tried in the common law test to be equivalent to the "reasonable possibility" requirement in Art 17A(1)(b), and in the latter, the court considered that the requirement of "substantially outweighs" in Art 17A(1)(a) may be a higher standard than the balance of convenience test.

⁷⁹ See Gary Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International), and Steven Lim, 'Interim Relief in International Arbitration', SIAC Congress, 6 June 2014.

⁸⁰ ICC, 'Extracts from ICC Awards referring to Interim and Conservatory Measures', October 2012.

apply the standard set out in the 2006 Model Law referred to above in the absence of any mandatory requirements.

VI. ENFORCEMENT OF EMERGENCY ARBITRATORS' DECISIONS

Enforcement of emergency arbitrators' decisions is one of the main questions to arise from the development of emergency arbitration procedures, and has given rise to considerable debate amongst academics and commentators.

There is a high degree of reported voluntary compliance with interim relief ordered by arbitral tribunals,⁸¹ and the lack of jurisprudence on the issue of enforcement of now approximately 45 successful applications across all institutions, suggests there is also a high degree of voluntary compliance with emergency arbitrators' decisions. For example, SIAC has reported that the parties have complied with the emergency arbitrator's decision or settled the dispute shortly thereafter.⁸²

Voluntary compliance may also be encouraged by many of the institutional rules providing a contractual regime for the parties' compliance with emergency arbitrators' decisions, as discussed above. Whilst this provides parties with a contractual remedy for breach of an emergency arbitrator's decision, this may be a pyrrhic victory if assets or important evidence has been dissipated in breach of an order.

A further remedy against failure to comply with an emergency arbitrator's decision is the drawing of adverse inferences by the arbitral tribunal. Whilst this may be effective in some instances, this will not assist where a party considers an unfavourable final award likely, and transfers assets to avoid the consequences.

Apart from voluntary compliance, the contractual regimes of enforcement, and the drawing of adverse inferences, there remains a significant number of decisions on interim relief not complied with by parties to justify the need for an effective enforcement regime.

The question of enforcement of emergency arbitrators' decisions gives rise to two questions. First, whether a decision on interim relief by an arbitral tribunal itself is enforceable, and secondly, whether an emergency arbitrator has the same status as an arbitral tribunal for the purposes of enforcement of interim relief.

With respect to the first question, enforcement of decisions on interim relief is usually required within the jurisdiction of the parties or their assets, and it is in this context where there is a lack of harmonization of

⁸¹ D Rennie and P Sherwin, 'Interim Relief under International Arbitration Rules and Guidelines: A Comparative Analysis', *American Review of International Arbitration* (2010), 20, 3, at p317.

⁸² N Vivekananda, 'The SIAC Emergency Arbitrator Experience', <<http://www.siac.org.sg>>.

the law, since the 1985 Model Law does not provide such a remedy. This has resulted in some States having amended their arbitral laws to allow for enforcement of interim relief ordered by tribunals in seats outside of the jurisdiction.⁸³

There are also decisions in some States in which the courts have interpreted orders for interim relief as ‘awards’ enforceable under the New York Convention, reasoning that it is sufficient if the tribunal’s order resolves one of the issues put forward by the parties, even though the decision was to have only temporary effect. Although currently a minority view, this approach is supported by a number of commentators, and argued as being equally applicable to decisions of emergency arbitrators.⁸⁴

Although most of the institutional rules allow an emergency arbitrator to characterise his or her decision as an ‘award’, this is unlikely to influence a court as to whether the decision should be enforced under the New York Convention if the substance of the decision is procedural and not final.⁸⁵

In most 1985 Model Law States therefore the position remains that interim relief ordered by tribunals seated outside the jurisdiction are unenforceable under national arbitral laws, and under the New York Convention by reason of their interlocutory and procedural nature, and having not finally resolved disputes between the parties.⁸⁶

In contrast to the 1985 Model Law, the 2006 Model Law provides for a sophisticated regime for enforcement of interim relief ordered by a ‘an arbitral tribunal...irrespective of the country in which it was issued’.⁸⁷ However, only 17 States have enacted these amendments into their national arbitral laws to date, including Australia in 2010.

⁸³ See, for example, s12(6) of the Singapore *International Arbitration Act* (Cap 143A). Section 42(1) of the English *Arbitration Act 1996* provides for the enforcement of an arbitral tribunal’s peremptory order to require compliance with any measures it has previously rendered, including decisions on interim relief. However, by the terms of ss2(1) and 2(4) of the Act, s42(1) only applies where the seat is in England, Wales, or Northern Ireland, and does not apply to arbitral decisions on interim relief in foreign seats.

⁸⁴ This has been the approach, although not consistently applied, by some United States’ courts, for example, the decision of the United States District Court for the Southern District of New York in *Yahoo! Inc v Microsoft Corporation* (SDNY 2013), enforcing an injunction issued by an emergency arbitrator under the AAA Optional Rules for Emergency Measures of Protection. See Fabio G Santacroce, ‘The Emergency Arbitrator: A Fully-fledged Arbitrator Rendering an Enforceable Decision?’, *Arbitration International* (2015) 31, 2, 2015, at p213.

⁸⁵ See, for example, the decision of the Singapore High Court in *PT Pukuafu Indah v Newmont Indonesia Ltd* ([2012] SGHC 187), in which the court refused an application to set aside an ‘award’ on the basis that the arbitral tribunal’s ruling was a procedural order. In doing so, the court made it clear that it is the substance of the ruling which is determinative, and not the label given to the ruling by the arbitral tribunal (at para 14).

⁸⁶ This was the position in Australia prior to amendments to the *International Arbitration Act 1974* (Cth) in 2010, as reflected by the decision of the Supreme Court of Queensland in *Resort Condominiums International Inc v Bolwell and Resort Condominiums (Australasia) Pty Ltd* ([1995] 1 Qd R 406). The court was of the view that the tribunal’s interim relief was of an ‘interlocutory and procedural nature’, and did not finally resolve disputes between the parties or their legal rights, thereby distinguishing interim relief from ‘awards’ for the purpose of the New York Convention.

⁸⁷ Arts 17H and 17I of the 2006 Model Law. In Australia, s2(1) of the *International Arbitration Act 1964* (Cth) makes it clear that Arts 17H to 17J apply extra-territorially.

Turning to the second question, if an emergency arbitrator is accorded the status of a *'fully fledged'* arbitrator,⁸⁸ the powers and jurisprudence relating to enforcement of arbitral tribunal's decisions on interim relief referred to above are equally applicable by analogy. Some commentators contend that an emergency arbitrator is a figure of contract only, and lacks a jurisdictional nature, referring to the potential for conflicting decisions between the emergency arbitrator and the arbitral tribunal, resolved by giving jurisdictional status only to the latter, the provisional nature of the emergency arbitrator's decision, and the arbitral tribunal's authority to review an emergency arbitrator's decision.⁸⁹ Santacrocce, in an analysis of the status of an emergency arbitrator, refers to different national legal systems trending towards a common definition of an arbitrator incorporating both contractual and jurisdictional characteristics, as follows:⁹⁰

'An independent and impartial third subject entrusted by the parties with the resolution of their dispute, who will exercise his task in an adjudicatory manner and whose decision will yield the effects of a judgment rendered by state courts.'

Santacrocce concludes that an emergency arbitrator can safely be considered a contractual figure, since his or her authority stems from the parties' selection of the relevant institutional rules. In his analysis of the jurisdictional characteristics, he also refers to the institutional rules as pointing towards emergency arbitrators being full-fledged arbitrators, such as the power to rule on his or her jurisdiction, the applicability of the principle of competence-competence, impartiality and independence, the obligation to observe due process, and the requirement for the emergency arbitration to have a seat.

The author respectively agrees with Santacrocce's analysis. However, the next step of whether courts will apply provisions such as Article 17H of the 2006 Model Law to the decision of an emergency arbitrator, notwithstanding his or her standing as a fully-fledged arbitrator, may be problematic. Santacrocce and other commentators argue policy considerations, or a purposive approach recognizing the parties' agreement to arbitration, dictates that courts should enforce emergency arbitrator's decisions under provisions equivalent to Article 17H.⁹¹ The author respectively agrees. However, there is a substantial risk that courts will construe the definition of *'arbitral tribunal'* in the Model Law (*'a sole arbitrator or panel of arbitrators'*) strictly in terms of the arbitral tribunal having authority to finally determine the

⁸⁸ Adopting the terminology used by Fabio G Santacrocce in 'The Emergency Arbitrator: A Fully-fledged Arbitrator Rendering an Enforceable Decision?', *Arbitration International* (2015) 31, 2, at p213.

⁸⁹ See, for example, Baruch Baigel, 'The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis', *Journal of International Arbitration*, (2014) 31, at p1, and Jean-Paul Beraudo, 'Recognition and Enforcement of Interim Measures of Projection Ordered by Arbitral Tribunals', *Journal of International Arbitration* (2005) 22, at p245.

⁹⁰ Fabio G Santacrocce, 'The Emergency Arbitrator: A Fully-fledged Arbitrator Rendering an Enforceable Decision?', *Arbitration International*, (2015), 31, 2, at p213.

⁹¹ See Professor Doug Jones, "Emergency! Is There an Arbitrator in the Building?" – The Practical Utility of Emergency Arbitrator Provisions', The 5th Asia Pacific Regional Arbitration Group (APRAG) Conference 2013.

substantive issues in dispute between the parties, rather than as including an emergency arbitrator. Indeed, the institutional rules themselves necessarily draw a distinction between emergency arbitrators, with a limited the power to decide interim relief prior to constitution of the arbitral tribunal, and the arbitral tribunal itself, with powers to reconsider the emergency arbitrator's decision, and the usual powers of an arbitral tribunal associated with deciding the substantive issues in dispute.

In the author's view, in light of the above, the only safe option to ensure enforcement of emergency arbitrator's decisions is to amend the national arbitration laws, which is the option adopted by both Singapore and Hong Kong.

Singapore, in 2012, amended the definition of '*arbitral tribunal*' in the Model Law in the Singapore *International Arbitration Act* (Cap 143A) to include '*an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation*', thereby conferring upon the emergency arbitrator the status of an '*arbitral tribunal*', and ensuring that an emergency arbitrator's decision on interim relief is enforceable in Singapore by the application of s12(6) of the Act.⁹² Hong Kong also amended its *Arbitration Ordinance* (Cap 609) in 2013 expressly to provide that emergency relief granted by an emergency arbitrator, whether in or outside Hong Kong, is enforceable in the same manner as an order or direction of the court, subject to leave of the court.⁹³

In addition to direct enforcement, courts may also be willing to indirectly enforce an emergency arbitrator's decision by ordering interim relief identical in effect to the decision of the emergency arbitrator. This was the mechanism by which the Bombay High Court in *HSBC PI Holdings (Mauritius) Limited v Avitel Post Studioz Limited* ordered interim relief equivalent to the decision of an emergency arbitrator under the SIAC Rules to restrain the respondents from withdrawing amounts of US\$60m from specified bank accounts.⁹⁴

VII. EMERGENCY ARBITRATION CASE STUDY

The author was appointed by SIAC as emergency arbitrator during 2014 in an application under the SIAC Rules seeking an interim order to restrain the calling of two on-demand performance bonds.

The contract was governed by Singapore law, with the arbitration seated in Singapore. Both parties were Indonesian entities, represented by Singapore lawyers. The claimant submitted its application on Day 1, along with its notice of arbitration, and SIAC appointed the author as emergency arbitrator on Day 2. The

⁹² Section 2(1) of the Singapore *International Arbitration Act* (Cap 143A).

⁹³ Section 22B(2) of the Hong Kong *Arbitration Ordinance* (Cap 609).

⁹⁴ (2014) ARBP1062.12.

author held a conference call with the parties on Day 3, and the respondent issued a written response to the application on Day 3, just prior to the conference. The author issued on the same day a procedural timetable for the applicant to provide written submissions in response to the respondent's written submissions on Day 6, and for the respondent to submit written submissions in response on Day 8. The author also ordered a hearing on the application by telephone on Day 10. The author also issued a temporary order for the parties to maintain the status quo until the emergency arbitration had been determined.

The parties complied with the procedural timetable, and the author issued to SIAC for review a draft reasoned '*award*' on Day 13. The SIAC registrar and counsel were on stand-by to review the draft, and SIAC issued the reasoned '*award*' to the parties on Day 15. The entire proceedings were conducted over a period of 10 business days, and the proceedings progressed smoothly.

VIII. EMERGENCY ARBITRATION BY CONTRACT

Parties are free to opt out of the emergency arbitration provisions in the arbitral institution rules, or agree for themselves a tailored emergency arbitrator procedure in their commercial agreements. Although all of the institutional rules are broadly similar, there are differences among the rules which drafters of arbitration clauses may wish to take into account, such as the timing of decisions, the content of applications, the substantive test to be applied by emergency arbitrators, and treatment of costs.

Parties may also be tempted to confer upon the emergency arbitrator the status of a fully-fledged arbitral tribunal, albeit with limited authority to determine interim relief prior to constitution of the tribunal, in the sense discussed above, to enhance the potential for enforcement of the emergency arbitrator's decision. In the author's view, there is a substantial risk that a court will construe the reference to relief granted by an '*arbitral tribunal*' in provisions such as Article 17H of the 2006 Model Law as being a mandatory requirement, and therefore, not subject to amendment by the parties' agreement.

IX. CONCLUSION

The development of emergency arbitrations has given parties an effective alternative to applications to court for interim relief, and this is reflected in the increasing level of take-up of the mechanism across jurisdictions. The development is an indication of the flexibility of international arbitration to develop practical solutions to problems in international disputes. However, enforcement of emergency arbitrators' decisions remains problematic. In the author's view, this does not detract from emergency arbitration as a viable alternative mechanism, since parties will inevitably consider at the relevant time the risks

associated with options for interim relief, including ease of enforcement in the jurisdiction of the parties or their assets.

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