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When Justice Delayed is Justice Denied: Advantages and Disadvantages of Emergency Arbitration in Comparison with Interim Relief

Abstract

Interim protection measures are essential for the proper functioning of dispute resolution processes. Without the existence of such measures, parties to a dispute resolution process – be it ordinary court proceedings or international arbitration – may suffer irreparable harm while waiting for the adoption of a final and binding decision settling their dispute. While international arbitration has many advantages over litigation in domestic courts, interim relief has been considered the Achilles' heel of the system because arbitral tribunals cannot order interim measures of protection before they are constituted. To fill this gap, arbitral institutions have adopted the emergency arbitration procedure. It allows parties who are unable to wait for the constitution of the arbitral tribunal to seek interim measures in proceedings that are independent of the merits. Even so, there are disadvantages to the emergency arbitration procedure in comparison to ordinary court-ordered interim relief. These stem from the peculiarity of international dispute resolution and the arbitral process. This paper sets out to examine the advantages and disadvantages of emergency arbitration as opposed to interim relief and offer potential solutions to the shortcomings of the former.

Keywords: international arbitration, interim relief, provisional relief, interim protection measures, emergency arbitrator, expedited procedures, arbitration rules

I. Introduction

Interim protection measures are essential for the proper functioning of dispute resolution processes. Without the existence of such measures, parties to a dispute resolution process – be it ordinary court proceedings or international arbitration – may suffer irreparable harm while waiting for the adoption of a final and binding decision settling their

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DOI: 10.56749/annales.elteajk.2020.lix.3.51

dispute. Delay in the dispute resolution process may result in, *inter alia*, loss of material evidence, continuous intellectual property infringement, dissipation of assets or loss of proprietary market value. Moreover, without interim measures, hostile respondents may engage more freely in guerrilla tactics to further delay and disrupt the dispute resolution process, thereby improving their tactical or commercial position. These concerns are especially present in international disputes, where parties may move their assets to jurisdictions where the possibility of enforcement against those assets is little to none. In some cases where time is of the essence, bereft of interim measures of protection, the dispute resolution process itself could be rendered moot.

Historically, ordinary courts had exclusive competence to order interim measures. This, however, gradually changed, and nowadays most jurisdictions afford the arbitrators the power to order interim measures of protection. At first glance, one would think that this places arbitral tribunals next to ordinary courts when it comes to the efficacy of interim measures of protection. In fact, arbitral tribunals cannot order interim measures of protection before they are constituted. This is a severe handicap for parties opting for arbitration as opposed to ordinary courts, because in most cases the parties seek interim measures at the outset of the proceedings. Moreover, the constitution of the tribunal may be severely delayed by the arbitrator selection and challenge process, thereby exacerbating the issue. To fill this gap, arbitral institutions have adopted the emergency arbitration procedure. It allows parties who are unable to wait for the constitution of the arbitral tribunal to seek interim measures in proceedings that are independent of the merits. Even so, there are disadvantages to the emergency arbitration procedure in comparison to ordinary court-ordered interim relief. These stem from the peculiarity of international dispute resolution and the arbitral process. This essay sets out to examine these and, at the end, to offer potential solutions to these conundrums.

To set the stage for the analysis, I will begin by introducing the domestic and international legislation surrounding interim measures of protection in the arbitral context. I will discuss why, despite its gradual development, it still falls short of expected results. In the second part, I will focus on emergency arbitration as opposed to ordinary court-ordered interim relief. I will present the advantages and disadvantages of these provisional measures. Finally, I will conclude by offering potential solutions to the deficiencies presented by promoting the adoption of the amendment of an existing international treaty and/or the amendment of national legislation.

II. Domestic and international standards on interim measures of protection in arbitration

1. International conventions

International conventions, in general, do not contain specific rules on the power of arbitrators to order measures of interim protection. Even so, a trend moving towards the explicit recognition of provisional measures in international arbitration can be traced. Before the 1960s, no international convention dealt with the issue of interim measures: neither the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards[1] nor the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[2] ("New York Convention") contains any reference to interim measures. Despite the New York Convention's silence on this matter, some commentators consider that the New York Convention should be read as precluding the Contracting States from restricting, via legislation, the power of the arbitrators to order interim measures of protection.[3]

The first convention to touch upon the issue was the 1961 European Convention on International Commercial Arbitration, which expressly permits parties to an arbitration to seek interim relief from ordinary courts and stipulates that such conduct will not waive the parties' right to arbitrate.[4] The European Convention, however, still did not contain any explicit reference to the power of the arbitral tribunal to order interim measures. In actuality, the ICSID Convention (1966) was the first to refer explicitly to the arbitrator's power to order interim measures.[5]

2. Domestic legislation

Contrary to the paucity of international regulation, one would be hard-pressed to find any domestic legal system that does not regulate interim measures in the arbitral context. States naturally wish to regulate and safeguard this subject-matter, as the power to order interim measures goes to the core of a state's sovereign power. It is therefore

[1] Convention on the Execution of Foreign Arbitral Awards, Geneva, 26 September 1927.
[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New York Convention), 330 U.N.T.S. 38 (1959).
[3] C. Boog, The Laws Governing Interim Measures in International Arbitration, in F. Ferrari and S. Kröll (eds), *Conflict of Laws in International Arbitration,* (Jurisnet, 2010) 409., 419.
[4] The European Convention on International Commercial Arbitration of 1961 done at Geneva, April 21, 1961, Article VI, para 49.
[5] Convention on the Settlement of Investment Disputes between States and Nationals of Other States; see also Gary Born, *International Commercial Arbitration,* (Wolters Kluwer, 3th ed., 2021) 2608.

not surprising that, in the early stages of development, domestic legislation took interim measures out of the arbitral tribunals' toolbox.[6]

Some authors claim that this restriction was embedded in the idea that interim measures were akin to coercive measures, which traditionally fell within the exclusive jurisdiction of national courts.[7] This viewpoint was, however, unsustainable because there is no reason to differentiate between the power of the arbitral tribunal to grant final relief by way of a binding award and that of provisional relief, both of which would, in any event, be enforced with the aid of domestic courts.[8] In turn, this practice has been relinquished and now there is almost universal acceptance of interim relief in arbitration, which mimics the general trend towards acceptance and recognition of international arbitration as a viable solution of international dispute resolution.

It is also important to note the impact of the UNCITRAL model law.[9] Article 17 of its 1985 version provided that "[u]nless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute".[10] This was further extended in the 2006 revision, which omitted the phrase "necessary in respect of the subject-matter of the dispute", thereby curtailing any limitation on arbitral tribunals that was imposed by the previous wording.[11] Furthermore, the wording "unless otherwise agreed", which appears in both the 1985 and the 2006 revised version, confirms the drafter's approach to require an express agreement only to restrict the arbitral tribunal's power to order interim measures but not for granting them.[12]

Nowadays, most developed jurisdictions – except for a few outliers[13] – have adopted the approach heralded by the UNCITRAL Model Law. As such, the initial legislative hurdle of the non-acceptance of arbitral interim relief seems to be resolved;

[6] Born, *International Commercial Arbitration,* 2610. For specific examples see German ZPO, §1036 (in force prior to 1998 adoption of UNCITRAL Model Law); Austrian ZPO, §593 (in force prior to adoption of the UNCITRAL Model Law) ("[the arbitrators] may not use enforcement measures or set fines against the parties or other persons"); Greek Code of Civil Procedure, Art. 685 (in force prior to 1999).

[7] Born, *International Commercial Arbitration,* 2610.; J. Lew, Commentary on Interim and Conservatory Measures in ICC Arbitration Cases, (2000) 11 (1) *ICC Ct. Bull.,* 23., 24.

[8] Born, *International Commercial Arbitration,* 2611.

[9] United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006 (Vienna: United Nations, 2008) [hereinafter: UNCITRAL Model Law], https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration (Last accessed: 31 December 2020).

[10] UNCITRAL Model Law, Art. 17. See also H. Holtzmann and J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary,* (Kluwer and TMC Asser, Deventer and The Hauge, 1989) 530–533.

[11] Born, *International Commercial Arbitration,* 2612.

[12] UNCITRAL Model Law on International Commercial Arbitration: A Commentary 314, 321 (2020).

[13] See Chinese Arbitration Law, Art. 68; Italian Code of Civil Procedure, Art. 818; Thai Arbitration Act, §16.

however, the effectiveness of such implementation is still questionable. In the next section, I will look at the deficiencies of interim relief in the arbitral context and how emergency arbitration attempts to resolve those issues.

III. Issues with arbitral interim relief

Despite the widespread acceptance of interim relief in arbitration, there are glaring limitations of the system in comparison with ordinary court-ordered measures. The first issue is that arbitral tribunals cannot order interim measures of relief with a binding effect on third parties.[14] This is because arbitration is a creature of consent created by a binding agreement between the parties to refer their case to arbitration; however, the scope of an arbitration agreement does not extend to third parties. In turn, it is generally accepted that, for example, arbitral tribunals cannot order attachment of property held by third parties.[15]

The second issue goes to the principle of equality of arms in international arbitration, which is of utmost importance to safeguard due process.[16] This principle, however, limits the power of arbitral tribunals to order interim measures on an *ex parte* basis, i.e. without hearing the party against which the interim measure is requested. One does not need to look further than Continental Europe. There, the right to a fair trial encompassing equality of arms – as enshrined in Article 6 of the European Convention on Human Rights ("ECHR") – forms part of European public policy at a normative level.[17] Therefore, even if the direct applicability of Article 6 of the ECHR on arbitration is debatable, arbitral tribunals must nevertheless be cognizant of the possibility of an annulment based on a violation of public policy. It is not surprising therefore that some arbitral rules explicitly exclude the possibility of *ex parte* interim measures.[18]

Third, there is a lack of uniformity concerning the standards for granting interim measures in international arbitration. The issue here boils down to the question of which law governs the standards for the tribunals' decision to accept or reject a request for an interim measure. Contemporary literature proposes three solutions: (1) the *lex arbitri;* (2) the

[14] M. Savola, Interim Measures and Emergency Arbitrator Proceedings, (2016) 23 *Croat. Arbit. Yearb.,* 74.
[15] J-F. Poudret and S. Besson, *Comparative Law of International Arbitration,* (Thomson Reuters, 2nd ed., 2007) 522–523.
[16] H. van Houtte, Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration, (2004) 20 (1) *Arbitration International,* 90–91. https://doi.org/10.1093/arbitration/20.1.85
[17] K. P. Papanikolaou, Arbitration Under the Fair Trial Safeguards of Art. 6 §1 ECHR (February 5, 2020), in *Essays in Honour of Prof. C. Calavros,* (forthcoming), https://ssrn.com/abstract=3567706 (Last accessed: 31 December 2020) 7–8.
[18] See 2006 ICSID Rules, Rule 39(4) ("The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations").

law governing the parties' underlying contract *(lex causae);* or (3) so-called international standards.[19] As there is no consensus on these issues, there is a high level of uncertainty for the parties when gauging the outcome of their request for an interim measure.[20]

The examples of deficiencies of interim measures in the arbitral context show the limitations of the current system. Still, when complemented with the ordinary courts' aid, interim measures are valuable and effective tools for parties to an arbitration. There is one limitation, however, which is absolute: an arbitral tribunal cannot order an interim measure prior to it being constituted. In such an instance, should a party refrain from seeking an interim measure directly from ordinary courts or should the ordinary courts be prohibited from ordering interim measures, there seems to be no further recourse. Emergency arbitration was created to resolve this specific issue.

IV. Emergency arbitration

Emergency arbitration is a procedure to obtain urgent interim relief and is available to the parties between filing an arbitration request and the constitution of the tribunal. It was developed to minimise the parties' reliance on ordinary court proceedings.

The first institution to adopt the emergency arbitration mechanism was the International Centre of Dispute Resolution (ICDR) of the American Arbitration Association (AAA). In 2006, it introduced the procedure under Article 37 of the ICDR Rules as default, so parties may only opt out of it. After 2006, emergency arbitration was quickly picked up by almost all institutions.[21] Since its inauguration, the procedure is gaining increasing traction: as of June 2016, the ICDR registered 67 emergency arbitrator requests, SIAC 50, ICC 34, SCC 23, and HKIAC 6 requests.[22] According to the more recent 2019 ICC survey, a total of 95 requests for emergency arbitration have been filed since its 2012 introduction to the ICC rules.[23]

[19] Born, *International Commercial Arbitration,* 2458–2459., 2463.
[20] Born, *International Commercial Arbitration,* 2464–2465.
[21] R. Alnaber, Emergency Arbitration: Mere Innovation or Vast Improvement, (2019) 35 (4) *Arbitration International,* 445. https://doi.org/10.1093/arbint/aiz021
[22] P. Shaughnessy, Emergency Arbitration: Justice on the Run, in P. Wahlgren (ed.), *Arbitration, published under the auspices of the Stockholm University Law Faculty,* (Stockholm Institute for Scandinavian Law, Stockholm, 2017) 324.
[23] ICC, *ICC Task Force on Emergency Arbitrator Proceedings Releases Findings* (ICC, 15 April 2019), https://www.whitecase.com/publications/alert/icc-task-force-emergency-arbitrator-proceedings-releases-findings (Last accessed: 31 December 2020).

1. Advantages of emergency arbitration

When comparing emergency arbitration to its main competitor, ordinary court-ordered interim relief, there are clear advantages in favour of the former and disadvantages to the latter. First, by turning to ordinary courts for interim measures, one of the main selling points of international arbitration, i.e. to circumvent "hostile" local fora, could be diminished. Second, the party requesting the interim measure could be hindered before national courts by language barriers. Moreover, national judges could lack the necessary legal and technical expertise required for the full comprehension of the dispute, thereby running the risk of misinterpretation at the interim measure stage. And finally, confidentiality could also be an issue before ordinary courts. On the other hand, with emergency arbitration, the parties gain speed, privacy, flexibility, and neutrality. And more often than not, the parties comply with the emergency arbitrator's decision without the intervention of ordinary courts.[24]

2. Disadvantages of emergency arbitration

Just by looking at this list of the drawbacks of ordinary courts, one would believe that emergency arbitration is a fault-free procedural solution that combines all the advantages of international arbitration without any hindrance present in ordinary court proceedings. In reality, despite its relative popularity, emergency arbitration is not flawless. Due to its relative novelty as a procedure, questions of interpretation linger around emergency arbitration.

First, similarly to the issue raised concerning interim measures in the arbitral context in general (see section III above), the standard for granting the requested interim measure via emergency arbitration is not clear. Therefore, both the parties and the emergency arbitrators are faced with a level of uncertainty akin to that of interim measures. Moreover, the restrictions on ordering interim measures against third parties or on an *ex parte* basis in the arbitral context apply to emergency arbitration as well (see section II above). Emergency arbitration offers no solution to those issues.

Secondly, there is a paucity of domestic legislation that covers emergency arbitration; therefore, its status, as to whether it forms an organic part of the underlying arbitration and in turn whether the same rules of domestic legislation covering arbitration apply to it, remains unclear.

Finally, there is the question of enforceability of the measures ordered by the emergency arbitration – a problem that ties into the previous two issues raised. Since there is no conclusive answer in most jurisdictions as to whether emergency arbitration

[24] Shaughnessy, Emergency Arbitration: Justice on the Run, 324.

is a standalone procedure or part of the arbitration, there is significant uncertainty regarding both the nature of the emergency arbitrator and of the procedure itself, which inevitably affects enforcement. Except for some jurisdictions such as Hong Kong and Singapore, where national legislation explicitly allows for the enforcement of orders rendered by emergency arbitrators, most national laws are completely silent on the matter.[25] The uncertainty caused by this *lacuna* in domestic legislation is a major concern for parties: 79% of respondents to the 2015 Queen Mary survey identified the uncertainty of the enforceability of emergency arbitration decisions as an influencing factor when choosing between options for requesting interim measures.[26]

In sum, the uncertainties mentioned above can be categorised as questions on (i) the nature of the decision; (ii) the nature of the emergency arbitrator; and (iii) the finality of the decision.

(i) The nature of the emergency arbitrators' decisions.

As to the nature of the decision, under some arbitration rules, the emergency arbitrator may render its decision in the form of an order or an award.[27] The term "award" generally refers to a decision on a substantive issue that carries finality with it, while an order is procedural in nature.[28] Therefore, arbitral institutions themselves seemingly could not come to a conclusion as to the legal nature of a decision rendered by an emergency arbitrator. Some institutions even side-stepped the issue by simply referring to the arbitrator's "emergency decision on interim measures".[29] The importance of this distinction can be viewed from the perspective of the New York Convention, which sheds further light on it. Article 1 of the New York Convention, in its pertinent part, reads that "[the New York Convention] shall apply to the recognition and enforcement of arbitral awards [...]". Textual interpretation of this passage can easily lead to the conclusion that an order rendered by an emergency arbitrator falls outside the scope of the New York Convention. In turn, a decision in the form of an order would not be enforceable under it.

(ii) The nature of the emergency arbitrator.

As to the nature of the emergency arbitrator, in essence, the question is whether an emergency arbitrator is an "arbitrator" within the same sense as members of the arbitral

[25] Sections 22A and 22B of Part 3A of Hong Kong's Arbitration Ordinance; Section 12(6) of the Singapore International Arbitration Act.

[26] Queen Mary University of London and White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015) https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf (Last accessed: 31 December 2020) 29.

[27] ICDR International Arbitration Rules (2014) art 6.4; CPR Rules for Administered Arbitration of International Disputes (2014) art 14.10; LCIA Arbitration Rules (2014) art 9B.8; SIAC Arbitration Rules (2016) sch 1, art 8; Swiss Rules of International Arbitration (2012) art 43(8), art 26(2).

[28] V. Clark, Decisions, decisions: order or award?, *Arbitration Blog,* 07.11.2019., http://arbitrationblog.practicallaw.com/decisions-decisions-order-or-award/ (Last accessed: 31 December 2020).

[29] See as an example: SCC Rules for Expedited Arbitrations 2017, Article 8.

tribunal. It can be argued that while the latter decides issues of substance with finality, the former does not decide upon the merits of the case and renders temporary decisions and is therefore fundamentally different. In jurisdictions with a strict interpretation of the term "arbitrator," challenges can be made to the decision of the emergency arbitrator based on this distinction.[30]

(iii) Finality of the decision.

Finally, the enforceability of a decision rendered by the emergency arbitrator may also be challenged, based on the argument that it lacks finality. This is because such decisions are temporary by their very nature, therefore they lack the finality required for enforcement under some domestic legislation. This situation is also not resolved by institutional rules classifying the decision of the emergency arbitrator as an award, since the normative content of what constitutes an award will ultimately be decided by national legislation and not by the institutional rules. For example, the Swiss Federal Tribunal has held inadmissible a request to set aside an award for interim measure rendered by an arbitral tribunal for lack of finality.[31] This reasoning naturally extends even more to emergency arbitrators' decisions, since those are not binding on the arbitral tribunal and will quickly be reviewed once the tribunal is constituted. Some argue that enforcement is a non-issue in practice because parties generally comply with the decisions of emergency arbitrators.[32] Even so, in cases where there are reluctant parties whose non-compliance with the interim measure may jeopardise the arbitration, the initiating parties are left with no other choice but to require assistance from ordinary state courts. In those cases, the challenge to the enforceability of the interim measure may prove to be detrimental to a party's case.

To sum up, emergency arbitration – similarly to interim measures of the arbitral tribunal – has its advantages and disadvantages when compared to interim relief by ordinary courts. The emergency arbitration procedure, when used properly, may indeed prove to be an adequate replacement for ordinary court proceedings. Even so, one must be mindful of the possibility that hostile parties may challenge the decision of the emergency arbitrator and thereby derail the arbitration. The question remains, therefore, how to remedy these deficiencies.

[30] R. Brown, Challenging the Enforcement of Emergency Arbitrator Decisions, (2020) 8 (3) *Kuwait International Law School Journal,* 67. https://doi.org/10.54032/2203-008-031-017

[31] Judgment of 13 April 2010, DFT 136 III 200.

[32] Savola, Interim Measures and Emergency Arbitrator Proceedings, 95.

V. Conclusions and the way forward

Although the overall scenario is quite promising for emergency arbitration, the following solutions could alleviate the deficiencies explained above and could settle any doubts as to the efficacy of the procedure. The first possibility is the amendment of the New York Convention so that it explicitly includes a reference to the recognition and enforcement of interim measures and, especially, to emergency arbitration. Hypothetically this could be the fastest way to resolve the issues surrounding enforcement of interim measures; in practice this seems unlikely, since amending the New York Convention would require all contracting parties to agree without reservations. In this day and age, this is well-nigh impossible, therefore we may rule out this option.

The more likely solution would be that pro-arbitration states amend their national laws to be similar to those of Hong Kong or Singapore, which recognise emergency arbitration decisions as enforceable. To serve as a final solution to the problems highlighted above, any such amendment to domestic legislation should include a definition of "arbitrator" or "arbitral tribunal" that also covers emergency arbitrators, similarly to the wording adopted by New Zealand in its Arbitration Act[33] to quash any challenge linked to the interpretation on the competences of an arbitrator. Moreover, national laws should recognise the enforceability of emergency arbitration, irrespective of whether it was handed down as an order or an award and irrespective of the seat of arbitration. As emergency arbitration is coming of age, we will see more crystallised case law on these issues, which could potentially gear up a wave of domestic legislation in pro-arbitration states.

Be it as it may, the emergency arbitration procedure is most certainly here to stay. One hopes that, with more and more national jurisdictions accepting the procedure as equivalent to court-ordered interim measures, the remaining hurdles to its efficacy will be removed and international arbitration can become even more of a self-contained regime.

[33] New Zealand Arbitration Act (1999) s 2(1).