



**EXPEDITED AND EMERGENCY PROCEDURES IN
INTERNATIONAL ARBITRATION**
R. M. Nottage, FCI Arb, Retired Judge
Supreme Court, Commonwealth of The Bahamas

**YES OR NO?
CHALLENGES AND
EXPERIENCES**

Expedited and Emergency Procedures in International Arbitration

“Notwithstanding that arbitration is subject to legal provisions and rules, arbitration is an art, and interim measures on arbitration are part of that art. Furthermore, if there is a subject appropriate as evidence of the nature of arbitration as an art, it is interim measures. Indeed, dealing with interim measures, either in court or in arbitration, causes serious problems for judges and arbitrators.”

Jose Maria Abascal, Counsel, Advisor and Arbitrator, Chairman of the UNCITRAL Working Group on Arbitration and Conciliation

The Emergency Arbitrator in International Arbitration: Challenges and Experiences

- ◆ The Emergency Arbitrator is a relatively new feature of International Arbitration.
- ◆ In 2006, the International Centre for Dispute Resolution (ICDR) incorporated emergency arbitrator proceedings into its rules.
- ◆ To date, emergency arbitrator rules have been written into almost every major international arbitration institution.
- ◆ The most obvious characteristic of these proceedings is the speed at which they are to be established and completed.
- ◆ All emergency arbitrator procedures call for the appointment of a sole emergency arbitrator by the institution.
- ◆ All of the institutional rules hold the emergency arbitrators to the same standard of impartiality and independence as for arbitrators in non-emergency proceedings.

The Emergency Arbitrator in International Arbitration: Challenges and Experiences

◆ ADVANTAGES - EXPERIENCES:

◆ Speed of Appointment:

- ◆ Appointment of an arbitrator range from within one (1) day (ICDR, SCC, SIAC, CPR), two (2) days (ICC, HKIAC), or three (3) days (LCIA).

◆ Speed in Rendering an award:

- ◆ In most of the reported cases, interim relief has been awarded or denied within extraordinarily short time frames:
- ◆ Rendering an award ranges from five (5) days (SCC) to 14 days (LCIA) to 15 days (ICC, HKIAC)

◆ But what are the challenges that the Emergency Arbitrator faces?

The Emergency Arbitrator in International Arbitration: Challenges and Experiences

◇ CHALLENGES:

- ◇ Emergency arbitration proceedings require that parties must be able to present their case. As such they do not provide for *ex parte* application to be made. Consequently, national courts will be the preferred venue when relief is requested *ex parte*.
 - ◇ It is important to note that the new Article 17 of the UNCITRAL Model Law now grants arbitrators the power to order *ex parte* temporary measures in the form of procedural orders. Some commentators regard the arbitrators' power to issue *ex parte* measures as contradictory with the foundation of the mission of the arbitrators.
- ◇ The 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. The question is, nevertheless, whether an emergency arbitrator can be considered to be an 'arbitrator' or an 'arbitral tribunal'?
- ◇ The decision of the emergency arbitrator is provisional, and may be revised or vacated by the arbitral tribunal or by the emergency arbitrator, thus preserving the jurisdiction of the arbitral tribunal. Clearly, whatever an emergency arbitrator is, he or she is not the 'arbitral tribunal' under most applicable arbitration rules.

The Emergency Arbitrator in International Arbitration: Challenges and Experiences

◆ CHALLENGES:

- ◆ There is no “universal consensus” with respect to the legal standard or test to be applied by emergency arbitrators in determining whether interim relief should be awarded. 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 fact, most international arbitration rules do not specify which standards should be taken into account by emergency arbitrators when deciding cases.
- ◆ Instead the rules state that emergency arbitrators may grant interim relief that is “urgent” (ICC, HKIAC), “necessary” (ICDR, SIAC, CPR), or “appropriate” (SCC).
- ◆ The standard set out in the UNCITRAL Model Law for interim measures 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.

The Emergency Arbitrator in International Arbitration: Challenges and Experiences

◆ CHALLENGES:

- ◆ Enforceability of the Emergency Arbitrator's Award and the attitude of the courts. Are decisions by emergency arbitrators enforceable in court?
 - ◆ Three perceived hurdles to enforcement:
 - ◆ The Emergency Arbitrator's status: Not deemed an 'arbitrator' under most national arbitration laws – but see Singapore International Arbitration (Amendment) Act, 2012, legislatively recognising the EA.
 - ◆ Is an Interim Decision Enforceable?
 - ◆ Decisions issued by emergency arbitrators are, by their nature, interim. As a general rule, courts do not have the power to review interlocutory (non-final) decisions by arbitral tribunals, but case law shows that they do have the power to enforce interim awards to support the integrity of the arbitral process. (See *Yahoo v Microsoft*); *the Republic of Congo case*; and *Chinmax Medical Systems case*)
- ◆ Is the Emergency Arbitrator's decision to be termed and Interim 'Award' or and Interim 'Order'?

The Emergency Arbitrator in International Arbitration: Challenges and Experiences

- ◆ CHALLENGES:
- ◆ Is Non-Compliance the ultimate sanction of enforceability?
- ◆ Some rules require the parties to undertake to comply with a decision of an emergency arbitrator (see ICC Rule 29(2)). Similar provisions are found in the SIAC (Sched 1(9) Rules and the SCC Rules (Appendix II, Art. 9(3)).
- ◆ Additionally, some national laws may impose penalties where a party fails to comply with a tribunal's interim decision – Might this also not apply *mutatis* to an interim Order made by an emergency arbitrator.
- ◆ The Tribunal can also draw negative inferences from the non-compliance of the parties, such as a failure to comply with an order requiring the preservation of property or production of evidence, and will have regard to this on reaching their final decision on the merits.

The Emergency Arbitrator in International Arbitration: Challenges and Experiences

- ◆ CONCLUSION:
- ◆ The last ten (10) years have seen the introduction of a new player to the field of international arbitration, the so-called 'emergency arbitrator'.
- ◆ The demand for the emergency arbitrator's availability has grown steadily.
- ◆ Nonetheless, the legal effect and status of an emergency arbitrator's decisions remain ambiguous and concerns regarding the enforceability of their decisions continue to niggle commercial parties.
- ◆ Voluntary compliance will in many cases obviate the need for more formal enforcement mechanisms. However, this new actor will gradually need to be properly recognized in a legal framework in order to ensure its survival and effectiveness.

The Emergency Arbitrator in International Arbitration: Challenges and Experiences



THANK YOU!