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THE NOTION AND PRACTICE OF EMERGENCY ARBITRATION

Abstract: The topic of this paper is the concept of emergency arbitration in theory and practice, its nature, development, and procedural intricacies. The author lays out a comprehensive comparable analysis of various institutional rules on emergency interim measures, followed by a discussion on the status of emergency arbitrators, due process concerns, and enforceability of decisions rendered in this process. Finally, the author touches upon the local perspective as well, evaluating existing rules on interim measures and contemplating the potential introduction of the emergency arbitration mechanism in Serbia.

Keywords: *emergency arbitration, interim measures, alternative dispute resolution, urgent relief*

1. INTERIM MEASURES IN INTERNATIONAL ARBITRATION

Interim measures of protection are a feature well-known to dispute resolution mechanisms worldwide. Also known as provisional, protective, pre-award, preliminary measures, preliminary-injunctive measures, holding measures or conservative measures, they protect the parties' rights and contribute to the effectiveness of the judicial or arbitral process.

Generally and inevitably, each dispute resolution method more or less takes time. This time is indeed needed to carry out the procedure, review the evidence, ensure that the right to be heard is granted to all parties and render a decision.[1] Still, over the course of the ongoing proceedings, time puts a strain on the parties' reality often burdened by

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[1] For example, the ICC Dispute Resolution 2020 Statistics show the median duration for arbitrations reaching final award in 2020 to be 22 months. Available at: https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/.

many risks such as dissipation of assets, destruction of evidence, loss of market value of property, disruption of a joint venture's operations, destruction of an ongoing business, disclosure of confidential information, etc. (Born 2021, 2605). A particular risk arises in the possibility that the opposing party might undertake dilatory and sabotage tactics in order to frustrate the process (Westber, 538). Therefore, the main request for relief is not enough to protect the interests of the parties (Lew, Mistelis, Kröll 2003, 586). The possibility to request an interim measure is necessary to mitigate these risks, balance out imperfections and bring a literal *relief* to the party in need. Interim measures function as 'holding orders', aimed at protecting the status quo and the integrity of the proceedings (Blackaby, Partasides, Redfern 2023, 313).

Interim measures are of a particular importance when it comes to international disputes, which brought them to the terrain of arbitration. Arbitration has indeed gained trust and popularity as a method of dispute resolution,[2] but arbitration proceedings have also become longer due to institutionalization, complexity of the subject matters and bureaucratization (Yesilirmak 2005, 15; Gouveia, Antunes 2019, 4), which increased the need for interim relief among parties. Even though particular hostility has lingered among numerous national legislators towards interim measures imposed by arbitral tribunals, today it is fairly commonly accepted that both arbitral tribunal and national courts have jurisdiction – usually concurrent – to impose interim measures.

A significant embodiment of this trend are 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration which envision that an arbitral tribunal has the power to grant interim measure. Article 17(2) defines interim measures in the following way:

> "*any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:*
>
> *(a) Maintain or restore the status quo pending determination of the dispute;*

[2] According to the 2021 International Arbitration Survey conducted by The School of International Arbitration (SIA), Queen Mary University of London, the majority of the respondent group (90%) named international arbitration as their preferred method of resolving crossed-border disputes. The whole survey available at: https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute."

Interim measures in general can take many forms, such as freezing, attachment or other orders that prevent the dissipation of assets, as well orders requiring the collection, disclosure and preservation of evidence.

The need for interim relief could very often be at its highest at the very beginning of a dispute, when the arbitral tribunal does not yet exist (Gurry 1997). Forming the tribunal takes time, often months (Shaugnessy 2010, 337), creating a gap which could cause irreparable harm after which the purpose of the arbitration proceedings could be defeated. Even though this gap could be bridged by "waking up a judge" (Bjorkquist, Morgan 2012) and requesting interim relief, this is often not an ideal solution for the same reasons that led the parties to opting for arbitration as a dispute resolution mechanism. Namely, court proceedings could be open to public, they are often lengthy, costly, they could "veer in unexpected directions" and a foreign party may fear that a national court might be biased towards its own national while rendering a decision (Lemenez, Quigley 2008, 2). Further on, the measures in question could concern multiple jurisdictions and it could be too complex to request relief from a number of different courts, all while baring expenses of legal counsel, translation and other costs. Most importantly, as suggested by Pavic and Knezevic (2013, 131), range of interim measures available within arbitration is much more diverse than what could be obtained before court. Arbitral interim measures could entail just about anything: any arrangement between the parties that maintains the status quo or minimizes the damage that could arise. In addition, those measures can also be imposed to ensure the efficiency of the arbitration procedure and preservation or even collection of evidence. Courts, on the other hand, are bound by national legislation on enforcement of interim measures, which limits the parties' choice, albeit provides them with more security when it comes to enforcement.

The institute of emergency arbitration was developed as a novelty supplement mechanism that will abridge certain gaps and issues

related to arbitral interim measures in general – allow the parties to seek interim relief within arbitration, urgently and efficiently, without waiting for the tribunal to be constituted. It is another important pillar that raises arbitration up and evidences its maturity and autonomy as a stand-alone system (Shaugnessy 2017, 320).

2. EMERGENCY ARBITRATION – THE IDEA AND THE DEVELOPMENT

Emergency arbitration is usually defined as a procedure that allows disputing party to apply for urgent interim relief at the outset of arbitration, before an arbitration tribunal has been formally constituted (Born 2021, 2633; Blackaby, Partasides, Redfern 2023, 4.17). This mechanism was first introduced by the International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA) in 2006 as Emergency Measures of Protection, giving the parties a right to submit a written application to the Administrator of the Rules asking for emergency relief.

Generally, a party is entitled to apply for emergency relief before the constitution of the tribunal, providing details on the relief sought and the urgency that justifies it being granted before the tribunal is constituted. Applying to the arbitral institution for emergency relief does not preclude the parties from seeking emergency or interim relief from national courts. The procedure follows a structure of 'regular' arbitration, but with simplified and condensed flow of proceedings. There are usually very short deadlines for the institution to appoint the emergency arbitrator and for the emergency arbitrator to render a decision; also, not infrequently are the existing deadlines shortened (such as the deadline for challenging an arbitrator).

Finally, the decision of the emergency arbitrator can take form of an order or an award. It is binding only between the parties to the arbitration agreement and not the subsequent, 'main' arbitral tribunal. The distinguishing characteristic of emergency decisions is that they are in essence not ultimately final: once constituted, the tribunal can review, modify or even annul the decision of the emergency arbitrator. This creates a review mechanism that is usually unknown to the arbitral process.

The provisions regulating the emergency arbitrator procedure are mostly of an *opt-out* nature, meaning that they always apply unless the parties have explicitly opted out of their application, i.e. that the

parties can opt for them not to apply when concluding the arbitration agreement. The opt-out formulation of these provisions allows them to be used more often and is probably to thank for the growing popularity of emergency arbitration, as otherwise the parties would most likely not indulge into particular discussions whether or not to apply emergency arbitration provisions when negotiating the main contract and concluding the arbitration agreement. Some authors argue that the opt-out approach should generally be used when the majority of users would expect or desire to have the option, which can be said when it comes to this mechanism (Shaugnessy 2010, 350).

The emergency arbitration procedure has been widely applied and recognized as useful, not only in regard to the relief sought but also going further and contributing to the overall resolution of the dispute (Carlevaris, Feris 2014, 4).

3. COMPARATIVE ANALYSIS OF THE RULES

As mentioned above, the first institution to introduce the emergency arbitration procedure was ICDR in 2006. SCC strongly followed couple of years later, with multiple renowned arbitral institutions jumping on board soon afterwards: SIAC in 2010, ICC and SCAI (now Swiss Arbitration Centre) in 2012, LCIA in 2014, HKIAC in 2013. It has been stated that no other new arbitral mechanism has found such widespread acceptance in recent revisions of institutional arbitration rules (Markret, Rawal 2020, 132).

An overview of the particular provisions regarding emergency arbitration in the respective rules of these major arbitral institutions is provided below.

3.1 International Centre for Dispute Resolution (ICDR)

Emergency Measures of Protection are provided in Article 7 of the ICDR Rules, as an opt-out mechanism that applies to all proceedings conducted on the basis of arbitration agreements concluded on or after 1 May 2006.[3]

[3] Art. 7 International Dispute Resolution Procedures, ICDR, Amended and Effective March 1, 2021 (2021 ICDR Rules); See also Cavalieros, Kim 2018, 277.

A party can apply for emergency relief concurrently with or following the submission of the Notice of Arbitration. As expected, the outset of the procedure takes place under tight deadlines – the ICDR is to appoint the arbitrator within only one business day since the receipt of application, whereas the arbitrator should create a schedule for consideration of the application for emergency relief as soon as possible, and at the latest within two days since the appointment. Also, once the emergency arbitrator is appointed, the parties have one business day from the time any disclosures are circulated to file a challenge.[4] As for the decision, the emergency arbitrator has in fact broad powers to issue the decision in form of an order or an award, as well as to impose any measures deemed necessary, but no specific time limit to issue it (as opposed to many other institutional rules).[5]

The provisions have mostly remained the same since 2006 – the 2021 edition of the Rules brought only a couple of amendments, the most notable being the provision that the emergency arbitrator has the authority to rule on its own jurisdiction.[6] Bedecking this procedure with the competence-competence principle is an important step, as it speaks to the jurisdictional nature of the emergency arbitrator's position.

According to the latest statistics published by the American Bar Association (ABA), the ICDR emergency procedures have been "*very successful*". As of December 2020, the ICDR has administered a total of 119 applications for emergency measures of protection, 85 of which were filed under the ICDR Rules (as the ICDR handles emergency arbitrations under the other sets of rules issued by the AAA, such as the AAA Commercial Arbitration Rules and the ICDR Canadian Arbitration Rules) (Martinez, del Rosal Carmona, 2022).

3.2 Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

SCC brought up the need for emergency relief prior to the constitution of the tribunal a long time ago, with the results of their 2008 User Survey, where 82% of counsel active in SCC arbitrations responded they believe that interim measures should be available from the early start of arbitration (Bergman, 2009). To that end, SCC, referred to as

[4] Art. 7(4) 2021 ICDR Rules.
[5] Art. 7(3) 2021 ICDR Rules.
[6] *Supra* n. 4.

one of the "first movers" when it comes to innovations, introduced the emergency arbitrator rules in 2010 (Foo, Chatterjee 2018).

According to Appendix II of the SCC Rules, a party may apply for emergency relief at any point before the case has been referred to the tribunal – that is, even before commencement of arbitration. This is a 'twist' in comparison with the ICDR Rules and an approach that will later be proven useful and followed by multiple arbitral institutions.

The Rules further state that the SCC Board of Directors *shall seek to appoint* an emergency arbitrator within 24 hours of the receipt of the application by the other party.[7] The same short deadline applies to challenges – 24 hours from the time the circumstances giving rise to the challenge became known to the party. The time limit for rendering the decision is distinctly short and that is 5 days from the date the application was referred to the emergency arbitrator, although with a possibility of an extension.

The Rules equate the powers of the emergency arbitrator with the powers of the tribunal regarding interim measures, which means the emergency arbitrator can grant any measure he or she deems appropriate. The decision can take the form of an award or an order and is binding on the parties (not on the tribunal). It can also be amended or revoked by the emergency arbitrator.

At the time when the emergency arbitrator provisions were introduced in the SCC Rules, their most striking feature was their *retroactive* opt-out nature. As mentioned, opt-out mechanism is not unusual for emergency arbitration – it can be deducted from the analysis of different rules herein that the opt-out is quite uniformly accepted as the preferred approach when it comes to the possibility to apply for urgent relief. However, the SCC Rules provide that the parties are deemed to have agreed on the version of the rules in force on the date of the commencement of arbitration or the filing of an application for the appointment of the emergency arbitrator.[8] This means that applying for emergency relief, when the respective provisions came into force, became a possibility for parties to all arbitration agreements that included SCC Rules, regardless of when they were concluded. Of course, there was and there is an option for the parties to agree otherwise, i.e. opt out,

[7] The wording seems to be formulated to give the Board some leeway in cases when it inevitably takes longer to find a suitable arbitrator. See Shaugnessy 2010, 341.

[8] Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, 2017, 4 (2017 SCC Rules).

but it could not have been realistically expected of the parties to predict introduction of the new emergency arbitration provisions, for example years before they were introduced, and opt-out of them in advance. The opt-out approach combined with retroactivity sparked comments and controversy, with many reviewers of the new rules urging that the new rules should not be applied retroactively (Shaugnessy 2010, 351).

This discussion, however, is not of great relevance at the present moment, twelve years since the rules were first introduced, bearing in mind the time it takes for an arbitration agreement to result in a commencement of arbitration. Still, it could be relevant for institutions and rules other than SCC when assessing whether to apply rules on pre-arbitral interim relief retroactively. It could be argued that this is not a simple revision of the rules, but that it even brings the consent of the parties in question as they might not have consented to emergency arbitration. Allowing for this procedure retroactively could be seen as materially altering the arbitration agreement (Zell 2009, 959). On the other hand, given the popularity of the emergency arbitration nowadays, it could be argued that the parties – especially their legal counsel – could have expected and can expect the introduction of this new pre-arbitral procedure, if it is not a part of their agreed rules already. Even more so, it could technically be expected from some arbitral institutions that do not offer application for urgent relief before the commencement of arbitration to revise this and grant the parties this possibility in the future (or retroactively).

3.3 Singapore International Arbitration Centre (SIAC)

In 2010, six months after the SCC introduced the above-analyzed rules, SIAC followed and became the first Asian arbitration institution to introduce the institute of emergency arbitration. The provisions had undergone certain changes over the years, with revisions of the Rules in 2013 and 2016.

Today, the procedure of applying for emergency relief is prescribed by Article 30.2 of the Rules and set out in Schedule 1. Namely, a party that wishes to seek emergency interim relief can file an application with the Registrar concurrent with or following the filing of the notice of arbitration. If it is determined that the application should be accepted, the President will appoint an emergency arbitration within one day since the receipt of application. This is not the only tight deadline there is: the

emergency arbitrator needs to establish a schedule for consideration of the application for emergency interim relief within two days of his appointment. The Rules expressly state that the emergency arbitrator has the power to order or award any interim relief he deems necessary, making SIAC Rules one of "the purest examples of an uncodified threshold" for grant of emergency relief, along with AIAC, CIETAC and ICC (Sajnani 2020, 293). Finally, the emergency arbitrator has 14 days from the date of his appointment to render the decision (which can take the form of an order or an award).[9] 2016 Rules brought an important novelty: an emergency arbitrator can also issue preliminary orders pending the parties' submissions.[10] This option almost resembles ex parte decisions on interim relief which will be discussed in the Section 5.3.1 below.

According to the 2021 Annual Report, since the rules were first introduced, the Centre accepted 129 emergency arbitrator applications. The applications came from parties in disputes arising out of different sectors, mostly corporate and commercial but also maritime/shipping and construction/infrastructure/engineering.[11]

Again, and same as in the case of the SCC, the SIAC Rules take an aggressive approach and apply to all arbitrations commenced on or after the date they came into force. This came to light in a couple of cases where the parties that have concluded arbitration agreements before SIAC Rules contained provisions on expedited procedure (and emergency procedure as well). Namely, the parties' arbitration clause provided for the dispute to be settled by three arbitrators. A couple of years later, and after SIAC introduced the emergency procedure, the claimant applied for expedited procedure. The application was granted and the procedure was conducted by a sole arbitrator appointed by SIAC. Respondent's petition for setting aside of the sole arbitrator's award was denied by the Supreme Court of Singapore, who stated that it was "commercially sensible" to interpret the parties' arbitration agreement as recognizing that the SIAC President does have the discretion to appoint a sole arbitrator.[12] In another, similar case, the Shang-

[9] Schedule 1(9) to the Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules 6th Edition, 1 August 2016 (2016 SIAC Rules). This deadline can be extended in exceptional circumstances.

[10] Schedule 1(8) to the 2016 SIAC Rules.

[11] 2021 SIAC Annual Report, 24. https://siac.org.sg/wp-content/uploads/2022/06/SIAC-AR2021-FinalFA.pdf.

[12] The High Court of Singapore, AQZ v. ARA, 13 February 2015, https://www.singaporelawwatch.sg/Portals/0/Docs/Judgments/[2015]%20SGHC%2049.pdf.

hai First Intermediate Court refused enforcement and explained that the appointment of sole arbitrator by SIAC is not line with the parties original arbitration agreement.[13]

Even though these cases concern expedited procedure, they are still relevant for the discussion on emergency arbitration, or in general courts' attitude towards innovations in institutional rules that apply retroactively.

The more than a decade-standing option of requesting emergency relief goes hand in hand with the popularity of SIAC and, particularly, Singapore as a pre-eminent dispute resolution hub.[14] Namely, SIAC has been consistently ranked as one of the top four most preferred arbitral institution, with a noticeable growth in popularity over the past couple of years.[15] Furthermore, Singapore is ranked jointly with London as the most popular arbitration seat in the world, and it is the most preferred seat in the Asia-Pacific region according to the 2021 International Arbitration Survey (VIajayan 2021). Singapore is especially *emergency* arbitration friendly: Singapore International Arbitration Act was revised in 2017 to specify that an emergency arbitrator falls under the definition of an arbitrator, which ensures that the statutory limitation of liability applies to emergency arbitrators as well.[16] However, this provision opens up the possibility of the respondent challenging the jurisdiction of an emergency arbitrator or their award in the same manner as one may challenge the jurisdiction of an arbitrator and an arbitrator's award under that law (Giaretta 2017, 88). Additionally, it is not entirely clear whether this provision is meant to provide for enforceability of emergency arbitrator orders issued in arbitrations with the seat outside Singapore as this definition of the tribunal, now including emergency arbitrators, applies only to arbitrations seated in Singapore.

Moreover, SIAC emergency arbitration provisions have somewhat recently been recognized as the Indian Supreme Court, which issued a

[13] The Shanghai No. 1 Intermediate People's Court, China, Noble Resources International Pte. Ltd v. Shanghai Good Credit International Trade Co., Ltd., 2016, https://res.cloudinary.com/lbresearch/image/upload/v1504105750/Noble_Resources_v._Good_Credit_oqc1di.pdf.

[14] Singapore: Effective ecosystems of arbitration – Key developments since 2021 and what to expect moving ahead, https://dentons.rodyk.com/en/insights/alerts/2022/april/19/singapore-effective-ecosystems-of-arbitration-key-developments-since-2021-and-what-to-expect-moving.

[15] QMUL 2021 International Arbitration Survey, 9–10.

[16] Singapore International Arbitration Act 1994, *Government Gazette*, No. 22, 2(1).

decision allowing enforcement of an order issued by the emergency arbitrator in arbitration under SIAC rules with the seat in New Delhi.[17] In that case, the Supreme Court recognized that the orders of the emergency arbitrators are "exactly like an order of an arbitral tribunal", as well as that they are "an important aid in decongesting civil courts and affording expeditious interim relief to the parties" (Goyal 2021).

3.4 International Chamber of Commerce (ICC)

The ICC provides for emergency arbitrator rules since 2012. Pursuant to Article 29 and Appendix V to the ICC Arbitration Rules, a party that needs an urgent interim or conservatory measures that cannot await the constitution of a tribunal may request such measures according to a specific procedure.

The party in need of urgent relief needs to submit the request – precisely, Application, to the ICC Secretariat before the file is transmitted to the arbitral tribunal. It is interesting to note that the request for emergency relief can be submitted regardless of whether the party has already submitted its request for arbitration.[18] This is a convenient option for the parties (in fact, in this case, only parties to the contract yet) as it saves them time needed for completion of the notice and commencement of arbitration. The emergency arbitrator is obliged to render the decision in 15 days from the date of the transmission.

The procedure comes with important limitations – the emergency arbitrator's decision is defined to take form of an *order* – not award – and binds only the parties to the arbitration agreement.[19] This differs from the rules on interim relief imposed by the tribunal, where arbitrators can choose whether they would order an interim or conservatory measure in form of an order or an award.[20] The ratio behind the limitation when it comes to emergency decisions might be, as pointed out by Djordjevic and Pavic (2016, 331), that issuing a measure in the form of an order is always quicker under the ICC rules.

The decision is not binding on the arbitral tribunal, which can modify, terminate or annul any orders made by the emergency arbitrator.[21]

[17] The Supreme Court of India, Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors, 6 August 2021, https://indiankanoon.org/doc/104517457/.

[18] 2021 ICC Arbitration Rules, Art. 29 (2021 ICC Rules).

[19] 2021 ICC Rules, Art. 29(2).

[20] 2021 ICC Rules, Art. 28(1).

[21] 2021 ICC Rules, Art. 29(3).

Emergency arbitration is available by default unless the arbitration agreement was concluded before 1 January 2012 or if it arises from a treaty. Also, the parties can choose to opt out of the emergency arbitrator provisions if they wish to not apply them.[22] Clearly, there is always an option to choose another pre-arbitral mechanism for interim relief.

One of the key features of the ICC emergency procedure is Article 29(7) which provides:

> "*The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat.*"

This provision slightly stirs up the jurisdictional aspect of emergency arbitrator, as it seems to suggest that a party is free to seek urgent relief from a competent court only prior to submitting the application for emergency arbitration procedure and afterwards only exceptionally, in the presence of "appropriate circumstances". It is similar to Article 28(2) which provides a similar rule regarding 'regular' interim measures in the arbitration procedure. This rule narrows the completely concurrent jurisdiction for issuing interim relief to the period before the emergency arbitration is commenced and does not give any guidance on what constitutes these "appropriate circumstances" in which the parties can turn to courts.

Therefore, the matter remains up to the discretion of different courts in different jurisdictions and their approach to concurrent jurisdiction. For example, in 2020 the Tel-Aviv District Court was requested to issue an injunction against the payment of a bank guarantee. The petitioner informed the Court that they were also planning on applying for emergency relief under the ICC Rules. The Court ultimately denied the motion for interim injunction on jurisdictional grounds as the arbitration has already commenced.[23] This decision highlights the risks of too wide of a discretion given to national courts which could lead to forum shop-

[22] 2021 ICC Rules, Art. 29(6).

[23] Tel Aviv District Court, O.M. (Tel-Aviv) 56844–10–19, Mer Telecom Ltd. v. Sint Maarten Telephone Company N.V., 17 March 2020.

ping by the parties, favoring the jurisdictions that hold a looser position towards the concurrent jurisdiction principle (Sharvit, Lerner 2020).

It is said that Article 29(7) was included in the Rules as the ICC Commission members were concerned that the existence of emergency arbitration provisions alone "could lead to the adverse consequence of some state courts deciding to deny their own jurisdiction to issue interim or conservative measures" (Voser 2011, 814). It would still be of substantial importance to consider revising, or at least detailing this provision further in the next rendition of the ICC Rules in order to avoid confusion as to which circumstances exactly make it appropriate for a party to resort to a state court even though the emergency arbitration procedure has commenced (Fry, Greenberg, Mazza 2012, 310).

3.5 Swiss Arbitration Centre

The emergency arbitration procedure has been introduced in the revision of the Swiss Rules in 2012. The procedure can be requested before the constitution of the tribunal, regardless of whether the notice of arbitration has been submitted. The Court will appoint an emergency arbitrator as soon as possible after receiving the application. Relevant deadlines for challenge of an emergency arbitrator are shortened from 15 to three days, while the decision should be rendered within fifteen days from the date on which the emergency arbitrator received the file, with the possibility of extension.[24] Like SCC Rules, emergency arbitration provisions apply in essence retroactively – to all arbitrations commenced after their introduction, as opposed to leaning on the date on which the arbitration agreement was concluded.

Swiss Rules are unique because of an important and unusual peculiarity within their emergency arbitration provisions: the possibility for the emergency arbitrator to render an *ex parte* decision on interim relief. This will be further discussed in Section 7.1 below, in the context of due process concerns when it comes to emergency arbitration.

3.6 The London Court of International Arbitration (LCIA)

LCIA tackled the issue of the need for urgent relief in 2014 edition of the Rules, by allowing any party to apply to the LCIA Court for

[24] The 2021 Swiss Rules state that the decision should be *notified* to the parties in this deadline, as opposed to the previous rendition which simply states *made*.

the appointment of an emergency arbitrator in the case of an emergency prior to the formation of the tribunal.[25]

Additionally, the 2014 rules provided that this Article 9B *"shall not prejudice any party's right to apply to a state court or other legal authority for any interim or conservatory measures before the formation of the Arbitration Tribunal; and it shall not be treated as an alternative to or substitute for the exercise of such right."*[26]

The 2020 LCIA Rules revisited the emergency arbitrator provisions with a few notable amendments. First, an emergency arbitrator can now determine the amount of costs relating to the emergency proceedings and the proportions in which the parties shall bear these costs, which was up until then a right reserved for the arbitral tribunal.[27] Second, the emergency arbitrator can now revisit the award prior to the constitution of the tribunal, on its own or upon application by a party and confirm, vary, discharge and revoke, in whole or in part, any previous orders and/or issue and additional order (Banerjee, Chatterjee, Desai 2020).[28] Finally and most notably, the rules now explicitly provide the right to apply to a competent state court for interim measures prior to the formation of the Arbitral Tribunal, as opposed to merely stating that the emergency arbitrator provisions do not prejudice such right. The new provision reads as follows:

> *"Notwithstanding Article 9B, a party may apply to a competent state court or other legal authority for any interim or conservatory measures before the formation of the Arbitral Tribunal* (emphasis added); *and Article 9B shall not be treated as an alternative to or substitute for the exercise of such right. During the emergency proceedings, any application to and any order by such court or authority shall be communicated promptly in writing to the Emergency Arbitrator, the Registrar and all other parties."*[29]

This particular amendment was propelled by a 2016 decision of English High Court where it was held that the court was only entitled to provide interim relief to a party to an arbitration agreement where

[25] 2014 LCIA Arbitration Rules, Art. 9B. See also Art. 9A for expedited formation of the arbitral tribunal.

[26] 2014 LCIA Rules Art. 9(12).

[27] 2020 LCIA Rules Art. 9(10).

[28] *Supra* n. 26.

[29] 2014 LCIA Rules Art. 9(13).

either an emergency arbitrator or an expeditiously formed tribunal were unable to provide the requested relief, as well as that the court will deny an application for interim relief if the LCIA Court denied it at first (Hughes-Jennett, Trinick 2016).[30] In this case, Gerald Metals, a commodities trader and the claimant in the arbitration in question, applied to the LCIA Court for urgent interim asset freezing relief. The LCIA Court however denied this request because it found that the application did not meet the condition of emergency. Gerald Metals then applied to the High Court, on the grounds of Section 44 of the England and Wales Arbitration Act 1996. The Court denied the request as well, stating that it may only act under Section 44 where the powers of an arbitral tribunal or an emergency arbitrator are inadequate, or where the practical ability is lacking to exercise those powers.[31] This decision indeed sparks perplexity, as the emergency relief provisions are envisioned to broaden options for the parties seeking immediate remedy and not have the opposing effect by putting a constraint on the court's power in this regard (Knowles 2016). Additionally, the decision arguably interferes with the party autonomy as this is could have not been what the parties had in mind when including the LCIA arbitration clause in their contract.

It remains to be seen how this will play out in light of the 2020 revisions to the LCIA Rules. The new wording, although precise, still could be interpreted as leaving open the question of which is the correct forum in these circumstances.[32] This debate should be borne in mind as it could easily arise in other jurisdictions, depending on the seat of arbitration, the governing law of the contract or the subject matter of the dispute. Some even state that opting out of the emergency arbitration provisions within the LCIA Rules could be the best and safest option in the cases where resorting to courts for interim relief seems necessary (Hughes-Jennett, Trinick 2016).

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[30] See also The English High Court, Gerald Metals SA v. Timis, 21 September 2016.

[31] Section 44(5) of the Arbitration Act 1996 states that the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

[32] See Dentons 2020. Advantage Arbitration? Will the new LCIA Rules persuade users that arbitration is preferable to litigation?, 2020, https://www.dentons.com/en/insights/articles/2020/october/26/will-the-new-lcia-rules-persuade-users-that-arbitration-is-preferable-to-litigation.

3.7 Hong Kong International Arbitration Centre (HKIAC)

Article 23 of the 2013 HKIAC Rules provided, for the first time, that a party may request emergency relief prior to the constitution of the tribunal by making an application to HKIAC.[33]

The relevant provisions were updated in the 2018 edition of the Rules, providing for even speedier recourse for parties seeking emergency relief.[34] The application should include, among other details, a description of the relevant circumstances and urgency that prompts the need for the relief sought.[35] The 2018 Rules introduce an important and modern detail, in line with other major institutions' rules such as the ICC and SCC – a party can request emergency relief even before commencing arbitration.[36] This, however, applies only to disputes arising out of arbitration agreements concluded after 1 November 2018, unless the parties have agreed otherwise.

The prescribed deadlines match the nature of this mechanism: if HKIAC accepts the application, it should appoint the emergency arbitrator within 24 hours after receipt of both the application and the application deposit.[37]

The general deadlines for challenge of an arbitrator are also significantly shortened in case of the emergency procedure. Instead of 15 days after the confirmation or appointment of that arbitrator has been communicated to the challenging party or after that party became aware of the circumstances relevant for the challenge, the deadline for challenging an emergency arbitrator is three days. The same change applies to the general 15-day deadline for HKIAC to decide on a challenge. Finally, the emergency arbitrator shall render a decision within 14 days from the date HKIAC transmitted the file

[33] Emergency Arbitrator Procedures, https://www.hkiac.org/arbitration/process/emergency-arbitrator-procedures; Art. 23, as well as Schedule 4(1) of the 2013 Administered Arbitration Rules of the Hong Kong International Arbitration Centre (HKIAC Rules).

[34] Essential Things To Know About The 2018 HKIAC Arbitration Rules, https://www.hk-lawyer.org/content/essential-things-know-about-2018-hkiac-arbitration-rules.

[35] Schedule 4(2) 2018 HKIAC Rules.

[36] Schedule 4(1) 2018 HKIAC Rules. In 2013 Rules a party could only apply for the appointment of an emergency arbitrator at the same time as the filing of its Notice of Arbitration, or later – see Schedule 4(1) 2013 Rules).

[37] Schedule 4(5) 2018 HKIAC Rules. The deadline is shortened from two days which was the case in 2013 HKIAC Rules.

to the arbitrator. These short deadlines seem to give a positive result, since the median duration of an emergency arbitration before HKIAC, over the period from 2013 to 2021, amounts to 15 days.[38] Unlike the ICC Rules, HKIAC Rules do not take position regarding the nature of the decision, but rather define an emergency decision as *any decision, order or award*.

As for the order of forums, the Rules state that this procedure is not intended to prevent any party from seeking urgent measures from a competent authority at any time.[39] It is also interesting that the HKIAC Rules enumerate types of interim measures that could be rendered (such as maintaining or restoring a status quo, preservation of assets or evidence) and gives examples of the relevant factors that should be taken into account by the tribunal when deciding on a parties' request. The 2018 Rules state that certain provisions on interim relief, including the abovementioned, apply to the emergency procedure as well – which is a useful, even if not procedure-specific, guidance on the standard of urgency that justifies the request for emergency relief.

The emergency arbitration provisions of the HKIAC Rules seem to be reasonably thorough and in step with the present developments of the notion of emergency arbitration. According to the most recent HKIAC Statistics, the total number of emergency arbitrator applications filed with HKIAC up to year 2021 is 31,[40] with 13 resulting in an emergency arbitrator decision.[41] It is also important to note that Hong Kong is one of only a few jurisdictions in the world where emergency arbitration decisions are expressly enforceable. Namely, the Hong Kong Arbitration Ordinance stipulates that any emergency relief granted by an emergency arbitrator is as enforceable as an order of the High Court of the Hong Kong Special Administrative Region.[42] This stipulation came into force in 2013, reportedly as a result of lobbying (Santers, Kudrna, 2017, ft. 51)[43], and greatly contributes to the reputation of Hong Kong as an arbitration-friendly jurisdiction (Dimsey 2017, 545;

[38] 2021 HKIAC Costs and Duration Report, https://www.hkiac.org/news/hkiac-releases-average-costs-and-duration-report.

[39] Schedule 4(20) 2018 HKIAC Rules.

[40] 2021 HKIAC Statistics, https://www.hkiac.org/about-us/statistics.

[41] 2021 HKIAC Costs and Duration Report.

[42] Article 22B(1) of the 2011 Hong Kong Arbitration Ordinance (Cap. 609), https://www.elegislation.gov.hk/hk/cap609.

[43] Similar chain of events supposedly occurred in Singapore as well.

Georgiou 2010, 123; Moser, Bao 2017, 287–288). It is worth noting that Hong Kong, Singapore and New Zealand[44] are the only jurisdictions with express provisions in their respective arbitration legislations providing for enforceability of emergency arbitrators' decisions.

3.8 Investment Arbitration

As opposed to its immense and growing popularity in the commercial disputes sphere, emergency arbitrator procedure is not as frequently utilized in investment arbitration. This can be seen by prima facie looking at the main sets of rules when it comes to investment arbitration. Namely, majority of investment disputes are initiated under the ICSID Convention and its ancillary rules ("ICSID"), as well as the UNCITRAL Rules (also suggested by Dahlquist 2015). Neither of these procedural frameworks include emergency arbitration provisions. Further on, according to the 2021 ICC Arbitration Commission Report on Arbitration Involving States and State Entities under the ICC Rules of Arbitration, about 18% of bilateral investment treaties ("BITs") refer to ICC Rules.[45] Emergency arbitration provisions within the ICC Rules are elaborated on above; however, in Article 29(5) it is stated that the emergency arbitrator provisions "apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories". This provision is understood to exclude emergency arbitration from investment disputes (Markert, Rawal 2020, 135; Koh 2016, 534). The SIAC Investment Arbitration Rules 2017 contain emergency arbitration provisions but demand an express agreement on their application by the parties.[46]

However, there is one major arbitral institution that does allow (that is, does not exclude) the use of emergency arbitration mechanism in investment treaty disputes – the SCC. Sweden and the SCC are generally a popular investment dispute ring: they serve as a forum for disputes between investors and states in at least 120 BITs as well as the

[44] Art. 1 New Zealand Arbitration Act 1996. Available at: https://www.legislation.govt.nz/act/public/1996/0099/latest/DLM403277.html. The Act was amended in 2017 to cover emergency arbitrators under the term arbitral tribunal.

[45] ICC Arbitration Commission Report on Arbitration Involving States and State Entities under the ICC Rules of Arbitration, 2016, 2. Available at https://iccwbo.org/publication/icc-arbitration-commission-report-on-arbitration-involving-states-and-state-entities-under-the-icc-rules-of-arbitration/.

[46] Schedule 1(1) 2017 Investment Arbitration Rules of the Singapore International Arbitration Centre (SIAC Investment Rules).

Energy Charter Treaty, with the SCC Rules either being applied or the SCC being the Appointing Authority under the UNCITRAL Arbitration Rules or that Sweden shall be the legal seat of the dispute.[47]

Under the SCC Rules this option is generally available to parties regardless of the type of arbitration, but it could be argued that it is not suitable for investment arbitration due to its specific nature. For example, a distinct feature of investment treaties is a "cooling off", "waiting" or "amicable negotiation" period, which is a period during which the parties are not allowed to initiate arbitral proceedings, but to engage in a good faith attempt of negotiating a settlement or attempting another peaceful dispute resolution mechanism, such as mediation or conciliation (Sicard-Mirabal, Derains 2018, 41). This obviously crashes with the idea of urgent relief, posing a question of whether a cooling off period makes initiating emergency arbitration procedure moot, as it essentially represents non-compliance with the investment treaty (Dahlquist 2015; Markert, Rawal 2020, 138).

However, the SCC emergency arbitrator provisions have been successfully applied in several investment disputes cases in which the underlying treaties included cooling-off clauses (Shaugnessy 2017, 323). In TSIKInvest LLC v The Republic of Moldova, also referred to as the first known investment treaty emergency arbitration (Dahlquist 2016, 261) and conducted under the SCC Rules, the claimant submitted that the cooling-off period does not apply to the appointment of an emergency arbitrator or to the decision in that regard, among other reasons also because the cooling off period is limited to commencement of substantive arbitration proceedings. Also, applying the cooling off period to the emergency procedure would be "unequitable and procedurally unfair to the Claimant". The emergency arbitrator granted the sought relief, stating that "*it would be procedurally unfair to Claimant and contrary to the purpose of the Emergency Arbitrator procedure to apply the Cooling-Off Period to the appointment of an Emergency Arbitrator or to an emergency decision on interim measures to be made by the Emergency Arbitrator, not least since Claimant seems to be facing a serious risk of suffering irreparable harm before the expiry of the Cooling-Off Period if interim measures are not granted*".[48] Same posi-

[47] For further information, see https://sccinstitute.com/dispute-resolution/investment-disputes/.

[48] SCC Case No. EA 2014/053, TSIKinvest LLC v. Republic of Moldova, 29 April 2014. Available at https://jusmundi.com/fr/document/decision/en-tsikinvest-llc-

tion, but with different argumentation was taken in Evrobalt v. Republic of Moldova, where the emergency arbitrator concluded that it is obviously futile to wait until the expiration of the six-month cooling off period, as it is unlikely that the dispute will be resolved amicably.[49] The futility exception was applied by an arbitrator in another case, shortly after, with the same Respondent in question.[50] However, in a more recent case, the Supreme Court of Ukraine refused recognition and enforcement of an emergency measure against Ukraine, one of the reasons being non-compliance with a three-month cooling off period.[51] More precisely, the Court found this non-compliance in the fact that JKX sent the notice of investment dispute to the Administration of the President of Ukraine rather than the Ministry of Justice of Ukraine. According to the decision, Ukraine was not notified of the dispute in accordance with the investment treaty applicable in question,[52] which in turn represents a ground for refusal of recognition and enforcement under Article V(1)b of the New York Convention.

There are numerous other potential issues that may arise in emergency procedure within an investment dispute. For example, whether emergency arbitrator has the legitimacy to impose coercive measures to a sovereign (which is, in contrary to commercial arbitration, always a party to an investment dispute) and whether it should be deemed that the sovereign has consented to the emergency arbitration procedure. Also, an interesting line of thought appears in the light of most favored nation clauses, as it is likely that a set of arbitration rules that include the possibility of emergency arbitration will be considered more favorable than arbitration without this option.

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v-republic-of-moldova-emergency-decision-tuesday-29th-april-2014.

[49] Evrobalt LLC v. Moldova, SCC Case No. EA 2016/082, 30 May 2016. Available at https://jusmundi.com/fr/document/decision/en-evrobalt-llc-and-kompozit-llc-v-moldova-award-on-emergency-measures-monday-30th-may-2016.

[50] SCC Case No. 2016/95, Kompozit LLC v. Republic of Moldova SCC Case No. 2016/95, 14 June 2016. Available at https://jusmundi.com/fr/document/decision/en-kompozit-llc-v-republic-of-moldova-emergency-award-on-interim-measures-tuesday-14th-june-2016.

[51] SCC Case No. EA 2015/002, JKX Oil & Gas plc, Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine (I), 19 September 2018.. Available at https://jusmundi.com/en/document/decision/uk-jkx-oil-gas-plc-poltava-gas-b-v-and-poltava-petroleum-company-v-ukraine-postanova-verkhovnogo-sudu-ukrayini-wednesday-19th-september-2018#decision_2410.

[52] Article 26(2) Energy Charter Treaty, https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/.

Emergency procedure undoubtedly poses a specific set of challenges when it comes to investment disputes. It is, however, an attractive feature generally and will definitely be perceived as such by the parties, most likely the investors. Therefore, awareness should be raised in this regard and particular attention should be paid when drafting dispute resolution clauses that indirectly or directly contain this possibility.

3.9 Ad hoc and Administered Arbitrations

To date, there is not a particular mechanism in place for ensuring the option of emergency procedure in ad hoc arbitration – where the arbitration mechanism is established solely for the specific agreement or dispute and the parties have not selected institutional arbitration (Lew, Mistelis, Kröll, 32). Notably, the UNCITRAL Arbitration Rules, which are widely common in ad hoc arbitrations, do not contain emergency arbitration provisions. This is because ad hoc arbitrations have no institutional oversight and no mechanism for the appointment of the emergency arbitrator and conduct of the procedure.

When it comes to administered arbitration, i.e. an arbitration which is administered by an international arbitration institution, Shaugnessy highlights an interesting question: could the parties who choose to use the UNCITRAL Rules with the administration of an arbitral institution also agree in their arbitration agreement to use the emergency arbitration procedures of the administering body (Shaugnessy 2017, 340)? In this way, there would be an institutional support system in place which could appoint the emergency arbitrator and undertake all the necessary accompanying procedural steps. However, even if this is technically possible, it means that the parties should think of the dispute when it has not yet occurred and include this specific mechanism up front, which in turn brings the emergency arbitration back to the infamous opt-in attire.

4. SIMILAR INSTITUTES

Emergency arbitration should be differentiated from certain similar mechanisms that have been developed in attempts to cater to the urgent needs of the parties.

Before ICDR pioneered the emergency procedure, there were some attempts at resolving the parties' need for interim relief before

the formation of an arbitral tribunal. First, in 1990 the ICC introduced an institute of Pre-Arbitral Referee, with an idea to have a third person decide on urgent interim requests by the parties. However, even though useful in its core, the procedure has been reported as only seldom used (Gaillard, Pinsolle 2004, 17; Hausmaninger 1992, 83; Paulsson 1990, 214).[53] The reason is assumed to be found in the fact that it is an *opt-in* mechanism. Consequently, it is equally unrealistic expecting to obtain the consent of both parties after the conflict has arisen as it is to have the parties discuss this procedure at the very beginning of their relationship, during the contract drafting.

In 2001, the Netherlands Arbitration Institute (NAI) has added Summary Arbitral Proceedings to its rules, in which a sole arbitrator decides solely on a request for provisional relief from a party, and that is "in all urgent cases that require immediately enforceable provisional relief in view of the parties' interests".[54] Summary arbitral proceedings have been referred to as one of the primitive forms of emergency arbitrator procedure, along with the pre-arbitral referee and the e American Arbitration Association ("AAA")'s Optional Rules for Emergency Measures of Protection published in 1999 (Shaugnessy 2010, 338; Tallent 2015, 287).

Namely, a party can request provisional relief from the existing tribunal in pending arbitration, or separately in summary proceedings whether the arbitration has yet started. Therefore, summary proceedings can be requested even if there is an ongoing procedure with an existing tribunal, but the Rules warn that the urgency test applied by the arbitrator in summary proceedings will be stricter than the one applied by the tribunal in the regular proceedings upon receiving a request for provisional relief.

This option is, however, available only for parties in arbitrations seated in the Netherlands. The request is filed with the NAI administrator, who will then appoint a single arbitrator "as soon as possible". The arbitrator's decision on provisional relief can take the form of an order or an award. It is interesting that the arbitrator can, upon a unanimous request of the parties, decide on the merits instead of pro-

[53] Between 1990 and 2010, the ICC registered approximately 10 requests under the pre-arbitral referee rules, the first being in 2001. See Van Houtte Acts as Emergency Referee, *Global Arbitration Review*, 9 December 2010, https://globalarbitrationreview.com/article/van-houtte-acts-emergency-referee.

[54] Art. 35(2) Arbitration Rules of the Netherlands Arbitration Institute. Available at https://www.nai-nl.org/downloads/NAI%20Arbitration%20Rules%20and%20Explanation.pdf.

visional relief or convert an arbitral award on provisional relief into the arbitral award on the merits.

The NAI Rules expressly state in Article 9.6 that the summary proceedings are different from the expedited proceedings, which result in a decision regarding the dispute itself, not just the question of urgent relief. However, slightly contradictory in the same article it is highlighted that the NAI Rules do not provide for expedited procedure, "as summary arbitral proceedings significantly and predominantly accommodate the need for an expedited decision or relief".

Summary procedure under NAI Rules presents a surprisingly similar mechanism that could easily be described as an older brother of emergency arbitration that was introduced only five years later. It is meant to allow the parties to seek urgent interim relief, if needed even before the tribunal is constituted. Also, the sole arbitrator deciding in these summary proceedings undeniably resembles an emergency arbitrator as defined today.

Emergency arbitration should not be confused with expedited procedure, also referred to as "fast-track arbitration," "expedited arbitration" and "accelerated arbitration", which is an arbitral process compressed into a short period of time for a quicker resolution of a dispute (Banifatemi 2017, 10). This mechanism is offered by many major arbitral institutions such as ICC, SCC, Swiss Arbitration Centre, SIAC, ICDR – all of which also contain emergency arbitration provisions.[55] The option to request expedited procedure is usually tied to the amount in dispute and the overall simplicity of the matter.[56] Therefore, the expedited procedure is a means of quickly and cost-effective solving of a simple dispute, whereas the emergency arbitration is related solely to a particular interim measure and, even though the particular procedure of granting emergency relief is highly expedited due to short timelines and urgency, it does not result in the ultimate resolution of the dispute. Besides, emergency arbitrator's decisions are subject to further reconsideration and revision by the full arbitral tribunal (Born 2021, 2480).

Another mechanism that accommodates urgency, closer to the idea of emergency arbitration but still different from it, is expedited formation of the arbitral tribunal.[57] The only major arbitral institution

[55] LCIA does not offer expedited procedure.

[56] Under the ICC Rules, expedited procedure applies to arbitration where the amount in dispute does not exceed USD 2 million. SIAC Rules set this amount to SG 6 million.

[57] See 2021 DIFC-LCIA Rules, Art. 9A; 2007 DIAC Rules, Art. 12.

that offers expedited formation of the tribunal is the LCIA, making it one of the most notable features of these rules. In the LCIA Rules, expedited formation of the tribunal is set as an alternative to emergency arbitration – a party may apply for the appointment of an emergency arbitrator at any time prior to the formation or expedited formation of the tribunal.[58] Application for the expedited formation of the tribunal can be made in cases of exceptional urgency. When the relevant requirements are met, formation of the tribunal could be expedited to virtually any time period – examples from the practice being as short as forty-eight hours (Bose, Meredith 2018, 186 and 193).

Expedited formation of the tribunal helps a requesting party to prevent its counterpart from using dilatory tactics to frustrate the arbitration or other urgent issues may arise that need immediate attention (Scherer 2021, 150). This is a very popular technique that has even been said to affect the overall attractiveness of the emergency arbitrator provisions in the LCIA Rules (Shaugnessy 2017a, 345). It shortens the time period (which could be weeks, or even months) required to form the arbitral tribunal and commence the arbitration proceedings. Same as fast-track arbitration, it is used for accelerating the process of ultimately solving the dispute, but it is not focused on a particular provisional measure in the way emergency relief is.

Still, aside from the LCIA, expedited formation of the tribunal remains a rare possibility overall, with the criterion of exceptional urgency interpreted and applied strictly (Blackaby, Partasides, Redfern 2023, 6.28). Some examples where the LCIA found that the case met the standard of exceptional urgency are the following: where the arbitration was at risk of becoming moot because the Respondent brought proceedings before a state court; where one party threatened to dispose of common assets; as well as when the Claimant was at risk of not having its products manufactured or sold due to an injunction restraining the Respondent's services (Turner, Mohtashami 2009, 74–75; Gerbay 2013, 67; Clifford, Wade 2015, 104; Ponty 2014, 764). However, when claimant applied for expedited formation on the grounds of urgency since the respondent was engaging in unfair competition, the Court decided that the requirement of exceptional urgency is not shown, since any damages caused by these practices can be compensated monetarily (also pointed out by Turner, Mohtashami 2009, 74–75).

[58] 2020 LCIA Rules, Art. 9B (9.4).

5. THE NATURE OF THE EMERGENCY ARBITRATOR

Probably the first and foremost debate revolving around the topic of emergency arbitration procedure is whether emergency arbitrator has the status of an actual arbitrator, i.e. if emergency arbitration can be seen as regular arbitration at all (Beisteiner 2019, 83).[59] The answer to this question is crucial to determining whether an interim measure granted by an emergency arbitrator can be enforced.

The notion of arbitrator or arbitration in general is rarely defined by arbitration laws (Santacroce 2015, 291). Naturally, this even more so applies to definition of an emergency arbitrator. It is generally agreed that the nature of an arbitrator has both contractual and jurisdictional characteristics (Born 2021, 240). He or she is a decision maker, a private individual who listens to the parties, considers the facts and arguments and makes a decision (Blackaby, Partasides, Redfern 2023, 2.). An arbitrator's power to decide over a dispute is a direct product of an agreement between the parties; on the other side, the decision rendered by the arbitrator has the same effect as a state court's judgment (Gaillard, Savage 1999, 12; Lew, Mistelis, Kröll, 79).

Therefore, in order for an emergency arbitrator to be perceived essentially the same as an arbitrator within a "proper" tribunal, both of these conditions should be met. Even though the beginning of use of this procedure brought discussions on the contractual element, today it should be safe to say that an emergency arbitrator is a product of the parties' agreement, despite the fact that he or she is not directly appointed by the parties. Even from the aspect of the institutional rules that tie the application of the rules to the moment of the commencement of the proceedings, rather than the conclusion of the arbitration agreement, such as SCC (as discussed above), emergency arbitration procedure is already well known enough for it to be assumed that the parties consented to this procedure by agreeing to the specific set of institutional rules that contain them. Parties are also free to opt out of the emergency arbitration provisions. The other aspect, jurisdictional element of the emergency arbitrator's legal nature is often deemed controversial.

[59] See also ICC Commission Report on Emergency Arbitrator Proceedings, 2019, 30.

Emergency arbitrators indeed have an adjudicatory function in parallel to one of tribunals or judges: to decide on a specific request for interim relief pending the resolution of the dispute on the merits. This role, along with the responsibility to establish and implement the procedures necessary for the resolution of the dispute, is "an inherent characteristic of the arbitral process" (Born, 2021 11; Beisteiner 2020, 293). Institutional rules usually provide the emergency arbitrator with the power to rule on his or her own jurisdiction, thus expanding the principle of competence-competence, one of the most prominent principles in international arbitration (Landolt 2013, 511) to the emergency procedure as well. Emergency arbitrators, as explained above, also have wide authority when it comes to deciding, usually to grant any interim relief they deem necessary.[60]

Therefore, upon analyzing the position and powers of the emergency arbitrator, it would be rather unsubstantiated to perceive this role as any less of a 'proper' arbitrator. Emergency arbitration, even though it starts at the very outset of the dispute, is an integral part of the main procedure, an arbitration within arbitration: it stems from the same agreement between the same parties, it regards the same dispute and is subject to revision by the subsequent tribunal. The emergency arbitrator usually does not tackle the merits; however, he or she has the same function as the judge would have while deciding on an urgent interim measure. Aiming at the end of a debate around the nature of the emergency arbitrator, some suggest that the best way forward would be tackling this question in the next revision of UNCITRAL Model Law (Giaretta 2017).

6. ENFORCEABILITY OF THE DECISIONS ON EMERGENCY RELIEF

Another contested, but a point of the utmost importance that stems from the previously discussed one is whether the decisions of emergency arbitrators are enforceable.

Truth be told, emergency interim measures – and arbitral interim measures in general – whether imposed by an order or an award (Ghaffari, Walters 2014, 163)[61], are usually complied with by the par-

[60] See for example Art. 8 of the Schedule 1 2016 SIAC Rules; Art. 23(2) 2018 HKIAC Rules.

[61] The authors' view is that the nomenclature, whether the decision is named an award or an order "does not matter" – what does is the true nature and the effect of the decision.

ties voluntarily, for the sake of reducing the costs and demonstrating a positive attitude towards resolution of the dispute (Fry, Greenberg, Mazza 2012, 292). This is why the court practice in this regard has been scarce so far; there are not many decisions on the recognition or enforcement of emergency arbitrators' orders or awards.

However, in case a party does not choose to obey an interim relief imposed by an arbitrator, there is not a mechanism in place within arbitration to coerce the party to do so. That is when enforcement comes into play. And where enforcement plays is, naturally, where the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") orchestrates. This is not only because of the Convention's undisputed importance and prevalence, but also because there is not an international instrument in place at the moment that regulates enforcement of arbitral interim measures. Moreover, enforcement of arbitral interim measures is rarely, if at all, regulated by national legislations.

Interim measures, or enforcement thereof, were not contemplated during the drafting of the New York Convention more than six decades ago. Therefore, the only way to assess the enforceability of emergency interim measures (and interim measures in general) is to take a look at the provisions regarding the enforcement of arbitral awards.

Courts have an obligation to enforce arbitral awards, unless presented with grounds for refusal as defined in Article V. These grounds include: (1) incapacity and invalidity, (2) lack of notice or fairness, (3) arbitrator acted in excess of authority, (4) the tribunal or the procedure was not in accord with the parties' agreement, and (5) the award is not yet binding or has been set aside (Moses 2008. 208).[62] All of these points must be invoked by the party resisting enforcement. There are two additional grounds for refusal of enforcement that can be raised by the court: (1) lack of arbitrability and (2) violation of public policy.[63] Among these, the point that is found to be coincidently problematic when it comes to enforcement of emergency arbitrator decisions is the requirement from the Article V(1))(e), that the award has become binding upon the parties.

Firstly, an issue arises as to the nature of the emergency decision, as institutional rules differ in prescribing whether a decision of

[62] Article V(1) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

[63] Article V(2) of the New York Convention.

the emergency arbitrator takes the form of order or an award.[64] Even if a decision is made in a form of an award, it is controversial whether it has the necessary finality to be enforced under the New York Convention (Shaugnessy 2017a, 342). Admittedly, the Convention does not mention the exact term "finality", but this condition has been regarded by many national courts and doctrinal authorities as necessary for granting recognition and enforcement to an arbitral decision (Brower, Meyerstein, Schill 2010, 74).[65]

Emergency arbitrator decisions are binding between the parties to the arbitration agreement, but not binding upon the third parties or the subsequent arbitral tribunal. The tribunal (or even emergency arbitrator himself or herself) can revisit the decision – modify, suspend or even terminate it. The finality problematics apply to interim decisions in general; courts have both denied and granted recognition or enforcement to interim decisions, some stating that they could be enforced only if finally determining at least a part of the main dispute[66] or containing a final decision on at least one of the claims.[67] Others, however, have considered interim decisions final enough to be considered awards, and at least final until the tribunal decides otherwise.[68] In one US decision, the court has in fact analyzed an emergency arbitrator's decision and refused an application for setting it aside, stating that the award imposing a conservatory measure pending the formation of the tribunal was indeed a final

[64] SCC, SIAC and HKIAC Rules provide that interim measures, as well as emergency relief, can be granted in a form of either an order or an award. However, ICC Rules only allow that a decision may be made in a form of an order.

[65] However, the question of whether finality is indeed a condition for enforcement under the New York Convention remains up to debate in the arbitration community. See also: International Council for Commercial Arbitration, ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, 2011, 17.

[66] Supreme Court of Queensland, Australia, Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty. Ltd., 29 October 1993; XX Y.B. Com. Arb. 628, 1995, https://www.queenslandjudgments.com.au/caselaw/qsc/1993/351/pdf.

[67] Oberlandesgericht Thüringen, Germany, 4 Sch 03/06, 8 August 2007, https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1311&opac_view=6; Alcatel Space, S.A. v. Alcatel Space Industries, S.A. and others, United States District Court, Southern District of New York, 25 June 2002, 02 Civ.2674 SAS, XXVIII Y.B. Com. Arb. 990, 2003.

[68] Cour d'appel, Paris, France, S.A. Otor Participations v. S.A.R.L. Carlyle (Luxembourg) Holdings 1, 1e ch., Oct. 7, 2004.

award "that can be reviewed for confirmation and enforcement by the district courts".[69]

However, as already mentioned, UNCITRAL Model Law provides that interim measures issued by an arbitral tribunal should be recognized as binding and enforced by the courts regardless of its country of origin.[70] Even though urgent measures are not issued by the tribunal but by the emergency arbitrator, they are essentially the same in their temporary nature.[71] The UNCITRAL Model Law further on includes interim measures when enumerating grounds for refusal of recognition and enforcement, which mirror the New York Convention.[72] This regime provides a way-out and allows the parties to request enforcement of interim measures from local courts independently of the New York Convention regime and without the need to establish whether the interim measure is an order or a final award (Moses 2008, 106). Therefore, for now the safest way to secure the enforcement of emergency relief, if needed, is to be mindful of jurisdictions that might be involved in the process when submitting the request and their local legislations. If nothing else, there is always an option of relying on an emergency arbitrator's decision to persuade national courts to grant similar interim relief against a non-compliant respondent (Shroff 2017, 815).

7. PROCEDURAL FAIRNESS IN EMERGENCY ARBITRATION

7.1 Due Process Concerns in General

On the opposite side of party autonomy as well as the tribunal's discretion, most national arbitration legislation grants minimum standards of procedural protection. These usually include the right to

[69] United States District Court, Southern District of California, Chinmax Medical Systems Inc. v. Alere San Diego, Inc., Case No. 10cv2467 WQH (NLS), Dec. 8, 2010, https://casetext.com/case/chinmax-medical-systems-inc-v-alere-san-diego.

[70] Art. 17(H)(1) UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (UNCITRAL Model Law).

[71] Supreme Court of India, Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. and Future Coupons Pvt. Ltd., SIAC Case No. 960, Feb. 1, 2022, https://jusmundi.com/fr/document/decision/en-amazon-com-nv-investment-holdings-llc-v-future-retail-ltd-and-future-coupons-pvt-ltd-judgment-of-the-supreme-court-of-india-tuesday-1st-february-2022#decision_19743.

[72] Article 17. I UNCITRAL Model Law.

be heard and the right to equal treatment (Born 2021, 2318). A good representative is Article 18 of the UNCITRAL Model Law, which requires that "*the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*". Also referred to as due process guarantees,[73] there is a concern that these important requirements could conflict with the nature of emergency proceedings (Santacroce 2015, 287). The party applying for the emergency relief is eager to obtain it and the emergency arbitrator is tied with short deadlines – it seems rather easy to slip and miss a certain important procedural measure of protection. The issue is especially present when it comes to the possibility of an emergency arbitrator granting ex parte decisions, that is decisions issued without participation of the other party. In rendering these decisions, the opposing party's right to be heard is undeniably denied, albeit only temporarily. As discussed above, the Swiss Rules allow for this option but require that the other party is granted an opportunity to be heard immediately when they received a preliminary order. Horn poses an interesting solution for overcoming due process concerns in these situations: to issue the decision but wait until the other party has had the opportunity to present its case to go through with enforcement (Horn 2019, 139).

Notwithstanding the above, most of the institutional arbitration rules already contain provisions raising particular awareness to the due process guarantees. The ICDR Rules state that an emergency arbitrator should "provide a reasonable opportunity to all parties to be heard and may provide for proceedings by telephone, video, written submissions, or other suitable means, as alternatives to an in-person hearing".[74] A similar provision is included in the SIAC Rules.[75] Further on, ICC, HKIAC as well as the Swiss Arbitration Centre provide in their respective rules that the emergency arbitrator is required to ensure that each party has a reasonable opportunity to present its case.[76] In the SCC Rules, this matter is regulated in Article 23, which deals with the conduct of the arbitration by the arbitral tribunal, which applies to the emergency

[73] In the context of international arbitration, perhaps a more suitable reference to these guarantees could be 'fundamental procedural fairness'. See Reed 2017, 366; Waincymer 2012, 16.

[74] Art. 7.3 2021 ICDR Rules.

[75] Schedule 1.7 2016 SIAC Rules.

[76] Art. 5.2 2021 ICC Rules; Schedule 4.10 2018 HKIAC Rules; Art. 43.6 2021 Swiss Rules.

procedure as well.[77] Taking into account the urgency inherent in these proceedings, the emergency arbitrator should "conduct the arbitration in an impartial, efficient and expeditious manner, giving each party an equal and reasonable opportunity to present its case".[78] LCIA Rules, however, do not require the emergency arbitrator to hear the other party when conducting the emergency proceedings. Namely, Article 9B.7 of the LCIA Rules state that the emergency arbitrator should take into account the nature of the emergency proceedings and "the need to afford to each party, if possible, an opportunity to be consulted on the claim for emergency relief (whether or not it avails itself of such opportunity), the claim and reasons for emergency relief and the parties' further submissions" (emphasis added)". The emergency arbitrator is also not required to hold hearings, either in person on virtually, and can decide on the claim solely on the basis of available documentation.[79] It is however held by the commentators that the emergency arbitrators should in practice give the other party an opportunity to respond to the request for emergency relief, even if it is within a very short deadline (usually while the arbitrator familiarizes himself/herself with the case) (Santacroce 2015, 286; Scherer 2021, 169).

There are additional examples of provisions that aim to ensure equal treatment of the parties in emergency arbitration procedure: it is a standard provision that, unless agreed by the parties, the emergency arbitrator cannot act as an arbitrator in the main proceedings.[80] The emergency arbitrator is also generally required to give reasons for the issued decision.[81]

In general, it is up to the emergency arbitrator to balance out these important requirements – take cognizance of urgency but also seek to issue a decision based on a procedure in which both parties had

[77] Appendix II, Art. 7 2017 SCC Rules.

[78] Art. 23.2 SCC Rules.

[79] Art. 9.7 LCIA Rules.

[80] Art. 7(5) 2021 ICDR Rules; Schedule 4 Art. 19 2018 HKIAC Rules; Appendix II, Art. 4.4 2017 SCC Rules; Art, 43.11 2021 Swiss Rules; Schedule 1 Art. 6 2016 SIAC Rules. Art. 2 of the Appendix V to the 2021 ICC Rules states that an emergency arbitrator cannot act as an arbitrator in any arbitration relating to the dispute that gave rise to the Application, without leaving the parties with an option to agree otherwise.

[81] Art. 6(3) of Appendix V, ICC Rules; Art. 6(4), ICDR Rules; Art. 9.9, LCIA Rules; Appendix II, Art. 8(2) of 2017 SCC Arbitration Rules; Schedule 1, Art. 8 SIAC Rules provides that an emergency arbitrator shall give "summary reasons" for his decision in writing.

an opportunity to present their case and were treated equally. In the words of Patricia Shaugnessy, these snap judgments that an emergency arbitrator is expected to make should indeed deliver justice, although this justice is dispensed "on the run" (Shaugnessy 2017, 329). Not only is procedural fairness one of the most important values and pillars of dispute resolution procedures, but it is also a ground for refusal of recognition and enforcement under both the New York Convention[82] and UNCITRAL Model Law.[83]

This is not an easy task, which is exactly why the role of emergency arbitrator is regarded as suited for more experienced arbitrators (even though there are not formal requirements in place that differ from the ones in regard to other arbitrators) (Bertrand, Taylor 2020, 150).[84] It is interesting to note that HKIAC holds a list – a panel – of emergency arbitrators, comprising experienced individuals who apparently satisfy the needs of the task.[85]

Finally, even though legitimate, important and necessary, due process concerns do not seem to provide a firm-standing argument against the application of the emergency arbitration provisions. They are outweighed by the advantages that this mechanism has for the parties in need. This is especially having in mind that, as demonstrated above, the institutional rules provide special guarantees of procedural fairness for the benefit of the parties involved in the emergency procedure. Legislators as well as national courts should not give into dismissing important innovations in international arbitration simply because of due process paranoia.[86] Moreover, the paranoia could easily become a 'self-fulfilling prophecy' (Ralevic 2020, 113), boomeranging straight into the arbitration terrain and resulting in emergency arbitrators not granting the interim relief fast enough because of the fear they are not

[82] Art. V(1)(b) New York Convention.

[83] Art. 17(1)(a)(i) UNCITRAL Model Law.

[84] *Ibid*.; A possibly problematic point could be whether emergency arbitration assignments are actually 'commercially' interesting to more experienced arbitrators, given the fees granted for this usually burdensome and sudden task are rather low. For example, costs of an emergency arbitrator proceedings at the ICC amount to $40,000. Furthermore, at the SCC the fee of the emergency arbitrator is EUR 12,000 while the SIAC differs between S$5,000 for overseas parties and S$5,400 for parties from Singapore.

[85] HKIAC Panel of Emergency Arbitrators is available at https://www.hkiac.org/arbitration/arbitrators/panel-emergency-arbitrators.

[86] Sanderson 2022.

being procedurally fair to the other party. This would be particularly detrimental to the emergency procedure due to its urgent and pressing, often 'now or never' nature.

7.2 Ex parte Decisions on Urgent Interim Relief

In the emergency arbitration procedure commenced under the Swiss Rules, the emergency arbitrator is allowed to grant urgent interim relief ex parte, i.e before communicating the request to both parties.[87] SIAC Rules are the one that come close, allowing emergency arbitrator to issue temporary orders for emergency relief pending submissions from the parties.[88]

Even though this position is a rallying point of much controversy, it was upheld in the latest revision of the Swiss Rules in 2021. This power is bestowed upon the arbitral tribunal when allowing interim relief and applies equally to the emergency arbitrator.[89] The request for interim measures must be communicated to the other party at the latest together with the preliminary order, which is when the other party is "immediately granted an opportunity to be heard".[90]

While it is not uncommon for national courts to grant interim measures on an ex parte basis, it is a highly controversial subject whether this is appropriate in the arbitration setting (Born 2021, 2696). On one side, ex parte decisions could be perceived as being truly catered to the idea of urgent relief, as sometimes a party could suffer grave damage if its counterpart becomes aware of the request for interim measure and, for example, rapidly destroys a critical piece of evidence. Moreover, unavailability of ex parte relief has been identified as a shortcoming, as the purpose for which the emergency relief is sought may be frustrated without "the element of surprise" (Bertrand, Taylor 2020, 149).[91] This is notably a problem when it comes to some forms of interim relief such as freezing orders (Clark, Hubbuck 2020). Also,

[87] Art. 29(3) 2021 Swiss Rules. For a definition of an ex parte decision, see van Houtte 2004, 85.

[88] Schedule 1.8 2016 SIAC Rules.

[89] Art. 43(8) 2021 Swiss Rules.

[90] Art. 29(3) 2021 Swiss Rules.

[91] These authors, for example, support the idea of ex parte emergency relief, in a "tightly circumscribed form", proposing the same provision to Hong Kong legislators, claiming that it would complement the already world-class interim relief regime that Hong Kong offers to arbitrating parties.

being able to issue an interim measure ex parte relieves the emergency arbitration procedure of further delays and makes it truly quick and urgent.[92] Regardless of these points, the 2006 Revisions of the UNCITRAL Model Law expressly permit ex parte provisional measures in limited circumstances.[93] However, some authors find that the absence of ex parte relief under numerous sets of arbitration rules may not be so problematic, practically speaking, as emergency procedures catch respondents by surprise in any way, leaving them little time to react due to tight deadlines (Sze Hui Low 2020, 110).

Emergency arbitrators' decisions rendered ex parte carry (or, in fact, increase) a risk of unenforcement, especially having in mind that refusing a party an opportunity to be heard represents a ground for refusal of recognition and enforcement under the New York Convention. Additionally, it is arguable how effective arbitration can be in imposing a coercive, urgent provisional measure right away.[94] Therefore, national courts might be the preferred venue when relief is sought ex parte (Hanessian, Dosman 2016, 223). Of course, when it comes to emergency relief, given that this option is rarely available in institutional rules, national courts do end up being the only option for parties in this situation.[95]

8. LOCAL PERSPECTIVE

Emergency arbitration is not known to any arbitral institutions or national legislations in the Western Balkans, including Serbia.

There are two permanent arbitral institutions in Serbia: Permanent Arbitration at the Chamber of Commerce and Industry of Serbia (Permanent Arbitration) and Belgrade Arbitration Center (BAC). As for the legal framework, arbitration matters are regulated by the Arbitration Act of 2006, which is based on the UNCITRAL Model Law with certain additions.[96]

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[92] *Ibid*.

[93] Art. 17 UNCITRAL Model Law.

[94] *Supra* n. 29.

[95] Hong Kong Court of First Instance, Top Gains Minerals Macao Commercial Offshore Ltd v. TL Res. Pte Ltd, HCMP1622/2015, Nov. 18 2015, https://vlex.hk/vid/top-gains-minerals-macao-862510752.

[96] For example, the number of arbitrators must be odd; the parties must appoint arbitrators within a certain time frame; an award may be set aside if based on a

Serbian Arbitration Act provides that both courts and tribunals (or sole arbitrators) can grant interim measures. This is an important novelty that was inspired by the original version of the UNCITRAL Model Law, as the previous regulations did not give such power to the arbitral tribunal (Stanivukovic 2022, 37). Article 31 states that an arbitral tribunal can impose "an interim measure that it considers necessary in respect of the subject matter of the dispute". Also, any party can request interim relief from court even before the commencement of the proceedings and even when the arbitration agreement concerns arbitration with the seat in another state.[97] This provision does not specify the form in which the tribunal decides on interim relief, nor if such decisions are enforceable before domestic courts.[98]

Interim relief is regulated by the rules of both arbitral institutions in Serbia. Both specify that arbitral tribunals can grant interim measures unless the parties have agreed otherwise. It is interesting that both sets of rules provide that arbitral tribunal can grant ex parte interim measures, although as an exception. Namely, according to the Rules of BAC, the opposing party should have an opportunity to respond to the request for interim measure before the decision is issued, except if the opposing party would "render the measure meaningless or significantly reduce its effect".[99] Further on, if an interim measure is issued ex parte, the tribunal should allow the opposing party to present its case "upon granting the measure".[100] The wording of the Rules of Permanent Arbitration is slightly different: ex parte decisions on interim relief are allowed if the requesting party "makes probable that it is necessary for the effect of the interim measure".[101] The tribunal should allow the opposing party to make a statement regarding the interim measure "as soon as possible by the nature of things".[102] This seems as a purely linguistic difference with essentially the same meaning; how-

false witness or expert testimony, counterfeit documents or criminal acts by arbitrators or parties (as established by a final and binding criminal court judgment). See Bezarevic Pajic, Lalatovic Djordjevic, Sumar, 2023.

97 Art. 15 Serbian Arbitration Act (SAA), *Official Gazette of the Republic of Serbia*, No. 46/2006.

98 *Supra* n. 74.

99 Art. 31.2 2014 BAC Rules.

100 *Ibid.*

101 Art. 37.3 Rules of the Permanent Arbitration, *Official Gazette of the Republic of Serbia*, No. 101/16.

102 *Ibid.*

ever, it could possibly be argued that the burden of proof is tougher on the requesting party under the Rules of Permanent Arbitration, as it is precisely prescribed that it should "make probable" that an ex parte decision is necessary for the effect of the interim measure. Of course, again, ex parte decisions do carry the extra risk of non-recognition and non-enforcement, given that the Serbian Arbitration Act in principle mirrors the New York Convention regarding these questions.[103]

In any case, Serbian legislation and the rules of arbitral institutions in Serbia do not envision the institute of emergency arbitration. Still, since the overall legislative framework was trend-oriented in the past 15 years, Serbia as a jurisdiction does not seem immature for the introduction of the emergency arbitration procedure in the near future. Besides, some legislation changes would be vastly useful not only for the emergency procedure but interim measures in general – for example, specifying the form in which the interim measure can be granted and explicitly stating that they are enforceable before courts as such or in general taking into account the 2006 amendments of the UNCITRAL Model Law that concern interim measures.

9. CONCLUSION

The institute of emergency arbitration is a creatively developed process aimed at abridging the arbitration-specific situation where a party's interest needs salvation and a judge is yet non-existent. Today, almost twenty years after its first introduction it is an important procedural instrument, a net that could save the whole process from possible decay and ultimate futileness. Without emergency arbitration, the inability of a party to obtain urgent relief when there is no court in place to grant it would have been considered a significant deficiency of the arbitral procedure.

Emergency arbitration is widely accepted, recognized and used by the parties; it is also still a distinctive feature of institutional rules that might make them more attractive to the parties. Numerous questions have and will arise, some even turning into a "chicken and egg" situation – who is the arbitrator, the emergency arbitrator or the arbitrator within the tribunal? Is the fact that a sole arbitrator appointed by

[103] Art. 66 SAA. Serbia is also party to the New York Convention since 1981.

the institution rendered an award overriding the arbitration agreement that calls upon a three-member tribunal? How costly is this? If a party applies for emergency relief before the institution, are the doors to the national courts slammed shut? Is it all worth it or should we just go ahead and wake up a judge?

However, as arbitration in general, the emergency arbitration too needs support to grow: while witnessing its ongoing development, the community will keep on recognizing the quirks and hurdles related to emergency arbitration and bring forward necessary safeguards.

Important task lies upon the arbitral institutions – to conduct this procedure while aiming to preserve the efficacy and integrity of the arbitral process; upon the courts – to not steer away from recognizing and enforcing the emergency measures; upon legislators – to introduce amendments and revisions necessary to avoid confusion and uncertainty; and, naturally, upon academics lies an ever-present task when faced with an idea: to pose questions, give answers and continuously challenge its nature, notion and practice.

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Nina Rašljanin*

POJAM I PRAKSA HITNE ARBITRAŽE

Abstrakt: Tema rada je pojam arbitraže za hitne slučajeve u teoriji i praksi, priroda, razvoj i proceduralne pojedinosti ovog instituta. Autor izlaže široku uporednu analizu različitih institucionalnih pravila o hitnim privremenim merama, praćenu diskusijom o statusu arbitara za hitne slučajeve i pitanjima vezanim za prava stranaka i mogućnost izvršenja odluka donetih u okviru ovog postupka. Najzad, autor sagledava i lokalnu perspektivu, analizirajući postojeća pravila o privremenim merama i razmatrajuću mogućnost uvođenja mehanizma arbitraže za hitne slučajeve u Srbiji.

Ključne reči: *arbitraža za hitne slučajeve, privremene mere, alternativno rešavanje sporova, hitne privremene mere*

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