SHOULD I STAY OR SHOULD I GO: THE EVOLUTION OF EMERGENCY ARBITRATION PROCEDURE WITHIN PRIVATE INTERNATIONAL LAW

Katarina Resar Krasulova[†]

ABSTRACT

The emergency arbitration procedure is widely and ever increasingly used by parties around the world. Because of that, the main question in the past decade has shifted from whether emergency arbitration will endure, to how it is that emergency proceedings became a fixture of international arbitration despite a body of academic literature that doubted its viability. Answering this question, this Article shows that the international arbitral rules have evolved in response to parties' demands and concerns, and this evolution contributed to the procedure's popularity. The Article then discusses how emergency arbitrators, legislators, and national courts devised solutions to problems relating to emergency arbitration systems identified by academics and practitioners concerning: (1) the development and harmonization of the legal standard that applies in emergency proceedings; and (2) the enforceability of emergency awards and orders. These changes and innovations are a direct response to the question of what made emergency arbitration an enduring, if imperfect, mechanism in international arbitration. International arbitration is a creature of contract, embedded in a global system of sovereigns with contesting demands, that must constantly evolve to meet the needs of parties to obtain their ex ante buy-in and the legal requirements of sovereign jurisdiction that validate their existence ex post. The emergency arbitration procedure adjusted to these competing demands and was therefore able to establish itself within private international law.

[†] Associate, Covington & Burling LLP; Harvard Law School, J.D. 2022.

TABLE OF CONTENTS

INTRODUCTION

International arbitration has evolved rapidly over the past three decades, putting pressure on the development of interim measures with it as the number of matters in front of arbitral tribunals needing urgent resolution grew.[1] Interim relief, or measures that aim to safeguard rights of parties to a dispute pending the resolution of a case, are common to and well-known in all legal systems.[2] It was unsurprising then to see claimants, accustomed to the availability of interim measures in their domestic systems, ask for like protective measures in front of international arbitral tribunals.[3] Practitioners and academics were at first skeptical and even distrustful of interim measures in arbitrations. However, as the international practice fueled by consumer demand for instant protective measures grew, the arbitral community slowly began to abandon its hostility towards international arbitral tribunals generally, and the ability of such tribunals to administer interim measures specifically.[4]

Emergency arbitral awards, a type of interim measure, were greeted with similar skepticism in the arbitral community as the interim measures once were. But almost fifteen years since the first arbitral center introduced the first emergency arbitration procedure in

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1 *See, e.g.*, *2018 International Arbitration Survey: The Evolution of International Arbitration*, WHITE & CASE (Aug. 31, 2018), https://www.whitecase.com/insight-our-thinking/2018-international-arbitration-survey-evolution-international-arbitration-0 [https://perma.cc/6CFY-HCR2] (Ninety-seven percent respondents "showed a clear preference for arbitration as their preferred method of resolving cross-border disputes."). The terms "interim measures," "interim relief," "provisional measures," or "conservatory measures" are used interchangeably to denote relief awarded by tribunals, or courts, to protect parties' rights pending the resolution of a case. The shorthand "emergency arbitration" is used to describe emergency arbitration proceedings under major international arbitral rules introduced in Emanuel Gaillard, *Interim and Emergency Measures of Protection*, 4 BCDR INT'L ARB. REV. 297, 299 (2017); s*ee also* GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 633-35 (2d ed. 2015).

2 *See* ALI YEŞILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 28-30 (2005).

3 *See* Marianne Roth, *Interim Measures*, 2 J. DISP. RESOL. 425 (2012) ("Traditionally, requests for interim relief have been a construct of courts. However, arbitrators are increasingly being asked to make such rulings themselves."); *see also* Marc J. Goldstein, *A Glance into History for the Emergency Arbitrator*, 40 FORDHAM J. INT'L L. 779, 787 (2017) (This source notes that even though early tribunals followed principles developed in international cases to decide whether requested provisional relief was warranted, "[a] decent respect for the legal traditions of the investor's home State and the domestic law of the respondent State might have called for some infusion of such principles into the proceedings.").

4 *See* Gaillard, *supra* note 1, at 299; s*ee also* BORN, *supra* note 1, at 633-35.

2006, the emergency arbitrator mechanism has now been adopted by all global and countless regional arbitral centers.[5] The procedure brought a meaningful and needed innovation. The availability of the emergency arbitration relief filled the gap between the commencement of an arbitral dispute and the establishment of a tribunal—a period that is key to preventing assets or people essential to a successful resolution of the arbitral dispute from vanishing.[6] But even the best idea and legal innovations sometimes fail to take hold in practice, and so we must ask what features of the practice to become an integrated feature of international arbitral systems.

The emergency arbitration procedure is a significant, even radical, innovation. The procedure has unique characteristics and often has case-altering consequences. Emergency arbitrators issue decisions with rapid speed: an arbitrator can be appointed within twenty-four hours and render a decision in as little as one week's time.[7] In addition

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5 The International Centre for Dispute Resolution (ICDR) was the first arbitral institution to adopt emergency arbitrator proceedings in 2006. Some of the arbitral centers include: the Stockholm Chamber of Commerce (SCC) and the Singapore International Arbitration Center (SIAC) in 2010; the Australian Center for International Arbitration Center (ACICA) in 2011; the International Chamber of Commerce (ICC) and the Swiss Chambers Arbitration Institution (SCAI) in 2012; the American Arbitration Association (AAA) and the Hong Kong International Institute for Conflict Prevention & Resolution (HKIAC) in 2013; the London Court of International Arbitration (LCIA) and the Japan Commercial Arbitration Association (JCAA) in 2014; the China International Economic and Trade Arbitration Commission (CIETAC) in 2015; the Korean Commercial Arbitration Board (KCAB) in 2016; and the Arbitrators & Mediators Institute of New Zealand (AMINZ) in 2017. *See generally* Alexandr Svetlicinii, *Emergency Arbitration in the Investor-State Dispute Settlement Cases: Challenges and Perspectives for Arbitration Institutions*, 8 KLRI J.L. & LEGIS. 1, 3-4 (2018); William G. Bassler, *The Enforceability of Emergency Awards in the United States: Or When Interim Means Final*, 32 ARB. INT'L 559-60, n.1 (2016).

6 For example, the ICSID arbitration center reports that once a tribunal is constituted, it takes an average of 258 days (around 8.5 months) to constitute a full arbitral tribunal. *Proposal for Amendment of the ICSID Rules – Working Paper*, 3 INT'L CTR. FOR SETTLEMENT OF INV. DISPS. 1, 902 (Aug. 2, 2018), https://icsid.worldbank.org/sites/default/files/publications/WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf [https://perma.cc/GT4Y-GPXD]. If the parties are limited to wait out this long period, "the dispute would surely be academic (i.e., the damage done) by the time an arbitral tribunal was constituted, received evidence, and completed its deliberations." Jan Paulsson, *A Better Mousetrap: 1990 ICC Rules for Prearbitral Referee Procedure*, 18 INT'L BUS. L. 214, 215 (1990).

7 The Stockholm Chamber of Commerce reports that in 2019 the average time for the appointment of an emergency arbitrator is twenty-four hours and the arbitrator renders a decision within 6.25 days. For comparison, only 27% of cases decided by an arbitral tribunal resolve within the prescribed 6 months. Most parties ask for an extension which leads to the tribunal rendering decisions within six to

to the speed of the process and expertise of the appointed arbitrators, emergency arbitration minimizes the need for parties to revert to local courts, which is often not known to the parties at the early stages of arbitration.[8]

The sizes and consequences of emergency awards and orders are also significant—they often involve hundreds of millions at stake and the most urgent matters.[9] For example, in a pharmaceutical commercial dispute under the International Centre for Dispute Resolution ("ICDR") rules, an emergency arbitrator granted an injunction to a party, allowing the party to enter a facility and dismantle medical equipment to prevent its further use.[10] In another emergency investment treaty arbitration under the Stockholm Chamber of Commerce ("SCC") rules, an arbitrator granted a foreign claimant-investor imprisoned in Mongolia access to counsel.[11] The option to have a fast and expert resolution of like urgent situations appealed to arbitral parties,[12] which led to a steady increase in the number of registered and decided emergency arbitration cases in the past decade.[13]

Despite the steady and growing number of emergency arbitrations each year, academic debates continue to surround

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twelve months in 50% of cases and twelve to eighteen months in 15% of cases. STOCKHOLM CHAMBER OF COMMERCE (SCC), SCC STATISTICS 2019 (2019), https://sccarbitrationinstitute.se/sites/default/files/2022-11/statistics-2019.pdf [https://perma.cc/J4EE-99LM].

8 *See* Rania Alnaber, *Emergency Arbitration: Mere Innovation or Vast Improvement*, 35 ARB. INT'L 441, 444 (2019) (discussing potential drawbacks of resorting to local courts, which include partiality, lack of expertise, or costs).

9 The latest ICC Commission Report states that the average value attached to an Emergency Arbitration Order or Award was $190 million, with the lowest awarded amount of $250,000 and the highest of $20 billion. *See* COMM'N ON ARB. & ADR, ICC COMMISSION REPORT, EMERGENCY ARBITRATOR PROCEEDINGS 37 (2019), https://iccwbo.org/content/uploads/sites/3/2019/03/icc-arbitration-adr-commission-report-on-emergency-arbitrator-proceedings.pdf [https://perma.cc/2BUN-VRL7] [hereinafter ICC EA REPORT 2019].

10 Rocky Mountain Biologicals, Inc. v. Microbix Biosystems, Inc., 986 F. Supp. 2d 1187, 1195 (D. Mont. 2013).

11 Mohammed Munshi v. Mongolia, Arbitration, SCC Case No. EA2018/007, IIC 1416 (2018), Award on Emergency Measures, ¶ 63 (Feb. 5, 2018).

12 An overwhelming majority of respondents in the 2015 White & Case arbitral survey reported that they favored the inclusion of emergency arbitrator provisions in institutional rules. WHITE & CASE, 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION 29 (2015), https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf [https://perma.cc/2LKZ-9PMH] [hereinafter 2015 INTERNATIONAL ARBITRATION SURVEY].

13 *See infra* Part I.C.

emergency arbitration's ability to provide a meaningful and certain form of relief to parties. Academics and commentators have in the past focused on two concerns: (1) uniformity of the legal standard applying to emergency arbitral relief; and (2) the enforceability of emergency awards and orders. These debates sowed doubts amongst parties about the procedure's efficiency.[14] This Article proposes that in the face of academic debates and uncertainties posed by the demands of different legal regimes, emergency arbitration did not react statically, but evolved through a combination of institutional reform, national legislation, and judicial intervention. The developments explain why, unlike some of its predecessors, established themselves permanently within the array of interim relief offered by international arbitral tribunals.[15]

To this end, Part I examines the first necessary step to make measures of international arbitration lasting and preferred by parties: institutional reform and institutional responsiveness. This Part shows how through a process of continuous experimentation and with the aid of expert and user feedback, the arbitral centers achieved a significant harmonization in many facets of emergency arbitration, such as basic application requirements, speed of the appointment of arbitrators, the ability of parties to challenge the appointments, and parallel access to national courts. This degree of harmonization helped to create a perception amongst parties that emergency arbitration is a generally available mechanism, rather than a procedure specific to a given set of rules. This Part also shows that differences still exist in several areas across the rules, for example with the provisions that aid enforceability. It argues, however, that these differences are an important part of the process of experimentation and that allows arbitral regimes to respond to obstacles and develop solutions best suited to parties' needs.

Part II addresses the evolution of the legal standard applicable to emergency measures. This Part shows that even without a codification in the arbitral rules, the practice coalesced around a standard that resembles an interim measures standard but provides enough

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14 12Even though 93% of respondents to the White & Case survey expressed their support for the availability of emergency arbitration proceedings, only 36% of respondents deemed arbitration highly effective while 30% found it "neutral[ly]" effective and 34% found it not effective. *See* 2015 INTERNATIONAL ARBITRATION SURVEY, *supra* note 12, at 27.

15 *See infra* notes 31-34 and the accompanying text for further details on the birth and early demise of the Pre-arbitral Referee Proceedings—the predecessor of emergency arbitration.

flexibility for arbitrators to weigh the urgency and factual circumstances specific to each emergency arbitration case. While differences continue to exist amongst different arbitrators applying the standard, these differences do not exceed that normally associated with judges applying legal standards to different sets of facts.

Part III then highlights how arbitral tribunals, national legislation, and national courts addressed problems associated with enforceability. It discusses theoretical obstacles to enforceability and offers a case study of four countries: Singapore, the United States, France, and India, which each adopted different responses in aid of, or instead of, enforcement of arbitral awards.

To assess the institutional and legal developments and the legislative and judicial responses outlined above, this Article critically evaluates relevant arbitral rules and national legislation, recent arbitral and national case law, and academic commentary. This Article focuses on developments in commercial arbitration, which constitute the majority of international arbitrations and emergency proceedings. Yet, investor-state arbitration case law is referenced in this Article because investor-state caselaw is often more accessible. This Article recognizes that the investor-state arbitral regime faces a particular set of demands and constraints associated with the presence of a party state. It posits, however, that these differences are not outcome-determinative for the development and durability of the emergency procedure in private international law. Because commercial arbitration dominates international arbitral proceedings, the developments and practices gathered will likely inform and encourage developments in investor-state arbitration as well.

I. PART I. THE EVOLUTION OF EMERGENCY ARBITRAL RULES

A. *Interim Measures in International Arbitration*

Interim measures come in many forms and shapes, but they always have significant consequences, often determining the "efficacy of the final award."[16] Indeed, interim measures as quintessential to the success of any adjudication is evidenced by its long history: some of the Roman law interdicts *unde vi* and *uti possidetis*—civil law

16 Dana R. Bucy, *How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration Under the Amended UNCITRAL Model Law*, 25 AM. U. INT'L L. REV. 580, 584 (2010).

remedies—protected property on a provision basis.[17] Later, in medieval times in England, the "possessory assizes" inspired by the Roman interdicts were used to mitigate delays between the issuance of a writ and the trial.[18] Nowadays, both common law and civil law countries use provisional—also known as interim—measures to protect property or status quo pending trial.[19]

Despite their long history and varied form, all interim measures share unifying characteristics in their temporary nature, urgent character, and associated risk of irreparable harm, and they are unified in their goal to protect the rights of the parties in aid of an ongoing main dispute.[20] The International Court of Justice characterized that interim measures' main purposes are "to preserve the respective rights of the parties pending the decision of the Court" and to ensure that "irreparable prejudice should not be caused to rights which are subject of dispute in judicial proceedings."[21] Under this definition, interim measures can be broadly categorized as mechanisms aiming to: (1) avoid or minimize loss, damage, or prejudice; and (2) facilitate later enforcement or award.[22]

The first category can be likened to a judicial injunction because it requires parties to continue or abstain from performance to preserve the status quo and avoid frustrating the resolution of the final dispute.[23] Types of interim measures in this category include measures to preserve evidence but also orders to continue performing a contract

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17 *See* JEROME B. ELKIND, INTERIM PROTECTION: A FUNCTIONAL APPROACH 30-31 (1981).

18 *See* YEŞILIRMAK, *supra* note 2, at 51.

19 *See* ELKIND, *supra* note 17, at 25-30.

20 *See* Bucy, *supra* note 16, at 583-84. *See also* YEŞILIRMAK, *supra* note 2, at 30-34 (discussing eight common characteristics of interim measures).

21 Order of Provisional Measures of 13 September 1993, in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia), Provisional Measures, 1993 I.C.J. Rep. 91 ¶ 35 (1993).

22 *See* Bucy, *supra* note 16, at 586. Variation to the categorization exists. For example, the amended Article 17 of the UNCITRAL Model Law authorizes a tribunal to award interim measures that "(*a*) [m]aintain or restore the status quo pending determination of the dispute; (*b*) [t]ake action that would prevent, or refrain from taking action that is likely to cause imminent harm or prejudice to the arbitral process; (*c*) [p]rovide means of preserving assets out of which a subsequent award may be satisfied; or (*d*) preserve evidence that may be relevant to the resolution of the dispute." UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006), Ch. IV A., § 1, Art. 17(2)(a)-(d).

23 Bucy, *supra* note 16, at 586.

for the duration of the arbitral proceedings or orders to refrain from taking certain actions.[24]

The second category aids eventual enforceability by ensuring that key assets related to the dispute do not dissipate. Courts, too, use like measures to assure that they can provide meaningful relief. Arbitral examples include freezing orders or attachments that prevent moving assets from the jurisdiction, deposition of movable property, or an order to provide security in the amount of arbitration costs or the amount claimed by the opposing party.[25]

Traditionally, parties had to resort to courts to request interim measures, but because courts were often not the preferred choice for parties for a host of reasons—be it that the national courts were partial toward foreign parties or not available at all—parties started to turn to arbitrators.[26] More than a hundred years since interim measures were introduced in commercial arbitration, all major arbitral institutions now uniformly provide that the arbitral panel has the authority to issue interim measures necessary for the protection or conservation of property. The states, leaving behind their initial hostility and suspicion, gradually "began to view the courts' role as supportive of arbitration."[27] Finally, countries almost universally abandoned the legislative prohibitions that disallowed arbitrators to grant interim relief.[28]

In many ways, emergency arbitration tracks the goals and development of interim measures in international arbitration. As was the case with interim measures, academics and practitioners at first

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24 *See* YEŞILIRMAK, *supra* note 2, at 38.

25 *Id.* at 36-38.

26 *See* Roth, *supra* note 3, at 425-26. *See also id.* at 52 (explaining that the concept of interim protection of rights was introduced into international commercial arbitration mainly for the "satisfaction of commercial and business needs").

27 Junmin Zhang, *The Harmonisation of Interim Measures Granted by the Emergency Arbitrator in the European Union*, *in* INTERNATIONAL DISPUTE RESOLUTION, SELECTED ISSUES IN INTERNATIONAL LITIGATION & ARBITRATION 90 (Vesna Lazić & Steven Stuij eds., 2018), *quoting* Dana Renée Bucy, *How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration Under the Amended UNCITRAL Model Law*, 25 AM. U. INT'L L. REV. 579, 588 (2010). *But see* Jason Fry, *The Emergency Arbitrator - Flawed Fashion or Sensible Solution*, 7 DISP. RESOL. INT'L 179, 180 (2013) (stating that "[n]otwithstanding subsequent amendments to the laws of numerous countries . . . interim measures have remained something of an 'Achilles heel' for arbitration" and discussing the concerns about their enforceability).

28 *See* Zhang, *supra* note 27, at 90.

greeted the procedure with caution and even skepticism.[29] Similarly, the parties' demand and the need for like procedures in certain urgent situations fueled the spread and development of emergency arbitration despite these doubts. In this process, the procedure has undergone a significant evolution to better address parties' needs and demands of varied legal regimes.

B. *The Evolution of the Emergency Arbitration Regime*

The idea of providing relief before the constitution of an arbitral tribunal predates the procedure that was first adopted in 2006 and has been since adopted by major arbitral centers. [30]

Responding to parties' demand for a fast and confidential procedure administered by experts that would avoid national courts, the International Chamber of Commerce ("ICC") first began to experiment with a pre-arbitral referee procedure in 1990.[31] The London Court of International Arbitration ("LCIA") then added provisions to its rules that allowed for an expedited formation of tribunals in urgent situations similar to expedited arbitral proceedings nowadays available by many arbitral rules.[32] In 2001, the Netherlands Arbitration Institute ("NAI") incorporated in its provisions the so-called Summary Arbitral Proceedings that remain in force today.[33] These pre-arbitral systems, inspired by the powers of national courts, attempted to provide the parties with a neutral avenue to protect their rights during the *entire* duration of a dispute. For example, the ICC Pre-arbitral Referee procedure directly emulated the French institution of the *le juge des référés* (a court sitting in urgent session) where a party may request from a magistrate court a broad array of provisional measures to prevent irreparable harm.[34]

But the first forms of pre-arbitral relief had drawbacks, and so their promise to serve as full-fledged alternatives to courts did not materialize: the ICC pre-arbitral referee and the NAI Summary Proceedings were not directly incorporated into arbitral rules, and

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29 *See* Fry, *supra* note 27 (discussing weaknesses, interim measures generally, and enforceability concerns regarding emergency arbitration procedure).

30 *See* Svetlicinii, *supra* note 5, at 10.

31 Emmanuel Gaillard & Philippe Pinsolle, *The ICC Pre-Arbitral Referee: First Practical Experiences*, 20 ARB. INT'L 13, 13 (2004).

32 *See infra* Part I.C.

33 Patricia Shaughnessy, *Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules*, 27 J. INT'L ARB. 337, 338 (2010).

34 *See* Paulsson, *supra* note 6, at 215.

parties had to expressly and separately agree to use the proceedings, which resulted in very few parties taking advantage of the proceedings.[35] The expedited tribunal formation is still around. However, the mechanism does not achieve the goals of pre-arbitral emergency proceedings because it only compresses the time during which the tribunal is constituted, which may not always be a sufficiently fast resolution.[36]

The new emergency arbitral provisions adopted in 2006, 2010, and later adoptions and amendments addressed the shortcomings of their predecessors by incorporating the provisions into the main arbitral rules and instituting opt-out rules that apply to parties without express consent. The new provisions, unlike the predecessors, provide only one type of a pre-arbitral mechanism—the emergency arbitration procedure—which has become harmonized across different arbitral systems in terms of basic application requirements; fast timeframes for the appointment and challenge of emergency arbitrators, and the rendering of awards; access to national courts; and treatment of *ex parte* relief.[37]

Undoubtedly, the standardization and the accessibility of the procedure are some of the reasons behind its popularity. The statistics show that despite the professed parties' doubts about the procedure and the low probability of success on the merits of about 30%, the number of emergency arbitration requests filed across all global arbitral centers steadily grew in the past ten years.[38]

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35 2*See* YEŞILIRMAK, *supra* note 2, at 180 (discussing the NAI Summary Arbitral Proceedings and the difficulties associated with an opt-in approach); Gaillard & Pinsolle, *supra* note 31, at 13, 24 (recommending that the ICC pre-arbitral referee be directly incorporated in the ICC Rules to avoid the necessity of a specific provision in an arbitration agreement); BORN, supra note 1, at 2452 ("The ICC's Pre-Arbitral Referee Procedure Rules have been in force since 1990 but have been used only very rarely (less than a dozen instances). That is because, under the Rules for Pre-Arbitral Referee Procedures, parties must agree in writing to the use of this specialized procedure and, given the realities of litigation, this cannot often be expected to occur after a dispute has arisen.").

36 *See generally infra* Part I.C.

37 *See infra* Part I.B.2.

38 *See* ICC EA REPORT 2019, *supra* note 9, at 37 (for statistics about application success rate); and 2015 INTERNATIONAL ARBITRATION SURVEY, *supra* note 12 (for a survey of parties' concerns about emergency arbitration procedure's effectiveness).
The ICC reports that there were two applications for EA in 2012, six in both 2013 and 2014, which averages to ten cases a year. In contrast, there were twenty-one EA requests filed in 2017, twenty-four in 2018, and twenty-three in 2019. A total of 154 applications were filed since 2020. *See* Emmanuel Jolivet & Philip Kucharski, ICC DISPUTE RES. BULL. (2015), https://jusmundi.com/en/document/publication/en-

But harmonization is just one part of the story that marks the development of procedures in private international law. Differences still exist with respect to the applicability of the rules, powers of the emergency arbitrators, and provisions impacting enforceability. These differences constitute important experiments in approaches to

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2014-icc-dispute-resolution-statistics [https://perma.cc/4F8Q-W6VM] (2014 report); *ICC Dispute Resolution 2018 Statistics*, INT'L CHAMBER OF COM. (2018), https://nyiac.org/wp-content/uploads/2019/08/icc_disputeresolution2018statistics.pdf [https://perma.cc/453X-QJMZ] (2018 report); *2017 ICC Dispute Resolution Statistic*, ICC (2017), https://library.iccwbo.org/content/dr/STATISTICAL_REPORTS/SR_0040.htm?l1=Statistical+Reports [https://perma.cc/CSD7-TXZJ] (2017 report); *ICC Dispute Resolution 2020 Statistics*, INT'L CHAMBER OF COM. (2021), https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf [https://perma.cc/7RDC-NT2P] (ICC total number 2012-2020); *The ICC 2012 Statistics – Another Busy Year for International Arbitration*, HERBERT SMITH FREEHILLS (Sept. 9, 2014), https://hsfnotes.com/arbitration/2014/09/09/the-icc-2013-statistics-another-busy-year-for-international-arbitration/ [https://perma.cc/2BQ9-4WFJ] (ICC 2012 and 2013 statistic).

The SIAC reports show that there were two EA proceedings administered in both 2010 and 2011, nineteen proceedings administered in 2013, and twelve in 2014, an average of 8.75 cases over a reported four-year period (the year 2012 was not reported). But, there were five EA proceedings administered in 2015, six in 2016, nineteen in 2017, twelve in 2018, and ten in 2019, and an average of 11.75 cases over a four-year period. *See* SCIAC, ANNUAL REPORTS, https://siac.org.sg/annual-reports [https://perma.cc/L7DU-V8US] (last visited Mar. 25, 2023).

SCC statistics show that there were two emergency arbitration proceedings administered in 2011 and 2012, while only one in 2013, an average of 1.7 in three years. But there were thirteen proceedings in 2016, three proceedings in 2017, four in 2018, and eight in 2019, an average of seven cases over four years and five over the last three years. *See* SCC INSTITUTE, STATISTICS, https://sccarbitrationinstitute.se/en/about-scc/scc-statistics/previous-years-statistics [https://perma.cc/WL2F-NLKD] (last visited Mar. 25, 2023).

The AAA-ICDR details that there were ninety-two EA applications filed in 2018 and ninety-four in 2019. *See* AMERICAN ARBITRATION ASSOCIATION, AAA-ICDR DATA AND STATISTICS, https://www.adr.org/research [https://perma.cc/U96Z-4LWH] (last visited Mar. 25, 2023).

The HKIAC received four applications for EA proceedings in 2017, three applications in 2018, and no applications in 2019, a total of thirty-two applications since its introduction in 2013. *See 2022 Statistics*, HKIAC, https://www.hkiac.org/about-us/statistics [https://perma.cc/5AUS-ZU75] (last visited Mar. 25, 2023).

The LCIA, in a 2018 report, stated that "[t]he figures reveal a growing recourse to emergency arbitrator and expedited tribunal formation procedures." However, the individual numbers for emergency arbitration are lower than in other centers: LCIA received no EA application in 2015, one application in each 2016 and 2017, three applications in 2018, and one in 2019. *See* LCIA, REPORTS, https://www.lcia.org/lcia/reports.aspx [https://perma.cc/9RPU-P8Z8] (last visited Mar. 5, 2023).

different issues encountered along the way, such as enforceability. Additionally, these differences often also signal an ongoing discussion about how to best reach the balance between efficient rules and parties' contractual rights, whether expressed through powers granted to the emergency arbitrator or the availability of opt-out procedures.

Both harmonization and continued experimentation form a necessary part of the explanation behind what made emergency arbitration procedures endure. A level of harmonization of the basic procedure and essential characteristics were necessary for the procedure to become established across the systems and known to parties all over the world. But further refinements are nevertheless required as the field evolves and encounters different party and legal demands.

1. *Emergency Arbitration Procedures That Underwent Harmonization*

a. Emergency Arbitration Application Requirements

To obtain emergency relief, parties must first file an application with the appropriate institutional Chamber or Office for the appointment of an emergency arbitrator.[39] The arbitral rules require that the emergency application contains: (1) a description of the circumstance giving rise to the Application; (2) a statement of the emergency relief sought and the urgent reasons for the application;[40] and in all instances other than the Swiss arbitral rules; (3) a notice to parties to the dispute.[41] Fees in excess of costs associated with filing have been adopted across international arbitral institutions as one of the gatekeeping mechanisms against frivolous and meritless claims.[42]

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39 *See* 2015 CIETAC RULES.

40 132136Although all but the SCC Rules require a degree of urgency as a threshold for application (and the SCC in practice requires urgency, too), the phrasing of the requirement varies. *See infra* note 130-134 and accompanying text.

41 2015 CIETAC RULES, art. 1(3); 2018 HKIAC RULES, art. 1.1; 2021 ICC RULES, art. 4(3); 2020 LCIA RULES, art. 1.1(i)-(vii); 2017 SCC RULES, art. 6(i)-(vii); 2012 SCAI RULES, art. 3(3)(a)-(i); 2016 SIAC RULES, art. 3.1(a)-(k).

42 42015 CIETAC RULES, art. 7(1), app. II, art. 1(4) (30,000 RMB fee); 2018 HKIAC RULES, sched. 4, art. 5 (fees determined by HKIAC by reference to EA's hourly rate subject to terms in Schedule 2); 2021 ICC RULES, app. V, art. 7(1) (40,000 USD); 2014 ICDR RULES, art. 6.8 (no application fee but an hourly rate for the emergency arbitrator in a departure from its standard and flexible fee schedules); 2020 LCIA RULES, art. 9.10, Schedule of Costs (9,000 GPB); 2012 SCAI RULES, app. B, ¶ 1.6 (registration fee of CHF 4,500 and deposit an advance of costs of CHF 20,000); 2016 SIAC RULES, sched. 1, art. 2; Sched. of Fees (around 5,000 SGD

b. Appointment of Emergency Arbitrators and Rendering Awards

The hallmark of modern emergency arbitration is the rapid speed of the appointment of the arbitrators and the short timeframe within which the arbitrators must render awards and orders. This favored feature of emergency arbitration has been fairly standardized across the different rules. All rules, except for Swiss rules, require that upon an application and screening procedure, an appropriate body—such as a Registrar, President, Secretariat, or Court—appoint an Emergency Arbitrator within one to three days.[43]

Similarly, all rules require the emergency arbitrator to render an award or order within just a short time period—the Swiss Chamber of Commerce ("SCC") rules require the arbitrator to render a decision within mere five days,[44] while the majority of arbitral rules allow the arbitrator to issue a decision within fourteen to fifteen days.[45] International Centre for Dispute Resolution ("ICDR") is the only regime that does not offer a time limit within which an arbitrator must be appointed, but the rules do require that they must be appointed. Despite the lack of codification and perhaps influenced by the majority standard, the ICDR statistics show that the majority of Emergency Arbitrations are nevertheless concluded within fourteen days of filing.[46]

c. Challenges to Appointments of Emergency Arbitrators

A necessary component of the fast-track appointment of an emergency arbitrator is a short yet meaningful opportunity for parties

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administrative fee and 25,000 SGD arbitrator fee); 2017 SCC RULES, app. II, art. 7, 10(2) (20,000 EUR application and emergency arbitrator fee). *See generally* Gaillard, *supra* note 1, at 317.

43 2015 CIETAC RULES, app. II, art. 2(1) (President appoints EA within one day); 2014 ICDR RULES, art. 6.2 (Administrator appoints EA within one business day); 2018 HKIAC RULES, sched. 4, art. 4 (HKIAC shall seek to appoint an emergency arbitrator within 24 hours); 2016 SIAC RULES, sched. 1, art. 3 (President appoints EA within one business day); 2017 SCC RULES, app. II, art. 4(1) (the SCC board will "seek to appoint" the emergency arbitrator within 24 hours); 2021 ICC Rules (the President of the ICC Court "within as short a time as possible, normally within two days from the Application"); 2020 LCIA RULES, art. 9.6.

44 2017 SCC RULES, app. II, art. 8.

45 2015 CIETAC RULES, app. II, art. 6(2) (15 days); 2018 HKIAC RULES, sched. 4, art. 12 (14 days); 2021 ICC RULES, app. V, art. 6(5) (15 days); 2020 LCIA RULES, art. 9.8 (14 days); 2012 SCAI RULES, art. 43(7) (15 days).

46 5 ICDR INTERNATIONAL ARBITRATION REPORTER 5 (2016), https://www.icdr.org/sites/default/files/document_repository/ICDR_International_Arbitration_Reporter-Vol.5.pdf [https://perma.cc/4BK6-N2SG].

to challenge the arbitrator's appointment. The majority of the arbitral rules condense the period for challenging the appointment to one to three days.[47] The LCIA, as the sole exception, allows parties to challenge the appointment of an arbitrator for fourteen days from the appointment and thus almost for the entire duration of the proceedings.[48]

This swift period for challenging arbitration is balanced by independence and impartiality requirements[49] and by mandatory disclosures that require the emergency arbitrator to disclose any outright potential conflicts of interest.[50] Furthermore, all rules but the LCIA require that an emergency arbitrator cannot serve as an arbitrator in the later dispute unless otherwise agreed by the parties.[51] Parties can waive this condition unless the arbitration is conducted under the ICC rules that do not allow for modification by the parties.

d. Access to Courts and Power to Award Ex Parte Relief

The arbitral rules explicitly recognize that recourse to state courts may still be necessary, stating that an application for emergency relief does not waive a right to access local and state courts later.[52] The

47 2015 CIETAC RULES, app. II, art. 3(4) (2 days); 2018 HKIAC Rules, sched. 4, art. 7 (3 days); 2021 ICC RULES, app. V, art. 3(1) (3 days); 2014 ICDR RULES, art. 6.1 (1 day); 2012 SCAI RULES, art. 11, 43(4) (3 days); 2017 SCC Rules, app. II, art. 4 (24 hours); 2016 SIAC RULES, sched. 1, art. 5 (2 days).

48 2020 LCIA RULES, art. 10.3.

49 *See, e.g.*, 2015 CIETAC RULES, app. II, art. 3(1); 2021 ICC RULES, app. V, art. 2(4); 2020 LCIA RULES, art. 9.6, 5.3; 2012 SCAI RULES, art. 4, 9; 2017 SCC RULES, art. 18(1).

50 2015 CIETAC RULES, app. II, art. 3(2)-(3); 2018 HKIAC RULES, sched. 4, art. 7, 11.4; 2021 ICC RULES, app. V, art. 2(5); 2014 ICDR RULES, art. 6.2; 2020 LCIA RULES, art. 9.6, 5.4-5.5; 2012 SCAI RULES, art. 43(4), 9; 2017 SCC RULES, art. 18(2); 2016 SIAC RULES, sched. 1, art. 5.

51 2015 CIETAC RULES, app. II, art. 3(8); 2018 HKIAC RULES, sched. 4, art. 19; 2021 ICC RULES, app. V, art. 2(6); 2014 ICDR RULES, art. 6.5; 2018 HKIAC RULES, sched. 4, art. 19; 2012 SCAI RULES, art. 43(11); 2017 SCC RULES, app. II, art. 4(4); 2016 SIAC RULES, sched. 1, art. 6.

52 2015 CIETAC RULES, app. II, art. 5(4); 2018 HKIAC RULES, sched. 4, art. 20; 2021 ICC RULES, art. 29(7) (stating, without elaboration, that parties may seek urgent relief from a court "in appropriate circumstances"); 2014 ICDR RULES, art. 6.7; 2020 LCIA RULES, art. 9.13; 2012 SCAI RULES, sched. 4, ¶ 22; 2017 SCC RULES, art. 30(3). Of course, this is not to say that concurrent courts' jurisdiction does not come with its own problem. For example in an English case, Gerald Metals S.A. v. Timis & Ors, [2016] EWHC 2327 (Ch), argued under the LCIA case, an English court rejected the Claimant's application for interim relief that had been rejected by an emergency arbitration because under Section 44(5) of the Arbitration Act 1996, which prevents a court from intervening in an arbitration unless the

lonely exception is the Singapore International Arbitration Centre ("SIAC") rule, which requires parties to waive any rights to appeal or recourse to any State court in connection with the potential emergency award.[53] This provision has been amended with a goal to protect parties from unpleasant surprises during enforcement proceedings in Singapore, but it is not clear whether courts would find a waiver of this type—a subclause in an arbitration agreement—valid.[54] It is therefore fair to conclude that concurrent national courts' jurisdiction is well-recognized in the feature of emergency arbitration and critical to the efficacy of the arbitral process.[55]

Access to state courts may be particularly necessary where the assets or evidence are in the hands of a third party[56] because all institutions, but the Swiss rules, do not permit an emergency arbitrator to award *ex parte* relief—relief without notice to the responding party.[57] The ability to award *ex parte* relief is a controversial feature in international arbitration, which can also endanger the enforceability of an award.[58] Amongst the many objections to *ex parte* relief, two stand out with particular authority in regard to enforcement. First, the UNCITRAL Model Law states that *ex parte* preliminary orders "shall not be subject to enforcement by courts," and the enforceability of an award would therefore be endangered in those civil law countries that modeled their arbitral laws based on the Model Law.[59] Second, under the New York Convention, a court may refuse recognition of awards where "[t]he party against whom the award is invoked was not given

arbitrator or tribunal "has no power or is unable for the time being to act effectively." The strategic implication of *Gerald* is that even though concurrent access to courts is allowed; it may not always be accessible once a party has applied for emergency measures.

53 2016 SIAC RULES, sched. 1, art. 12. ("The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made.").

54 INSTITUTIONAL ARBITRATION: A COMMENTARY 658 (Rolf A. Schütze ed., 2013).

55 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2522-63 (3d ed. 2020).

56 *See generally* Grant Hanessian & E. Alexandra Dosman, *Songs of Innocence and Experience: Ten Years of Emergency Arbitration*, 27 AM. REV. INT'L ARB. 215, 221 (2016).

57 SCAI RULES, art. 26(3).

58 *See generally* Hanessian & Dosman, *supra* note 56, at 222-23.

59 UNCITRAL MODEL LAW, art. 17C(5) (2006).

proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."[60]

2. *Emergency Arbitration Provisions That Vary*

a. Provisions Concerning Applicability

The first area of differences concerns when the parties can apply for emergency relief. A handful of institutional rules such as the Hong Kong International Arbitration Centre ("HKIAC"), ICDR, and LCIA do not allow the commencement of emergency arbitration before commencing the main arbitration.[61] Academics argue that this requirement is a secondary gatekeeping mechanism after the application costs.[62] Such gatekeeping mechanism serves a dual purpose of: (1) providing a party with notice of the dispute; and (2) ensuring that parties will commence arbitral proceedings that are to be aided by emergency arbitration.[63] But even the rules that do not require concurrent or subsequent filing provide that arbitration must be initiated within a given period of time, otherwise the emergency order or award ceases to be binding.[64] The significance of this difference is unclear because in the end, an arbitration tribunal must be constituted under both types of rules or the applicant forgoes significant application fees and the award or order ceases to be binding.

Second, even though it was clear that the opt-in mechanism—provisions that required an explicit agreement by the parties to be applicable—decreased the efficiency of emergency arbitration and

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60 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(b), June 10, 1958, 21 U.S.T. 2157 [hereinafter New York Convention].

61 The following rules only allow filing an emergency arbitration request concurrently or subsequent to the request for the main arbitration: 2018 HKIAC RULES, sched. 4, art. 1; 2014 ICDR RULES 6(1); 2020 LCIA RULES, art. 9.7; and 2016 SIAC RULES, sched. 1, art. 1.

62 *See* Gaillard, *supra* note 1, at 316-17.4

63 *Id.*

64 *See id.* 2021 ICC RULES, art. 29(1), app. V, art. 1(6); 2017 SCC RULES, app. II, art. 1(2), 9(4); 2012 SCAI RULES, art. 43(3). The 2017 CIETAC RULES do not explicitly state that an application for EA must wait until the arbitral tribunal is formed. *See* 2017 CIETAC RULES, art. 1(2). Such reading is reinforced by art. 6(6), which provides that if an arbitral tribunal is not formed, the emergency order or award ceases to be binding.

many institutions moved away from such provisions,[65] differences still exist regarding the availability of opt-out and the retroactive applicability of emergency rules out of a fairness concern.[66] Opt-out is different from opt-in because it requires parties to actively choose that the emergency arbitration rules do not apply to a given arbitral contract. Some arbitral rules do not give parties an option to opt-out at all and apply the emergency arbitration procedure by default. But the ICC, the LCIA, the SCC, the Swiss Chambers Arbitration Institution ("SCAI" or the "Swiss Rules"), and arguably also the China International Economic and Trade Arbitration Commission ("CIETAC") rules, allow parties to opt-out from the application of the emergency arbitrator procedure.[67] Still, opting out of an arbitration agreement is something that is rarely, if ever, done.[68] Perhaps reflecting the low use of the opt-out mechanism or the acceptance of emergency arbitration as a permanent mechanism, some arbitral rules recently did away with the provisions allowing for an opt-out, and it is possible that more institutions will do so in the future as well.[69]

An issue related to opt-out is the "retroactive" application of the agreement or whether the amended rules would apply to agreements signed before the rules were amended to include emergency arbitration provisions. Because the emergency arbitrator provisions were adopted in the past ten years and many more arbitral agreements were signed before the adoption of the rules, retroactive application ensures that a great number of parties are not excluded from access to the proceedings. The SCC was the first institution to apply the provisions to all agreements in 2010, regardless of whether they were signed before or after the amended rules came into effect. The SCC's adoption was followed by the Swiss Rules in 2012, SCIAC in 2016,

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65 *See supra* note 35 and accompanying text explaining that the early Pre-Arbitral Referee required an "opt-in," a separate express agreement for the arbitral-referee procedure to apply.

66 *See infra* note 71 and accompanying text.

67 2021 ICC RULES, art. 29(6)(b); 2020 LCIA RULES, art. 9.16; 2012 SCAI RULES, art. 43(1); SCC, p.2. The 2017 CIETAC RULES, app. II, art. 1(1) condition the applicability of the entire rules on the agreement of parties. This arguably means that unless parties specifically agree to exclude the EA mechanism, it applies to the arbitration agreement under the rules.

68 Christian P. Alberti, *Practical Considerations When Navigating Maritime Disputes: Pre-Award Security Through Emergency Arbitration*, 50 J. MAR. L. & COM. 91, 97, n.22 (2019).

69 Emanual Gaillard notes that the 2017 Bahrain Chamber for Dispute Resolution (BCDR) Rules and the 2017 ICDR do not offer a possibility for the parties to opt-out of emergency arbitration. The ICDR thus amended its 2014 Rules that allowed an opt-out. *See* Gaillard, *supra* note 1, at 316-17.

and most recently by the amended ICDR Rules.[70] Other arbitral systems, such as the ICC, decided against retroactive application to prevent "dramatic change introduced by the new provisions."[71] LCIA and HKCIA also limit emergency relief to agreements signed after the amendments providing for such relief, which may explain their low emergency arbitration caseload.[72]

The third area of divergence is the availability of an initial screening performed by the arbitral institutions. The preliminary screening mechanism, together with application fees and the requirement to file an emergency arbitration request concurrent or after the arbitration request, serves as a gatekeeping mechanism against meritless or frivolous claims.[73] Professor Gaillard notes that in this area as well, institutional rules "vary considerably . . . indicating that these screening processes are an area in which additional development may be expected."[74] The majority of institutions designated an institutional role in the screening process, but do not spell out whether the review is automatic or whether the institutional determination depends on certain criteria.

For example, under the 2020 CIETAC Rules, the Arbitration court decides whether, after a preliminary review of the Applicant's submission, the emergency arbitration procedure applies.[75] Similarly, the HKIAC, the Presidents of the SIAC, and the ICC Courts decide whether to accept the application.[76] LCIA rules, on the other hand,

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70 SCC RULES, p.2; 2012 SCAI RULES, § I, art. 1(3); 2016 SIAC RULES, r. 1.2. Article 37 of the 2006 ICDR RULES states that the rules apply to agreements entered into after the Rules' effective date disappeared in the 2014 amended rules. *See* Gaillard, *supra* note 1, at 315.

71 2021 ICC RULES, art. 29(6)(a); Justin D'Agostino & Ula Cartwright-Finch, *First Aid in Arbitration: Emergency Arbitrators to the Rescue*, KLUWER ARB. BLOG (Nov. 15, 2011), http://arbitrationblog.kluwerarbitration.com/2011/11/15/first-aid-in-arbitration-emergency-arbitrators-to-the-rescue [https://perma.cc/W2FF-VCAJ].

72 *See* Gaillard, *supra* note 1, at 317; 2020 LCIA RULES, art. 9.16; 2018 HKIAC RULES, art. 1.4.

73 Gaillard, *supra* note 1, at 317.

74 *Id.*

75 2015 CIETAC RULES, app. II, art. 2.

76 2018 HKIAC RULES, sched. 4, art. 4; 2016 SIAC RULES, sched. 1, art. 3; 2021 ICC RULES, app. V, art. 1(5), 29(5)-(6) (requiring that the President determines whether the arbitration agreement was signed on or after January 1, 2012; whether the parties were signatories; and whether the parties did not opt out or agree on a different pre-arbitral procedure for obtaining conservatory, interim or similar measures).

state that the LCIA Court "shall determine the application as soon as possible."[77]

Lastly, some rules also include a criterium under which the institution determines admissibility. The SCC states that the Board will not appoint an emergency arbitrator "if the SCC manifestly lack[s] jurisdiction over the dispute," while the SCAI Court shall not appoint a sole emergency arbitrator unless there is "manifestly no agreement to arbitrate referring to these rules."[78] Professor Gaillard argues that there is an overlap between the institutional screening processes and emergency arbitrator's ability to determine the admissibility of applications. He also recommends additional clarity on the nature and extent of institutional screening of applications in the future versions of the rules.[79]

b. Provisions Defining the Scope of Emergency Arbitrator's Powers

None of the rules specify what standard the emergency arbitrator should apply to their decision about whether to award emergency relief. However, most of the rules expressly state an arbitrator can rule on their own jurisdiction[80] and also award interim measures as they deem "necessary" or "appropriate."[81] The HKIAC, LCIA, SCC, and the Swiss rules also grant the emergency arbitrator the same powers

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77 2020 LCIA RULES, art. 9.6.

78 2017 SCC RULES, app. II, art. 4(2); 2012 SCAI RULES, art. 43(2)(b) (Under the SCAI, the Court also will not appoint the arbitrator if "it appears more appropriate to proceed with the constitution of the arbitral tribunal and refer the Application to it.").

79 *See* Gaillard, *supra* note 1, at 318.

80 Rules providing that the emergency arbitrator has the power to rule on their own jurisdiction: 2018 HKIAC RULES, art. 9(3); 2021 ICC RULES, app. V, art. 6(2); 2014 ICDR RULES, art. 6(3); 2020 LCIA RULES, arts. 9.14, 23; 2016 SIAC RULES, sched. 1, ¶ 10.

81 2015 CIETAC RULES, art. 23(2) ("The emergency arbitrator may decide to order or award necessary or appropriate emergency measures."); 2018 HKIAC RULES, sched. 4, art. 10 & art. 23(2) (emergency arbitrator can grant relief as they consider "appropriate and necessary"); 2014 ICDR RULES, arts. 6(4) ("necessary"); 2016 SIAC RULES, sched. 1, art. 8 ("necessary"). Under the 2021 ICC Rules, the emergency arbitrator must determine whether the application is admissible and whether they have jurisdiction to order emergency measures. 2021 ICC RULES, app. V, art. 6(2). However, it is unclear to what extent the emergency arbitrator's power to determine applicability is different or overlapping with the arbitrator's power to determine what's necessary or urgent. *Id.* at 313.

as a fully constituted tribunal would have under the rules, which helps to clarify the emergency arbitrator's powers and aids enforceability.[82]

The emergency arbitrator generally possesses significant freedom to conduct the proceedings as they see fit—most rules include that an emergency arbitrator can conduct proceedings in the manner they consider "appropriate," provided that they give the parties a reasonable opportunity to be heard.[83] Recently, the arbitral centers introduced two variations in the scope of the arbitrator's powers over the procedure that makes the arbitral process more efficient: (1) the requirement that the emergency arbitrator issues a scheduling order within two days; and (2) clarification that an emergency arbitrator can conduct proceedings through telephone or video conference or in written form as an alternative to a hearing in person.

Both the ICDR rules and the SIAC rules require the emergency arbitrator to issue a schedule within two days of their appointment, while the CIETAC rules recommend that the arbitrator does so "within a time as short as possible, best within two days."[84] The two-day timeframe for the issuance of the scheduling order is new,[85] and it aids both the impressive speed with which the procedure moves along and the procedural clarity.

Both the ICDR and SIAC rules clarify the permissible form of proceedings. The rules provide that telephone and video conferences as well as written submissions and other suitable means serve as alternatives to a hearing.[86] The newest LCIA rules additionally explain that a hearing may be held in person or virtually with participants in one or more geographic locations—a global arbitration trend that will likely increase the cost-effectiveness and flexibility of proceedings.[87] But the LCIA rules state that the emergency arbitrator still retains the

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82 2020 LCIA RULES, art. 9.8; 2018 HKIAC RULES, sched. 4, art.7; 2017 SCC RULES, app. II, art. 1(2); 2012 SCAI RULES, art. 26(1), 43(1).

83 2015 CIETAC RULES, app. II, art. 5(1); 2018 HKIAC RULES, sched. 4, art. 10; 2021 ICC RULES, app. V, art. 5; 2014 ICDR RULES, art. 6(3); 2020 LCIA RULES, art. 9.7; 2017 SCC RULES, app. II, art. 7; 2012 SCAI RULES, art. 43(6); 2016 SIAC RULES, sched. 1, art. 7.

84 2014 ICDR RULES, art. 6(3); 2016 SIAC RULES, sched. 1, art. 7; 2015 CIETAC RULES, app. II, art. 5(1).

85 *See* Gaillard, *supra* note 1, at 312 (discussing a similar provision in the BCDR Rules).

86 2014 ICDR RULES, art. 6(3); 2016 SIAC RULES, sched. 1, art. 7.

87 2014 LCIA RULES, art. 19.2. *See generally* Dipen Sabharwal KC & Viraen Vaswani*, LCIA Introduces New Arbitration Rules for New Era*, WHITE & CASE (Aug. 13, 2020), https://www.whitecase.com/publications/alert/lcia-introduces-new-arbitration-rules-new-era [https://perma.cc/RN69-EWAN].

discretion to hold any hearings in person or, conversely, can decide issues based on written submissions only.[88]

Under almost all arbitral rules, the emergency arbitrator's powers cease upon the constitution of the arbitral tribunal or the transmittal of the file to the tribunal.[89] Additionally, almost all rules state that an emergency award is subject to confirmation or modification by the main tribunal.[90] The modification provisions raise concerns about the finality of the award and enforcement.[91] Additionally, the provisions that deprive the emergency arbitrator of all powers upon the constitution of the tribunal hinder efficiency because the emergency arbitrator may be on the verge of issuing a decision when the tribunal is constituted, and restarting the process for an award of interim measures upon the constitution of the tribunal will cause unnecessary delays to issuing a decision.[92]

Only a handful of arbitral rules—the ICC, the HKIAC, and the Swiss rules—allow the emergency arbitrator to retain the power to issue an order or award within the appropriate time limit, regardless of whether a tribunal had been constituted.[93] Although allowing the emergency arbitrator to retain the power to issue decisions within a limited timeframe, even when a tribunal had been constituted, would improve efficiency and potentially save costs, no such changes are on the horizon. Even though some arbitral centers such as the ICC, LCIA, or HKIAC amended their rules very recently, the amendments did not incorporate provisions that would allow the arbitrator to retain power after the constitution of an arbitral tribunal.

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88 2020 LCIA RULES, art. 9.7 ("The emergency arbitrator is not required to hold any hearing with the parties whether in person, or virtually by conference call, videoconference or using other communications technology and may decide the claim for emergency relief on available documentation.").

89 2014 ICDR RULES, art. 6(5); 2020 LCIA RULES, art. 9.12; 2017 SCC RULES, app. II, art. 9; 2012 SCAI RULES, art. 43(7); 2016 SIAC RULES, sched. 1, art. 10; 2018 HKIAC RULES, sched. 4, art. 18.

90 2015 CIETAC RULES, app. II, art. 5(4); 2018 HKIAC RULES, sched. 4, art. 17(c); 2021 ICC RULES, art. 29(3); 2014 ICDR RULES, art. 6(5); 2020 LCIA RULES, art. 9.11; 2017 SCC RULES, app. II, art. 9(4)(i); 2012 SCAI RULES, art. 43(8); 2016 SIAC RULES, sched. 1, art. 10.

91 *See infra* Part III.A.

92 *See* Gaillard, *supra* note 1, at 318-20.4

93 2021 ICC RULES, app. V, art. 2(2); 2018 HKIAC RULES, sched. 4, arts. 13, 18; 2012 SCAI RULES, art. 43(7).

c. Provisions Concerning Enforceability of Awards and Orders

At least two types of provisions continue to differ and impact enforceability: (1) form of the award; and (2) provisions stating whether the award is binding. All institutions except the ICC allow the sole emergency arbitrator to issue an award or order.[94] The ICC only allows the arbitrator to issue an order to avoid appellate review by the ICC International Court of the Arbitration, which would impact the speed and efficiency of the proceedings.[95]

For some time, courts and academics focused the discussion about enforceability on the first question—whether the final decision constitutes an award or order. As discussed later, courts have largely abandoned the formalist view of an award or order as a meaningful determinant of enforceability.[96] And, arbitrators were given powers to label the decision an award to avoid enforceability issues in jurisdictions that may nevertheless adhere to this more formalist view, with some rules even emphasizing that the arbitrator should decide about the form of the decision bearing enforceability in mind.[97]

Provisions that in one way or another make an award binding on parties are at the center of ongoing experimentation across various rules that could address some uncertainty surrounding the enforceability of emergency arbitral awards. Under the most common version of such provisions, parties expressly agree that the award is binding on them and that the parties undertake to comply with an emergency order or award by agreeing to arbitrate under the rules. [98]

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94 The following rules permit an emergency arbitrator to issue an "award" or "order": 2015 CIETAC RULES, app. III, art. 6(1); 2018 HKIAC RULES, sched. 4, art. 12; 2014 ICDR RULES, art. 6.4; 2020 LCIA RULES, art. 9.8; 2017 SCC RULES, art. 37(3), app. II, art. 1(2); 2016 SIAC RULES, sched. 1, art. 9; 2012 SCAI RULES, § III, art. 15.7.

95 2021 ICC RULES, app. V, art. 6(1).

96 *See infra* Part III.A.

97 *See, e.g.*, 2015 CIETAC RULES, app. III, art. 6(1); *see generally* Fry, *supra* note 27, at 189.27

98 CIETAC RULES 2015, art. 23 ("The decision of the emergency arbitrator shall be binding upon both parties."); 2018 HKIAC RULES, sched. 4, art. 16 (emergency decisions "shall be binding on the parties when rendered"); ICC RULES 2021, art. 29(2) ("Parties undertake to comply with any order made by the emergency arbitrator."); ICDR RULES 2014, art. 6(4) ("[i]nterim award or order . . . shall be binding on the parties when rendered" and "the parties shall undertake to comply with such an interim award or order without delay"); LCIA RULES 2020, art. 26.8 (an emergency decision is "final and binding" and the parties "undertake to carry out any award immediately and without any delay"); SCC RULES 2017, app. II, arts. 9(1), (2) (an emergency decision is binding and parties "undertake to comply with [it] without delay"); SIAC RULES 2016, sched. 1, art. 12 (an emergency decision is

Such promises can serve as a foundation for a breach of contract claim in a case of non-compliance, thus aiding or supplementing an award's enforceability.[99]

Several other types of provisions that clarify the effect of emergency decisions and their enforceability have emerged. For example, some rules state that an emergency order or award has the same effect as interim orders awarded by a tribunal.[100] The 2015 CIETAC Rules go even further: they provide that parties are bound by the emergency decision, but also that they may "seek enforcement of the decision from a competent court pursuant to the relevant law provisions of the enforcing state or region."[101] However, because the Chinese Arbitration Law requires parties to seek interim and emergency relief from the local courts, this provision has been thus far understood to only apply to arbitrations administered by the CIETAC in Hong Kong.[102]

C. *Emergency Arbitration Alternatives: Expedited Arbitration*

Apart from resorting to courts, the parties' only option before the constitution of an arbitral tribunal is to resort to expedited arbitration. However, expedited procedure is not a distinct procedure that occurs before the formation of a tribunal. Rather, it is a mechanism that speeds up the constitution of the final tribunal, which can then rule on an emergency matter. To understand why emergency arbitration is nevertheless preferable or at the very least not thoroughly replaceable by expedited arbitration, one must understand the basic mechanics of expedited arbitration.

The chief benefit of expedited arbitration is that the duration of the entire arbitral process, from the appointment to the award, is shortened to three to six months, as opposed to the twelve to eighteen

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binding and parties "undertake to carry out the interim order or award immediately and without delay"); SCAI RULES 2012, § III., art. 15(7) (Parties "undertake to comply with any award or Order made by the arbitral tribunal or emergency arbitrator without delay.").

99 *See infra* Part III.B.3.

100 ICDR RULES 2014, art. 6(4); 2018 HKIAC RULES, sched. 4, art. 16; LCIA RULES 2020, art. 9.9; SCAI RULES 2012, art. 43(8); etc.

101 CIETAC RULES 2015, art. 6(4).

102 Anita Fong, *The New CIETAC Rules 2015*, H.K. LAW. (Mar. 2015), https://www.hk-lawyer.org/content/new-cietac-rules-2015 [https://perma.cc/L67X-WNGY]; *Going Global: CIETAC Introduces new Arbitration Rules 2015*, HERBERT SMITH FREEHILLS LLP (Nov. 25, 2014), https://hsfnotes.com/arbitration/2014/11/25/going-global-cietac-introduces-new-arbitration-rules-2015/#page=1 [https://perma.cc/89MV-6UUX].

months that a full-fledged arbitral process could take.[103] The expedited procedure usually takes place in front of a sole arbitrator who adjudicates the dispute based on a limited number of written-only submissions.[104] Because the procedure is shorter and involves a more bare-bones procedure, it increases efficiency and leads to greater cost savings.

Although many arbitral institutions offer the option of expedited proceedings, they often limit it to disputes of relatively small value. For example, the 2021 ICC Rules apply to arbitrations with the amount not to exceed 3 million USD—an increase from the 2 million USD that the first version of expedited procedure in the ICC Rules introduced in 2017.[105] The threshold is larger under the HKIAC and SIAC rules: 3 million USD and around 4.5 million USD respectively.[106] In contrast, the ICDR expedited procedure can apply only to dispute not to exceed a meager 250,000 USD.[107] Despite these procedural limitations, expedited procedure enjoys sizeable popularity. International arbitral centers registered and administered hundreds of expedited tribunal disputes over the past decades.[108]

Given the advantages of expedited procedure, authors Lal and Kasey argue that expedited arbitration would be a better-suited alternative for urgent dispute resolution. Specifically, the authors

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103 Alexandra Mitretodis & Brock Euper, *Expedited Arbitrations: Comparison of the Various Institutions' Rules*, ADR INST. CAN., https://adric.ca/expedited-arbitrations-comparison-institutions-rules/ [https://perma.cc/FU4E-VWXW] (last visited Feb. 13, 2023).

104 Mitretodis & Euper, *supra* note 103.

105 2,000,000 USD if the arbitration agreement was concluded on or after March 1, 2017, and before January 2021, and 3,000,000 USD if the arbitration agreement was concluded on or after January 1, 2021. ICC RULES, app. VI, art. 1(2).

106 For the HKIAC-set amount, see 2018 HKIAC RULES, art. 42.1. *See also Expedited HKIAC Arbitration*, HKIAC, https://www.hkiac.org/arbitration/process/expedited-hkiac-arbitration [https://perma.cc/57NR-ASPJ] (last visited Feb. 2, 2023); SIAC RULES 2016, r.5.1.

107 2014 ICDR RULES, art. 1(4).

108 For example, the SCAI administered over 454 expedited procedures between 2004 and 2018 within an average of 6 months. Between 2014 and 2018, the HKIAC registered 69 applications for expedited procedures and administered 47, with a mean duration of 8 months. The SIAC received staggering 499 applications for expedited procedure between 2010 and 2018 and accepted 291 of these applications. The SIAC reports that the mean duration of cases before a sole arbitration is 13 months. *See Responses to the UNCITRAL Questionnaire on Expedited Arbitration*, UNCITRAL, (July 29, 2019), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/responses_to_questionnaire_29_july.pdf [https://perma.cc/8N6S-D22Z].

argue emergency arbitration applications are rarely successful and uncertainties continue to exist about the enforceability of emergency awards.[109] They therefore suggest that because an applicant requires an emergency relief that facilitates the final relief, it also follows that the applicant also wants to achieve the final resolution as quickly as possible.[110]

But the desire of the parties to achieve resolution of the entire dispute is a truism—it does not tell us anything about the needs of the parties to nevertheless resort to urgent procedures because is it necessary to preserve their rights in a later dispute. And, as the authors themselves admit, expedited procedure has many limitations including: (1) the need for the parties to agree to an expedited timetable; (2) the inflexibility of the institutional rules that also vary greatly; and (3) the already discussed monetary ceilings.[111]

There is no guarantee that the parties will agree to an express resolution through the expedited procedure and because the rules do not have tight procedural time limits, like those offered by emergency arbitral rules, or that the tribunal will be established in the time necessary to preserve key evidence or assets.[112] Therefore, expedited arbitration often cannot fill in the gap before the constitution of an arbitral tribunal and assure that the assets or rights of the parties are preserved. Lastly, because expedited procedure comes with many procedural restrictions that require parties to commit to a set briefing schedule, not only for the emergency issue but also for the main dispute, and prevents recourse to oral hearings or witness examination, parties may not always wish to resort to this option even if the tribunal could be constituted fast enough.[113]

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109 Hamish Lal & Brendan Casey, *Ten Years Later: Why the 'Renaissance of Expedited Arbitration' Should be the 'Emergency Arbitration' of 2020*, 37 J. INT'L. ARB. 325, 325-40 (2020).

110 *Id.* at 332.

111 *Id.* at 333.

112 *See* BORN, *supra* note 55, at 2453 (arguing the expedited procedure enables "a tribunal to be formed and be in a position to consider requests for provisional measures in a matter of days or weeks" and that although the procedure does not address every "need for rapid mechanisms for tribunal-ordered provisional measures" the appointment procedure nonetheless provides a means for tribunal ordered provisional relief in some cases).

113 *Using Fast Track Arbitration for Resolving Commercial Disputes*, *in* CORPORATE AND COMMERCIAL DISPUTE REVIEW 25, 27 (Norton Rose Fulbright Issue 6, ed. Mar. 2018) (explaining that fast track arbitration is not suitable for complex disputes or multi-party proceeding because of the process' "short deadlines, [which] entail very considerable preparation, whereby documents [must] be

Undeniably, expedited tribunal formation has its advantages, and it can in some circumstances replace a recourse to emergency arbitration. But emergency arbitration proceedings are still a necessary option for parties in instances where the issues are truly urgent or where a party cannot rely on the cooperation of the adverse party.

II. PART II. THE LEGAL STANDARD AND PREREQUISITES TO A GRANT OF EMERGENCY RELIEF

Once the framework in which emergency arbitration exists is set up, the next question is what standard an emergency arbitrator applies when evaluating whether to grant a requested emergency arbitration relief. Despite the question's obvious importance, a majority of arbitral rules never codified a standard for adjudication of what situation merits an award of an emergency relief or interim relief more broadly.[114] Similar to the provisions outlining the arbitral tribunal's powers to grant interim measures, the provisions delineating the power of the emergency arbitrator broadly recognize the arbitrator's powers to award provisional measures if they "consider" it "necessary" or "appropriate" to do so.

The absence of international rules or national legislation led the United Nations Commission on International Trade Law in 2006 to propose a draft of an article encapsulating a standard for a grant of interim measures based on earlier practice[115]:

> (1)The party requesting an interim measure under article 17(2)(*a*), (*b*) and (*c*) shall satisfy the arbitral tribunal that:
>
> (*a*) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
>
> (*b*) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on

collected and verified rapidly and witness statements drafted even before the commencement of proceedings").

114 *See* Alnaber, *supra* note 8, at 449.

115 *See* NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 315 (6th ed. 2015) (stating that because "the applicable test for interim measures is rarely enunciated in applicable laws of arbitration," the revised UNCITRAL Model Law of 2006 set out a test that followed earlier arbitral practice).

> this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.[116]

Yet no international arbitral center other than the HKIAC and the Australian ACICA adopted a formal standard in the subsequent revisions to the institutional rules.[117] Moreover, the proposal to codify an interim relief standard proposed in UNCITRAL Model Law Article 17A was criticized as "unnecessary and unwise" because it would threaten the "ongoing formation of intentional standards, tailored to the needs of particular cases."[118] But in the end, the lack of codification of the Model Law did not prevent it from guiding and influencing the development of an international standard.[119]

Over time, most arbitral tribunals and sole emergency arbitrators developed a standard, with varying language, that requires a showing of: (1) a degree of urgency that is often closely connected with; (2) a reasonable possibility of success on the merits; and (3) a harm that cannot be adequately compensable by damages.[120] Additionally, an arbitrator is also required to balance the burdens on the parties.[121]

Some scholars group the standard for a grant of emergency interim with the requirement of the arbitrator's prima facie

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116 U.N. COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, at 10, U.N. Docs. A/40/17, A/61/17, U.N. Sales No. E.08.V.4 (2006) [hereinafter UNCITRAL MODEL LAW].

117 *Compare* 2018 HKIAC RULES, art. 23 (incorporating UNCITRAL MODEL LAW art. 17A); AUSTL. CENTER FOR INT'L COM. ARB. [ACICA], ACICA RULES, art. 37.3 (2021) [hereinafter 2021 ACICA RULES] (incorporating UNCITRAL MODEL LAW art. 17A); *with* ACICA, ACICA RULES, sched. 1, art. 3.5 (2016) (showing that (a) "irreparable harm is *likely* to result;" (b) such harm substantially outweighs the likely harm to the party affected by the measures; and (c) the party has "a reasonable possibility" of success on the merits) [hereinafter 2016 ACICA RULES]; 2021 ICC RULES, app. V, art. 1(3); (adopting the emergency procedure in 2012 but amending the rules both in 2017 and 2021); 2020 LCIA RULES, *supra* note 41, art. 9.5 (adopting the procedure in 2014 but amending the arbitral rules in 2020). Article 23.4 of the HKIAC rules, which applies through emergency arbitration through Schedule 4, Article 11, outlines that an applicant for emergency relief must show that: (1) the harm is "not adequately reparable" by an award of damages; (2) such harm "substantially outweighs" the harm to the party against whom the measure is directed if the measure is granted; and (3) there is a "reasonable possibility" that the applicant will succeed on the merits. 2018 HKIAC RULES, art. 23.

118 *See* BORN, *supra* note 1, at 2465.

119 *See* Hanessian & Dosman, *supra* note 56, at 227-28.

120 38*See generally* BORN, *supra* note 1, at 2468-83; Goldstein, *supra* note 3; Alnaber, *supra* note 8, at 449-53.

121 *See* BORN, *supra* note 1, at 2468 (Tribunals also sometimes consider the requirement of no prejudgment on the merits.).

jurisdiction.[122] Even though, as a general matter, jurisdiction is also a "requirement" for the grant of emergency relief, it is conceptually distinct from the legal standard. Jurisdiction is a necessary pre-condition to the application of a legal standard on the merits rather than a legal standard itself, and therefore, for clarity's sake, it is beneficial to treat jurisdiction and prima facie requirements analytically separate, even though their constituent elements may overlap, to avoid confusion.

A debate continues to surround the standard. On the one hand, authors point out that the absence of a standard means that the standard is well established, containing a "coherent set of criteria for evaluating applications for interim relief" that equips the tribunals and sole arbitrators with flexibility and discretion to tailor their decision to the circumstances of a given case.[123] Many welcome the flexibility of the standard and perceive it as necessary to address different circumstances and types of relief in question. For example, provisional measures to preserve the status quo or order performance may require a stronger showing of serious injury, urgency, and a possibility of success on the merits than a request for preservation of evidence or enforcement of confidentiality of obligation.[124] On the other hand, critics argue that the standard creates much confusion for arbitrators in a proceeding that needs condensing into a short timeframe, risking errors and misunderstandings.[125]

This section shows that a "common arbitral law" standard that applied to emergency relief has emerged, and each of the three discussed prongs—urgency, success on merits, and requisite harm—

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122 8*See, e.g.*, Alnaber, *supra* note 8, at 449 (articulating "three commonly used requirements" for granting an interim relief) ("(i) '[P]rima facie jurisdiction'; (ii) 'prima facie case' (or reasonable possibility of success); and (iii) 'harm not adequately reparable.'"); Edgardo Munoz, *How Urgent Shall an Emergency Be – The Standards Required to Grant Urgent Relief by Emergency Arbitrators*, 4 Y.B. ON INT'L ARB. 43, 56 (2015) (explaining that generally applied "requirements" are (1) jurisdiction of the arbitrator; (2) prima facie case on the merits; (3) irreparable harm suffered by the applicant; (4) urgency; and (5) balance of convenience/proportionality.).

123 4*See* Gaillard, *supra* note 1, at 305-06.

124 3*See* BORN, *supra* note 1, at 2468-69; *see also* Goldstein, *supra* note 3, at 797 ("[T]he extent to which these recognized criteria will be applied . . . will vary with the urgency [of the request], the profile of the arbitrator, the briefing of issues by the parties, and the nature of the emergency relief sought—with possibly more attention to the jurisprudence of standards and criteria when the applicant seeks affirmative relief than when the applicant seeks to preserve the status quo . . . .").

125 *See* Svetlicinii, *supra* note 5, at 18.

has distinct and established content.[126] For example, the showing of reasonable success on the merits requires slightly more than a threadbare assertion of a claim, but it also is not a demanding showing of a possibility of success. Because the content of this prong captures a range of possible outcomes, scholars worry that it gives too much discretion and creates uncertainty.[127] But the metes and bounds of each prong are set. In this example of reasonable success on the merits, there is a lower and upper threshold—the closer the claim is to the floor that is a threadbare claim, the harder it will be to tell where the cutoff line is. Most arbitral and even judicial standards leave some space for discretion because fixating the standard to one point within a range is often hard, if not impossible, to convey with the use of language. Often, it is also not desirable out of concern for depriving the standard of flexibility.

Acknowledging the existing variance or even a potential for clarification does not mean that there is not a generally workable emergency measures standard. Both tribunal-ordered interim measures, of which standards are identical to emergency arbitral measures,[128] and even judicial permanent injunctions have been criticized as suffering from too much flexibility and too little clarity.[129] Without commenting on whether reform would be appropriate or necessary, this section shows that the standard applied to emergency measures reached, at the very least, a level of harmonization and workability comparable to tribunal-granted interim measures or injunctions.

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126 *See generally* CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 135 (2007) (discussing the creation of common arbitral law).

127 Svetlicinii, *supra* note 5, at 18; *see also* Goldstein, *supra* note 3, at 797-80, 793 (It is perhaps in regard to the strength of the applicant's case on the merits—as must be demonstrated as a prerequisite for the obtaining of provisional relief—that there is the largest chasm between the approach of common law courts and the international customary standard.).

128 *See generally* CHARTERED INST. OF ARBS., INTERNATIONAL ARBITRATION PRACTICE GUIDELINE 4: APPLICATIONS FOR INTERIM MEASURES 5-9 (2016), https://www.ciarb.org/media/4194/guideline-4-applications-for-interim-measures-2015.pdf [https://perma.cc/42YT-FHTK].

129 *See, e.g.*, Stephen Benz, *Strengthening Interim Measures in International Arbitration*, 50 GEO. J. INT'L L. 143, 143 (2018); Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 498 (2003).

A. *Urgency*

The UNICITRAL Model Law does not explicitly refer to urgency, even though it appears to lie at the very core of emergency arbitration—without urgency, there is no justification for an extraordinary grant of relief before the formation of the tribunal.[130] But even in the articulation of the standard without urgency, urgency is implicit in the evaluation of harm. Because urgency and harm ask whether a situation is so serious that it warrants extraordinary relief, they constitute the most important criteria for predicting the success of an application.[131]

The arbitral rules articulate harm differently. The ICC rules, for example, require a party to show that the request measure "cannot await the constitution of an arbitral tribunal."[132] Other rules require the applicant for emergency rules to state reasons for the emergency relief sought.[133] The HKIAC rules combine these two formulations, requiring that an applicant provides "the reasons why the applicant needs the Emergency Relief on an urgent basis that cannot await constitution of an arbitral tribunal."[134] In addition to these provisions, Professor Gaillard also points out that the arbitrator's power to determine whether a measure is "appropriate or necessary"[135] ordinarily includes an evaluation of urgency.[136]

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130 For a long time, international tribunals recognized the obvious but essential meaning of urgency early. *See, e.g.*, STEWART A. BAKER & MARK D. DAVIS, THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 139 (1992).

131 *See* BORN, *supra* note 1, at 2468-75 (explaining that a "better view" on the Model Law's omission of urgency is that it is "implicit" in the "requirement for serious injury"); *see also* SCC Emergency Arbitration 2018/140 ("The concept of urgency is interdependent on the existence of imminence of a threat: if the threat of grave harm is imminent, there is a need for urgent relief.").

132 2021 ICC RULES, *supra* note 41, art. 29(1). Indeed, some sole arbitrators reject urgency as a separate standard and analyze it as a part of the "serious" or "irreparable harm" requirement. *See* SCC EA Case No. 2016/30.

133 2014 ICDR RULES, *supra* note 42, art. 6(1) (requiring an applicant to state why relief is "required on an emergency basis"); 2020 LCIA RULES, *supra* note 41, art. 9.5 (requiring that an application "set out . . . specific grounds for requiring, as an emergency, the appointment of an Emergency Arbitrator"); 2012 SCAI RULES, *supra* note 41, art. 43 ("statement of the interim measure(s) sought and the reasons therefor"). The exception is the SIAC rules, which only state that a "party that wishes to seek emergency interim relief" may do so. 2016 SIAC RULES, *supra* note 41, at sched. 1, art. 1.

134 2018 HKIAC RULES, sched. 4, art. 2.

135 481*See* Gaillard, *supra* note 1, at 305-06. *See also* text accompanying *supra* note 80 for a summary of the relevant rules.

136 *See* Gaillard, *supra* note 1, at 313.

Because under the rules, urgency seems to have a role both at the application and merits stage and because the evaluation of urgency overlaps with other prongs of the standard, two principal areas of differences emerged in how arbitrators analyze urgency: (1) the issue of whether to analyze urgency as a threshold matter or on the merits; and (2) what considerations constitute urgency.

First, some emergency arbitrators interpreted the reference to urgency within the articles stating the requirements for an application—such as ICC Article 29(1), which provides that a party can apply for emergency measures if they "cannot await constitution of an arbitral tribunal"—as a threshold applicability question and not a question for the merits.[137] For example, in ICC EA Case No. 8, the tribunal found that there was no need to consider merits because the applicant did not show sufficient urgency "that cannot await the constitution of an arbitral tribunal" as a matter of admissibility.[138] The ICC Task Force, on the other hand, found that a proper reading of ICC Article 29(1) would require an arbitrator to consider urgency as a two-step approach at the admissibility and merits stage, possibly applying a lower standard for urgency as a matter of admissibility.[139] Although differences and overlaps may exist just as they often do in considerations of jurisdiction and merits in courts, they do not constitute a major cause for concern because if an applicant cannot meet a possibly lower showing of urgency as an admissibility matter, the applicant will be unlikely to succeed on the merits either.

The second area where arbitrators differ in analyzing urgency concerns the constituting elements of urgency. At least three differently construed approaches to evaluate urgency emerged: (1) a standard that equates urgency with irreparable harm; (2) a standard that evaluates whether a measure can await the constitution of an arbitral tribunal; and (3) a standard that assesses whether a measure causes irreparable harm and additional factors.

An example of the first approach is an SCC case in which the claimants—oil and gas importers and wholesalers—applied for emergency measures that would maintain the status quo and prevent the respondent—an oil supplier—from enforcing an increased contract price and resume deliveries of oil.[140] The emergency

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137 2021 ICC Rules, *supra* note 41, art. 29(1).

138 *See* ICC EA REPORT 2019, *supra* note 9, at 13 (quoting ICC EA Case No. 8).

139 9*See* ICC EA REPORT 2019, *supra* note 9, at 13-14.

140 SCC Case No. EA 2016/30, SCC Case No. EA 2016/31, and SCC Case No. EA 2016/32, *in* ANJA HAVEDAL IPP, SCC PRACTICE NOTE, EMERGENCY

arbitrator rejected a separate urgency test and instead found that "the very conclusion that there is an imminent risk of (further) harm not adequately reparable by an award of damages should be sufficient to meet the urgency test."[141]

The second approach evaluates "urgency" by assessing whether the measure could await the constitution of the arbitral tribunal. In another SCC case, a chemical company applied for interim measures that would prevent a fertilizer supplier from moving certain assets that were the subject of the dispute.[142] The emergency arbitrator found that the measure was urgent because of the supplier's restructuring that would move assets would likely take place before the tribunal was constituted.[143] A similar approach is also dominant in ICC case law where Article 29 requires the tribunal to assess whether the urgency "cannot await the constitution of an arbitral tribunal."[144]

ICC case law also reveals that arbitrators apply a third approach—something of an "irreparable harm *plus*"—where the arbitrator considers not only whether the relief is required to avoid imminent irreparable harm, but also other factors that include whether the applicant contributed to the urgency and whether there are other compelling reasons that ground the urgency of the requested measure.[145]

On the surface, it appears that arbitrators' approach to assessing urgency is not consistent, which could create uncertainty for parties and inconsistent results.[146] But because urgency is so heavily fact dependent, it can hardly be reduced to a mechanical multi-factor formula. Instead, a workable standard must communicate some level of urgency required as it does here but leave enough flexibility to the arbitrator to consider a potentially unlimited number of factors that can impact urgency.

Further, it is not entirely clear that these standards are not simply different articulations of the same standard. After all, the articulation

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ARBITRATION DECISIONS RENDERED 2015-2016 5, 5-7 (June 2017), https://sccarbitrationinstitute.se/sites/default/files/2022-11/ea-practice-note-emergency-arbitrator-decisions-rendered-2015-2016.pdf [https://perma.cc/QUT6-M8MU].

141 SCC Case No. EA 2016/046, *in* ANJA HAVEDAL IPP, SCC PRACTICE NOTE, EMERGENCY ARBITRATION DECISIONS RENDERED 2015-2016 5, 7 (June 2017).

142 *Id.* at 7-8.

143 *Id.*

144 9*See* ICC EA REPORT 2019, *supra* note 9, at 24.

145 *Id.*

146 *Id.* at 24-25.

of urgency as a harm that "cannot await a constitution of arbitral tribunal" closely overlaps with whether harm is "irreparable" because only harms that cannot be adjudicated before a tribunal is constituted are truly irreparable. The core of the standard in each iteration, therefore, focuses on the possibility of immediate serious harm set against the broader principles of emergency arbitration that aim to preserve the rights of the parties until proceedings on the merits can be held. Because urgency seems to be at the very heart of emergency arbitration proceedings, arbitrators and tribunals should consider it with great caution. However, it is not certain that more clarity would be achieved by further refining of the standard because of the impossibility of encompassing the many salient facts that could constitute urgency in each case.

B. *Reasonable Possibility of Success on the Merits*

Although the formulation of the prong resembles the standard for obtaining provisional relief in common law courts, the content of the international customary standard for a grant of interim relief that was adopted in emergency arbitration is different.[147] The expressions of this requirement vary, with expressions such as "good prospects of success on the merits," "a likelihood of success on the merits," "reasonable possibility of success of the merits," "good prospect on the merits," "prima facie case," "good arguable case," and "real probability" of success.[148] The various iterations of the success-on-the-merits requirement have one unifying goal: to keep out meritless and vexatious claims but also to do it in a manner that would not prejudge the issue that will be in front of the tribunal later.[149]

Although the articulation of the standard differs and often includes the common law wording of harm as irreparable, it is generally agreed that the international standard is less demanding than the traditional common law standard. Professor Kaufman-Kohler

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147 The courts in common law systems can grant injunctive relief if the plaintiff shows a "likelihood of success on the merits, the prospect of irreparable harm, the comparative hardship to the parties of granting or denying relief, and sometimes the impact of relief on the public interest." *See* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 525 (1978).

148 569*See* Hanessian & Dosman, *supra* note 56, at 228. *See also* ICC EA REPORT 2019, *supra* note 9, at 25 (observing most EA proceedings operate under the SCC regime and so "reasonable possibility" of success on the merits is one of the widely articulated standards).

149 *See* Alnaber, *supra* note 8, at 451; Hanessian & Dosman, *supra* note 56, at 228-29.

noted that the "transnational standard" of "possibility of success on the merits" "soften[ed] the traditional requirement and tend[s] to be satisfied with a showing that the claim is not manifestly without merit."[150] Arbitral tribunals are particularly reluctant to extend assessments on the merits at a very early stage of disputes where the record is still scarce.[151] This reasoning applies with a particular force to emergency arbitral awards, which are decided within a very short timeframe and on even more limited party submissions.[152]

Nevertheless, commentators argue that disparities persist within the standard as applied to emergency relief and that two versions of the standard emerged: (1) a "softer standard" requiring a showing that "the elements of a claim are present;" and (2) a "higher" standard that requires "something more" than a bare claim, which is most closely encapsulated by a "reasonable possibility of success."[153]

The first standard, requiring nothing more than elements of a claim, appears to be an exception rather than a genuine alternative. The SCC noted this standard was only applied in a handful of cases, and most arbitrators apply the "something more" standard.[154] Other arbitral institutions also report similar results.[155]

The second and prevailing standard was best articulated in a dispute in front of an SCC tribunal. There, the claimant—a chemical company—requested an order directing the respondent, a producer of fertilizers, to refrain from transferring property.[156] The sole emergency arbitrator outlined the standard for interim measures citing a broad

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150 Goldstein, *supra* note 3, at 794 (quoting GABRIELLE KAUFMANN-KOHLER & ANTONIO RIGOZZI, INTERNATIONAL ARBITRATION LAW AND PRACTICE IN SWITZERLAND 343-44 (¶ 6.120) (3d ed. 2015)).

151 3*Id.*

152 *See supra* notes 40-41, 43-46 and accompanying text.

153 140Summarizing recent SCC EA decisions, Chung found that there are at least two different standards for assessment of a prima facie case in emergency arbitration: (1) a prima facie, "showing that the elements of a claim are present," and (2) a higher threshold of requiring a finding by the arbitrator that the claimant's claim is "more plausible" or that the claimant appears "more likely than respondent to succeed on the merits." Kyongwha Chung, *Prima Facie Case on the Merits in Emergency Arbitration Procedure*, KLUWER ARB. BLOG (Sept. 8, 2017), http://arbitrationblog.kluwerarbitration.com/2017/09/08/prima-facie-case-merits-emergency-arbitrator-procedure/ [https://perma.cc/HG7A-FHEZ]. *See also* IPP, *supra* note 140, at 18 (outlining that although some arbitrators were satisfied with mere elements of a claim present, most require a "somewhat higher threshold of a reasonable success on the merits").

154 *Id.*

155 9*See* ICC EA REPORT 2019, *supra* note 9, at 25.

156 *See* IPP, *supra* note 140, at 7.

consensus, common sense, and the well-known arbitration treaties by Gary Born and Redfern & Hunter.[157] The emergency arbitrator further explained that a reasonable prospect of success on the merits has been "described as a *prima facie* test, but in fact it should be slightly more . . . [:] a 'colorable claim,' one might say, which is more than a *prima facie* showing, which requires no evidence at all."[158] Such standard is somewhat of a "goldilocks" even as compared to the general international standard: a lower standard than one required by many common law courts but a higher standard than a bare recitation of a claim, so that an arbitrator could still perform their function of sorting out meritless claims.

C. *Requisite Harm*

The concept of "irreparable" or "serious" harm also parted with its common law origins. The division between the courts of law and equity contributed to the development of a common law standard that allows the court to grant injunctions, drawing on its equitable powers, only where monetary damages—also known as remedies at law—were not enough.[159] The international arbitral practice largely evolved away from a strict common law understanding of irreparability through non-compensability by monetary damages. The Model Law's Article 17A embodies the general international standard by articulating harm as "not adequately reparable" through damages, rejecting the restrictive common law version promulgated by the United States delegation present at the drafting process and following a by-then developed practice.[160]

But the common law-influenced approach to irreparable harm through strict compensability did not disappear from the international arbitral caselaw, perhaps as a result of common arbitrators being influenced by their domestic practices. Two well-known investment-treaty arbitrations under the SCC demonstrate the distinct approaches to irreparable harm that emerged—*Evrobalt LLC v. The Republic of Moldova* and *Kompozit LLC v. The Republic of Moldova*.[161] Both of these cases concerned investors who acquired substantive shares in a

157 140*Id.*

158 *Id.*

159 *See* Leubsdorf, *supra* note 147, at 530.

160 *See* Goldstein, *supra* note 3, at 789-90.

161 Evrobalt LLC v. The Republic of Moldova, SCC EA Case No. 2016/82 (Swed.); Kompozit LLC v. The Republic of Moldova, SCC EA Case No. 2016/95 (Swed.).

Moldovan bank in an alleged violation of a Moldovan law that required permission from the National Bank of Moldova.[162] Because of this alleged violation, the National Bank suspended the investors' voting rights and ordered the investors to sell the shares within a certain time period.[163] In both cases, the claimants filed for emergency relief to stay the Bank's order.[164]

To everyone's great surprise, the sole emergency arbitrator reached opposite results in these nearly identical cases. In *Evrobalt*, the arbitrator refused to grant the requested stay because the harm caused by the National Bank's order of suspension of voting rights and the order to sell shares was "purely economic in its nature and confined in its scope."[165] This harm, according to the arbitrator, was "adequately reparable by an award of damages," unlike the harm in *Paushok v. Mongolia* and *Chevron v. Ecuador*.[166] The sole arbitrator distinguished the tax imposed in *Paushok*, where the tribunal found irreparable harm because the new tax would have "economically ruined the claimant."[167] The arbitrator further distinguished the harm from the one in *Chevron* because in *Chevron*, the harm was "potentially huge" and there was additionally a threat to the claimant's right to achieve an "adequate remedy" because of enforcement and execution of the judgment in foreign jurisdictions by third parties.[168]

Yet in *Kompozit*, the arbitrator found that almost the same type of suspension of voting rights and forced divestiture of shares would cause "irreparable harm." The arbitrator in *Kompozit* applied a lower threshold for what constituted "irreparable harm"—a "substantial prejudice"—instead of the higher threshold applied in *Evrobalt*.[169] The arbitrator pointed out different reasoning in *Paushok v. Mongolia* as a support for his decision because in *Paushok*, the tribunal explained that irreparable harm has "a flexible meaning" in international law, which means that "[t]he possibility of monetary

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162 *Evrobalt LLC*, SCC EA Case No. 2016/82, ¶ 16; *Kompozit LLC*, SCC EA Case No. 2016/95, ¶ 86.

163 *Id.*

164 *Id.*

165 Evrobalt *LLC*, SCC EA Case No. 2016/82, ¶ 48.

166 *Id.* ¶ 51; *see also* Sergei Paushok v. Gov't of Mongolia, Order on Interim Measures, (Sept. 2, 2008); Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23, Fourth Interim Award, (Feb. 7, 2013).

167 *Evrobalt LLC*, SCC EA Case No. 2016/82 ¶ 53 (citing Paushok, Order on Interim Measures, ¶¶ 78, 89).

168 *Id.* (citing Chevron, PCA Case No. 2009-23, ¶ 83).

169 *Compare Kompozit LLC*, SCC EA Case No. 2016/95 ¶ 88, *with Evrobalt LLC*, SCC EA Case No. 2016/82 ¶ 51.

compensation does not necessarily eliminate the possible need for interim measures."[170] The sole arbitrator thus concluded that the divestiture of shares and suspension of voting rights would likely irreparably harm the claimant.[171]

Critics point out that the different results in these twin cases with nearly identical facts suggest unpredictability and lack of uniformity about when a tribunal or a sole arbitrator grants an interim measure that increases uncertainty and costs for businesses.[172] While this criticism has some merit, *Kompozit* and *Evrobalt* also share unifying characteristics. Neither of these cases applied a strict irreparable harm test that would dictate that any harm compensable by damages is not irreparable.[173] Instead, the arbitrator in *Evrobalt* found that the monetary damage was not serious enough, such as the harm in *Chevron* that amounted to eighteen billion dollars.[174]

Broadly speaking then, the standard of "irreparable harm" applied in emergency arbitration agrees with the general international arbitration practice that is interpreted as requiring a showing of grave harm, even if compensable by money.[175] A truly irreparable harm standard in commercial arbitration would severely limit the instances when arbitrators and tribunals could grant interim measures to an occasion when one party is insolvent or enforcement is impossible.[176]

Kompozit and *Evrobalt* showed that the standard, although rejecting strict non-compensability by damages, still needs calibration. Only future case law will show whether the role of damages will be

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170 *Kompozit LLC*, SCC EA Case No. 2016/95 ¶ 89.

171 *Id.* ¶ 88.

172 *See* Benz, *supra* note 129, at 162; Svetlicinii, *supra* note 5, at 18.

173 A traditional definition of "irreparable harm" in the United States is harm that "cannot be readily compensable by an award of damages." *See* BAKER & DAVIS, *supra* note 130, at 139-40.

174 Evrobalt LLC, SCC EA Case No. 2016/82 ¶ 53 (citing *Chevron*, PCA Case No. 2009-23, ¶ 83).

175 9*See* BORN, *supra* note 1, at 214 (explaining that most decisions that state that damage must be "irreparable" to qualify for interim relief, "do not appear to apply this formula, but instead require that there be a material risk of serious damage to the plaintiff"); ICC EA REPORT 2019, *supra* note 9, at 25 ("[I]n international arbitration practice, the *periculum in mora* requirement has often been interpreted to require a showing of serious or grave harm, even if compensable by money.").

176 *See* UNCITRAL MODEL LAW, *supra* note 116, at 521, n.45 ("The 2010 UNCITRAL drafters believed 'irreparable harm' would occur, for example, in situations such as a business becoming insolvent, essential evidence being lost, an essential business opportunity (such as the conclusion of a large contract) being lost, or harm being caused to the reputation of a business as a result of a trademark infringement.").

entirely eliminated, as in *Kompozit*, or considered to a certain threshold when the damages are considered too grave, as in *Evrobalt*.

III. PART III. ENFORCEABILITY OF EMERGENCY ARBITRAL ORDERS AND AWARDS

Parties to disputes in international commercial arbitration historically showed a tendency towards compliance with tribunal-ordered interim measures.[177] Emergency arbitration awards and orders fared similarly; the statistics show that parties voluntarily comply with a vast majority of emergency awards and orders.[178] Parties also have good reasons to comply. Non-compliance could have grave consequences: it could impact the credibility of a nonperforming party in the business community or, worse, lead to the tribunal drawing adverse inferences against the noncomplying party at the merits stage.[179]

But there may be reasons for an obstinate party to not comply as well. For example, a party may desire to preserve its arguments on jurisdiction and admissibility in a case of multi-tiered dispute resolution clauses where certain mandatory conciliation procedures had not been followed or simply believe that the negative consequences in the form of possible adverse inference are not substantial or sufficiently defined.[180] Because of this possibility, the enforceability of the emergency arbitration measures remains a vital concern to the protection of one party's rights and a critical consideration for parties deciding whether to apply for the measures.[181]

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177 *See* KAUFMANN-KOHLER & RIGOZZI, *supra* note 150, ¶ 6.130.

178 9*See* ICC EA REPORT 2019, *supra* note 9, at 39-43; Anja Ipp, *Urgency, Irreparable Harm and Proportionality: Seven Years of SCC Emergency Proceedings*, KLUWER ARB. BLOG (June 29, 2017), http://arbitrationblog.kluwerarbitration.com/2017/06/29/urgency-irreparable-harm-proportionality-seven-years-scc-emergency-proceedings/ [https://perma.cc/7HUW-D4KM] (noting that the compliance with SCC emergency decisions appears to be high but also that this assessment is based on anecdotal evidence).

179 *See* Bassler, *supra* note 5, at 574.

180 *See generally* Lal & Casey, *supra* note 109, at 330.

181 12In a 2015 White & Case survey, parties view the enforceability of arbitral awards as the most valuable characteristic of international arbitration. Seventy-nine percent of respondents pointed to "concerns about the enforceability of emergency arbitrator decision as one of the most important factors influencing their choice [whether to apply for an emergency measure]." 2015 INTERNATIONAL ARBITRATION SURVEY, *supra* note 12, at 28.

Much has been written about the long shadows that enforceability poses for the bright dawn of emergency arbitration.[182] On a theoretical level, the concerns about enforceability center around two issues: one concerns the form and nature of emergency arbitration and decisions, and the other concerns the finality of arbitral decisions. After reviewing the theoretical underpinnings of these concerns, this Part will address four country examples—the United States, France, India, and Singapore—that represent four varied examples of how countries approached enforceability issues.

A. *Concerns Surrounding Enforceability of Emergency Awards*

1. *Form as an Obstacle to Enforcement*

The enforcement of arbitral awards and orders under the New York Convention and national arbitration laws depends on whether the award or order falls within the formal definitions of an "arbitrator," "arbitral tribunal," and "enforceable award."

First, even though all arbitral rules refer to the sole emergency arbitrator as "emergency arbitrator" and the arbitral process as "emergency arbitration," questions arose in the past about whether these are indeed an "arbitrator" and "arbitration" within the scope of the definitions provided by the New York Convention and national arbitral laws.[183] Focusing mainly on the form, Baigel argued that the ICC Emergency Arbitral Rules from 2012 were akin to the Pre-Arbitral Referee procedure and that the procedure agreed to an emergency arbitration is pre-arbitral and contractual rather than

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182 *See, e.g.*, Lal & Casey, *supra* note 109, at 328 ("Serious questions about the enforceability of Emergency Arbitrator Orders or Awards remain despite the fact that Emergency Arbitrator mechanisms are present in all of the major institutional rules."); Fry, *supra* note 27, at 180 ("Notwithstanding subsequent amendments to the laws of numerous countries to incorporate these change, interim measures have remained something of an 'Achilles heel' for arbitration.").

183 GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 557 (3d ed. 2021). Illustrative of the problems is Article 17H of the revised UNCITRAL Model Law 2006, which states that "interim measures issued by an arbitral tribunal shall be recognized as binding and . . . enforced upon application to the competent court." The New York Convention on the other hand provides that the treaty applies only to "arbitral awards." *See id.* at 529. The courts that adopted laws modelled on the UNCITRAL Model Law or who are signatories to the New York Convention will be then left to interpret what fall under the definition of an "arbitral tribunal" and an "arbitral award."

"arbitral."[184] Baigel also argued that entrusting "two arbitrators"—the emergency arbitrator and the arbitral tribunal—could cause problems such as conflicting conclusions on the same application for interim relief.[185] Baigel's argument, which was founded on an understanding of the emergency arbitrator's powers as a "contractual mechanism" rather than an arbitral decision, was similar to the Paris Court of Appeal's analysis in a famous case *Société Nationale des Pétroles du Congo and République du Congo v. TotalFinaElf E&P Congo*.[186] In *Société Nationale*, the Paris Court of Appeal denied enforcement of an ICC Pre-Arbitral Referee order.[187] The Court reasoned that the Pre-Arbitral Referee was not an arbitrator because his powers stemmed solely from the contract and because the Pre-Arbitral Referee Rules carefully avoided mention of the words "arbitration" and "arbitrator."[188]

Other commentators rejected Baigel's "contractual" theory of emergency arbitrator's powers and the Paris Court of Appeal's formalism.[189] Instead, the majority of scholars in the past focused on a functional analysis of the emergency arbitrator's powers and duties and concluded that because arbitrator's duties require them to follow a judicial-like procedure, an emergency arbitrator should be treated as an ordinary arbitrator.[190] These scholars found that even though the arbitrator's power to act has a basis in contract, once the arbitrator

184 Baruch Baigel, *The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis*, 31 J. INT'L ARB. 1, 9-10 (2014).

185 *Id.*

186 Cour d'appel [CA] [regional court of appeal] Paris, Apr. 29, 2003, Société Nationale des Pétroles du Congo and République du Congo v. TotalFinaElf E&P Congo.

187 *Id.*

188 *See* Alnaber, *supra* note 8, at 458.

189 There are many counterarguments and nuances addressing arguments introduced by Baigel and the Paris Court of Appeals reasoning that this paper omits for the sake of brevity. For a general response to the "contractual theory" and arguments introduced by Baigel in particular, see Fabio G. Santacroce, *The Emergency Arbitrator: A Full-fledged Arbitrator Rendering An Enforceable Decision?*, 31 ARB. INT'L 283, 290-302 (2015).

190 8*See, e.g.*, Alnaber, *supra* note 8, at 458-60; Santacroce, *supra* note 189, at 292-93. For a discussion arising from applying the Paris Court of Appeal's decision to the ICC pre-arbitral procedure, see Diana Paraguacuto-Mahéo & Christine Lecuyer-Thieffry, *Emergency Arbitrator: A New Player in The Field - The French Perspective*, 40 FORDHAM INT'L L.J. 749, 756-69 (2017).

accepts the mandate, they must act to resolve a dispute and therefore also exercise autonomous "adjudicatory" powers.[191]

Despite this debate, a few jurisdictions amended the definitions of "arbitrator" and "arbitral tribunal" to include emergency arbitrator.[192] Because the issue of whether an emergency arbitrator is an arbitrator was not taken up by the courts either, it appears that the existence of the debate about whether an emergency arbitrator is an arbitrator has been confined to academic discussions.

The second issue that attracted scholarly attention was whether the form of the emergency arbitrator's decision impacts enforceability. Most arbitral rules, apart from the ICC rules which only allow the emergency arbitrator to issue an order, allow the emergency arbitrator to decide whether to issue an order or an award.[193] The choice between an award and an order gives the arbitrator flexibility to choose an appropriate form of relief and to take into account enforceability issues. Many considerations go into the arbitrator's choice between an order or an award. An emergency arbitrator may decide to grant a "reasoned procedural order" for efficiency reasons—because an order requires less extensive text or elicits less scrutiny from the administering institution and is therefore faster—but may also decide against adopting an order if the measure needs to be enforced in a jurisdiction that considers orders non-enforceable.[194]

For example, the New York Convention requires contracting states to grant recognition and enforcement to foreign arbitral

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191 *See, e.g.*, Santacroce, *supra* note 189, at 292-93 ("It may be said, at the end of the day, the [emergency] arbitrator acts as a 'private judge,' carrying out the same tasks as those of state court judges. These are clearly jurisdictional features, which lead to the conclusion that the arbitrator has also a jurisdictional nature."). Emergency arbitrator's powers wield considerable discretion when it comes to establishing the procedure for conducting the arbitration, *see supra* note 83, but also when it comes to fashioning a relief that he or she deems "appropriate" or "necessary, *see supra* notes 81-82.

192 For example, Hong Kong Arbitration Ordinance § 22(b) was amended to state that "[a]ny emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court." Arbitration Ordinance, E.R. 2, (2014) CAP 609, § 22(b). The Bolivian Conciliation and Arbitration Law was similarly amended in articles 67-71. *See* BORN, *supra* note 183, at n.581.

193 *See* 2021 ICC RULES, *supra* note 92.

194 *See* Gaillard, *supra* note 1, at 308. *See also* Fry, *supra* note 27, at 184, 189 (pointing out that certain rules emphasize that the decision about the form "must be made while bearing in mind the duty to make every reasonable effort to ensure the enforceability of the decision").

"awards."[195] Alternatively, national law can also provide that only an "award" is enforceable.[196] Although courts interpreting these provisions tend to look to the substance, rather than the form, of the decision, it is still important for an arbitrator to have the latitude to shape a relief with the view of how it impacts enforceability.[197]

2. *Definition as an Obstacle to Enforcement*

A closely related concern to the form of the award is the definition of an award and the question of whether the emergency order falls therein. The New York Convention and many national arbitral legislations apply only to awards that are final and binding.[198] Commentators raised doubts about whether emergency measures are final and binding because they are temporary, modifiable by the tribunal, and do not settle the ultimate dispute between the parties.[199]

Equally strong arguments exist in favor of enforcing emergency arbitral awards as final and binding. Textually, nothing prevents an emergency order or award as an enforceable award because it shares all the characteristics of an ordinarily enforceable decision: a reasoned

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195 183*See* BORN, *supra* note 183.

196 *See generally* Gaillard, *supra* note 1, at 308.

197 9Courts of jurisdictions that do not strictly apply the principle of "substance over form" would remain of concern. The ICC highlighted these jurisdictions may be Australia, Lebanon, the U.A.E., Thailand, and Russia. ICC EA REPORT 2019, *supra* note 9, at 31.

198 5The New York Convention requires that the award be binding to be recognized and enforced. N.Y. Convention, art. 5(1)(e). The Convention does not, however, state that the award must be final, but finality has been required by judicial construction across many jurisdictions. *See* Bassler, *supra* note 5, at 563-64. Many jurisdictions require finality as well. Under U.S. law, the Federal Arbitration Act requires that the award be final to be enforceable. Federal Arbitration Act (FAA), 9 U.S.C. § 1. In France, an award is characterized as the "decision of an arbitral tribunal which finally settles in whole or in part, the underlying dispute wither[s] on the merits, on jurisdiction, or on any procedural issue which terminates the arbitral proceeding." *See* Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., Oct. 12, 2011, Bull civ. I, No. 11-16444 (Fr.).

199 9092189*See* 2015 CIETAC RULES, *supra* note 39; Gaillard, *supra* note 1 and accompanying text for an overview of the tribunal's powers to modify the emergency award under different rules. *See also* Santacroce, *supra* note 189, at 299-300 (discussing the criticism aimed at the provisional nature of emergency relief and the tribunal's powers to modify the measures). Historically, similar concerns arose in the enforcement of interim arbitral awards where national courts held that interlocutory orders are not final and binding on parties because they "may be rescinded, suspended, varied or reopened by the tribunal." Born, *supra* note 183, at 530-33 (quoting Resort Condominiums Int'l Inc. v. Bolwell, Y.B. COMM. ARB. 628 (Queensland Sup. Ct. 1993) (1995)).

decision issued by an arbitrator with significant discretion that finally disposes of a given issue.[200] Furthermore, public policy strongly favors recognizing emergency measures to aid the arbitral process and prevent harm interim measures were broadly created to address. Still, because of the scarcity of case law and legislation definitively deciding whether awards are enforceable, uncertainties about enforceability expressed by commentators or parties continue to exist. Against the backdrop of a growing demand for emergency arbitration, various countries developed different methods for aiding enforceability outlined below.

B. *National Solutions in Aid of Enforceability*

Enforceability of emergency awards is affected by the judicial construction of what is an "award" but also by individual national arbitration laws that define their legal status. Many arbitral laws address whether interim measures granted by an arbitral tribunal are enforceable.[201] However, most of these laws do not specify whether emergency measures are likewise enforceable, and there is a scarcity of judicial precedent addressing the issue.[202]

The doubts about the enforceability of emergency interim relief create uncertainty and potentially increase the costs of arbitration for parties. These concerns are not novel. The same doubts and concerns surround tribunal-granted interim measures, and they have resurfaced from the adoption of the first emergency arbitral mechanisms fifteen years ago. Despite these concerns, the interest in emergency arbitration grew. There are two phenomena explaining this growth. First, the threat of non-compliance has always been small because the parties have strong incentives to comply.[203] Second, countries and courts devised a patchwork of solutions that many times do not

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200 *See generally* Bassler, *supra* note 5 (arguing that a "purposive interpretation of the finality requirement for emergency arbitrator awards would enhance the effectiveness of arbitration and enforce the consensual arrangements and expectations of the parties").

201 *See generally* ICC EA Report 2019, *supra* note 9, at 30-31.

202 9To complicate the matters, many countries that do have statutory provisions that allow tribunals to grant interim measures distinguish between domestic- and foreign-seated arbitrations. In some countries, such as Columbia, emergency arbitration decisions are not enforceable in domestic arbitral proceedings but should be if the arbitration seat is abroad. Conversely, in countries like Croatia, only domestic relief orders are considered enforceable. *See generally* ICC EA REPORT 2019, *supra* note 9, at 30-31.

203 *See supra* notes 177-179.

completely eradicate the complications connected with non-enforcement but often time mitigate costs associated therewith or provide alternative avenues for redress.

The fastest and most direct solution to enforceability issues is amendments to national arbitral legislation. A handful of countries—Singapore, Hong Kong, and most recently New Zealand—amended their arbitral statutes and empowered their respective courts to enforce emergency arbitration awards.[204] But, parliaments are notoriously slow in addressing issues and enacting laws. In the absence of statutory direction, countries developed approaches that either enhance enforceability or provide alternative remedies. The next section addresses four country examples that encountered the problem of enforceability. Some of these countries' solutions aid enforceability directly, and others indirectly, through increasing costs of potential non-compliance. The first one is the already mention preferred solution, a legislative amendment that directly aids enforceability, introduced with the example of Singapore. The second one is a favorable judicial construction of emergency awards exemplified by the United States. The third solution shows the possibility of alternative actions in contract that aid enforceability, explained in the example of France. The last approach, adopted by India, points to the possibility of indirect court enforcement of arbitral awards.

1. *Singapore*

Singapore was the first country to amend its arbitration statute to provide that an "arbitral tribunal . . . includes an emergency arbitrator" and that "all orders or directions [which include emergency arbitrator] . . . shall be enforceable in the same manner as if they were orders made by a court . . . ."[205] The amendment did away with any doubts about the status of the sole arbitrator, the orders granted by the sole arbitrator, and the enforceability of the orders, and it likely applies to awards rendered in Singapore and abroad.

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204 Singapore amended its Arbitration Acts in 2012 to state that (1) an emergency arbitrator is an arbitral tribunal; and (2) an "award" or "order" issued by an emergency arbitrator will be enforceable in Singapore. Hong Kong similarly passed the Arbitration Bill of 2013, which allows Hong Kong courts to enforce provisional measures granted by emergency arbitrators. And lastly, New Zealand passed a law similar to Singapore's amendments that went into effect on March 1, 2017. *See* ICC EA REPORT 2019, *supra* note 9, at 31.

205 Singapore International Arbitration Act (amended May 15, 2012), §§ 2(1), 12(6); Singapore Arbitration Act, § 28(4).

Even legislation directly supporting emergency relief cannot completely fend off legal challenges. So far, Singaporean courts expressed strong support for the tribunal's powers to award interim relief, including expedited and emergency relief. In *PT Perusahaan Gas Negara v. CRW Joint Operation*, an Indonesian gas company ("PGN") hired a subcontractor company to install and test a pipeline from South Sumatra to West Java, which led to a dispute over contract modifications and eventual arbitrations over the amount of money owed for this project.[206] PGN disputed the award and enforcement, arguing that the interim award was not final and therefore not enforceable.[207] Citing a well-known arbitration treatise by Gary Born, the Court of Appeals found that the interim award was "final and binding."[208]

National legislation enforcing interim and emergency relief encourages courts to take a robust approach to enforcement of such awards, which in turn increases parties' confidence in emergency arbitration. But, there are drawbacks to this approach. Ostensibly, it may take years, at best, for a sizeable number of countries to amend their laws to a similar effect. Even if more countries adopted laws enforcing emergency arbitral awards, some commentators still point out that these national statutory fixes may not achieve sufficient harmonization and that an international instrument would be preferable.[209] Because legislative amendments in aid of enforceability are not readily available or perhaps even perfect, evaluating other measures in the interim remains a focal point for the discussion about enforceability.

2. *United States*

The United States has not enacted arbitral legislation, but it did the next best thing: developed a judicial precedent that rejects the formalism discussed above and adopts a favorable stance to

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206 PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation, (2015) SGCA 30 (Singapore Ct. App.).

207 Kevin Elbert, *On the Nomenclature and Characterization of Arbitral Awards: PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation [2015] 4 SLR 364*, SING. L. BLOG (Apr. 6, 2016, 3:35 PM), https://singaporelawblog.sg/blog/article/155 [https://perma.cc/JRL2-VDRF].

208 CRW v. PGN (2015) SGCA 30-27 (Sing.).

209 189*See* Santacroce, *supra* note 189, at 310-11 (arguing that "an additional protocol to the New York Convention" or a new protocol that deals with enforcement of interim measures "would be desirable," because it would "greatly enhance the effectiveness of arbitral interim relief").

enforcement of emergency awards.[210] However, without statutory guidance, the courts' approach remains discretionary in evaluating whether an award is enforceable. Inevitably, some courts arrived at different conclusions.

Much has been written about two decisions that arrived at different conclusions about the nature of emergency relief and the courts' power to enforce it.[211] The first one is *Yahoo! Inc. v. Microsoft Corp.*, a dispute conducted under the AAA rules, where the emergency arbitrator ordered Yahoo! to continue executing its contract with Microsoft and complete its transition to the Microsoft search engine.[212] Yahoo! moved to vacate the award in the Federal District Court for the Southern District of New York, arguing, inter alia, that the award lacked finality.[213] The district court deferred to the findings of the arbitrator and dismissed the motion to vacate upon finding that even though the nature of the relief amounted to final relief, the arbitrator was granted the power to award such relief.[214]

The second decision is *Chinmax Medical System Inc. v. Alere San Diego, Inc.*, where the district court found that it did not have jurisdiction to vacate an emergency order of an ICDR arbitrator because it was not final and binding under the New York Convention.[215] The court's analysis was based on the ICDR provisions that allow the arbitral tribunal to "reconsider, modify or vacate the interim award or order of emergency relief," which in the court's eyes meant that the order was not final.[216] However, a closer look at *Chinmax* reveals that in the end, the court not only left the emergency order in place, but it did not engage with the question of enforceability in the United States on the merits. Therefore, even though the court

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210 The U.S. courts recognize that enforcement of emergency awards is necessary to prevent harm these measures aim to prevent. *See* Yahoo! Inc. v. Microsoft Corp., 983 F. Supp. 2d 310, 319 (S.D.N.Y. 2013) (quoting *Southern Seas Nav. Ltd. v. Petroleos Mexicanos*, 606 F.Supp. 692, 694 (S.D.N.Y. 1985)) (holding that "if an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made").

211 8556*See* Alnaber, *supra* note 8, at 464-65; Bassler, *supra* note 5, at 569-79; Jason Fry, *The Emergency Arbitrator - Flawed Fashion or Sensible Solution*, 7 DISP. RESOL. INT'L 179, 195-96 (2013); Hanessian & Dosman, *supra* note 56, at 233-34.

212 *Yahoo! Inc.*, 983 F. Supp. 2d at 315.

213 *Id.* at 315.

214 *Id.*

215 Chinmax Med. Sys. Inc. v. Alere San Diego, Inc., No. 10CV2467 WQH NLS, 2011 WL 2135350, at *5 (S.D. Cal. May 27, 2011).

216 *Id.*

refused jurisdiction, the decision has little if any precedential value on the question of enforcement of emergency awards.

For a long time, the U.S. courts showed a tendency towards enforcing interim awards, as shown in *Yahoo!*.[217] A recent example is *Vital Pharmaceuticals v. Pepsi Co, Inc.*, a decision from the Southern District of Florida in which the court confirmed an emergency arbitrator's order against Vital Pharmaceuticals that required it to abide by the terms of its Distribution Agreement with Pepsi pending an arbitration.[218] The district court found that the emergency arbitrator's order was "sufficiently final to be confirmed under the FAA" because it was "not the type of relatively inconsequential procedural decision or preliminary ruling of which judicial review, in the interest of retaining the efficiency that is *the raison d'être* of our arbitration system, is disfavored" but rather that it "resolves the issue of whether the parties are required to maintain the status quo and continue to perform their contractual obligations during the pendency of the arbitration."[219]

A recent decision from a federal district court in Atlanta, *Al Raha Group for Technical Services v. PKL Services Inc.*, was the first to refuse enforcement of an emergency award.[220] In a rather short opinion, the district dismissed a petition to confirm an emergency award on the basis of subject matter jurisdiction.[221] The court acknowledged that even "[t]hough an interim award may at times be considered final, such that a district court may then 'confirm' the

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217 Cases enforcing emergency award or denying vacatur include Thrivest Specialty Funding, LLC v. White, No. CV 18-1877, 2019 WL 6124955, at *1 (E.D. Pa. July 1, 2019); Sharp Corp. v. Hisense USA Corp., 292 F. Supp. 3d 157, 177 (D.D.C. 2017), dismissed, No. 17-7158, 2017 WL 9401061 (D.C. Cir. Dec. 26, 2017); Rocky Mountain Biologicals, Inc. v. Microbix Biosystems, Inc., 986 F. Supp. 2d 1187, 1196 (D. Mont. 2013); Blue Cross Blue Shield of Mich. v. Medimpact Healthcare Sys., Inc., No. 09-14260, 2010 WL 2595340, at *2 (E.D. Mich. June 24, 2010). This case law supports the Restatement's view that "[t]emporary measures institutes by an 'emergency' arbitrator are prima facie treated the same as interim measures granted by a tribunal; that is, a presumption attaches that they are awards."). RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION § 1.1 cmt. a (2019).

218 The arbitration was conducted under the AAA rules. Vital Pharm. v. PepsiCo, Inc., No. 20-CIV-62415-RAR, 2020 WL 7625226, at *1 (S.D. Fla. Dec. 21, 2020).

219 *Vital Pharm*, 2020 WL 7625226, at *3 (internal quotation marks omitted).

220 Al Raha Group for Tech. Serv. v. PKL Serv. Inc., 2019 WL 4267765 (N.D. Ga. Sept. 6, 2019). Of course, it could be argued that the *Chinmax* court to some extent foreshadowed *Al Raha* in stating that the emergency arbitrator's order is not final, although the *Al Raha* court did not rely on the *Chinmax* court's findings.

221 *Id.* at *1.

award," this was not the case here because the award "did not finally and definitely dispose of any independent claim."[222] The court elaborated that because the award merely prevented the termination of the contract and therefore "only meant to pause the crumbling relationship between the parties until such time as the full arbitration tribunal could be convened . . . the award itself was still an interim placeholder."[223]

It is uncertain whether *Al Raha* will remain an outliner in its approach to the finality of the award or whether the courts will extend its favorable treatment of interim awards to emergency awards, as exemplified by *Yahoo!* and *Vital Pharmaceuticals*. But even the *Al Raha* court recognized, in a footnote, that other circuits found similar types of relief that preserve the status quo as "sufficiently 'final' for purposes of subject-matter jurisdiction,"[224] which suggests that the impacts of the decision may not be adopted by other courts. A favorable construction of an enforceable emergency award or order is therefore still a powerful, even if not always reliable, method that aids enforcement.

3. *France*

Similar to many other jurisdictions, the French courts did not yet decide the precise question of whether an emergency award is enforceable in France, nor did France enact legislation enforcing interim awards. For the longest time, commentators and practitioners have centered the debate of emergency award enforceability in France around an earlier-mentioned precedent in *Société Nationale* from 2003.[225] In *Société Nationale*, the Paris Court of Appeal refused to set aside an order granted by the predecessor of emergency arbitrators—

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222 *Id.* at *2-3.

223 *Id.*

224 *Id.* at *2, n.1 (quoting Zeiler v. Deitsch, 500 F.3d 157, 169 (2d Cir. 2007) (Awards that have "finally and conclusively disposed of a separate and independent claim . . . may be confirmed although [they do] not dispose of all the claims that were submitted to arbitration.")); Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1023 (9th Cir. 1991) (temporary orders calculated to preserve assets or performance may be final orders that can be confirmed and enforced by district courts); Island Creek Coal Sales Co. v. Gainesville, 729 F.2d 1046, 1049 (6th Cir. 1984) (temporary equitable relief is final for purposes of subject-matter jurisdiction where it disposes of a "separate, discrete, independent, severable" issue).

225 Cour d'appel [CA] [Regional Court of Appeal] Paris, Apr. 29, 2003, Société Nationale des Pétroles du Congo and République du Congo v. TotalFinaElf E&P Congo.

the ICC Pre-arbitral referee—because the court did not consider the order an award that could be set aside.[226] The court's analysis focused on the fact that the ICC Pre-arbitral Referee rules never mentioned the word "arbitrator" and found that the decision issued by the referee was not judicial in nature, but instead merely contractual.[227] *Société Nationale* has been criticized for excessive formalism in understanding the role of the ICC Pre-arbitral referee.[228] The applicability of this precedent to the new arbitral rules that not only adopted a new name for the arbitrator but also broadened their powers is, therefore, uncertain and potentially only academic.[229]

However, there are other provisions of French law that impact the potential enforceability of emergency awards, such as whether the award falls under the legal definition of an award.[230] The French legislature defined an award as a "decision of an arbitral tribunal which finally settles in whole or in part, the underlying dispute either on the merits, on jurisdiction or any procedural issue which terminates the arbitral proceeding."[231] Under this restrictive definition, an emergency award or an order on interim and conservatory measures would not be considered to finally settle the underlying dispute or terminate the arbitral proceedings, and it would not be enforceable.[232] Although United States courts have successfully overcome similar obstacles by defining emergency arbitral awards more broadly as finally resolving parts of the disputes before the court, commentators argue that similar arguments will not be convincing to French courts.[233]

The French courts can nevertheless be of help in providing measures in lieu of enforceability. A party seeking to order compliance with an emergency order can in some circumstances and during the limited time before the tribunal is constituted, file for a summary judgement for a breach of contract.[234] If granted, the President of the Civil Court will order specific performance of an

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226 *Id.*

227 *See* Fry, *supra* note 27, at 195.

228 827190*See generally* Alnaber, *supra* note 8, at 458-59; Fry, *supra* note 27, at 195; Paraguacuto-Mahéo & Lecuyer-Thieffry, *supra* note 190, at 764-69.

229 *See supra* Part III.A.1.

230 190*See* Paraguacuto-Mahéo & Lecuyer-Thieffry, *supra* note 190, at 764-69.

231 *Id.* at 768-70 (quoting Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., Oct. 12, 2011, Bull civ. I, No. 11-16444 (Fr.)).

232 *See id.* at 771.

233 *See id.* at 772.

234 9*Id.* at 775; ICC EA REPORT 2019, *supra* note 9, at 33.

arbitral order or award and even attach a provisional penalty.[235] The order would be immediately enforceable in France, notwithstanding an appeal.[236] For example, the French *Cour de Cassation* issued such a summary judgement in a dispute under the ICC rules, finding that the parties agreed to comply with a final award and therefore "do" a particular thing.[237] The recent reforms in the arbitral rules—that parties are obliged to agree that the agreement is binding and that the parties undertake to comply—will, therefore, be crucial for maintaining a similar action in the future.[238]

The arbitral tribunal can also sanction noncompliance with the emergency arbitral order during the merits stage. Even though the French courts will no longer have jurisdiction once an arbitral tribunal is constituted and empowered to decide all claims related to the emergency arbitral proceedings, a party can always plead with the arbitral tribunal to consider noncompliance as part of the tribunal's merits assessment.[239]

Finally, in other jurisdictions—such as Austria, Belgium, and the UK—the national courts can provide even further assistance that encourages compliance. The courts of these jurisdictions have the power to order fines for contempt of court—also known as *astreintes*—for each day the debtor fails to comply with a judgement.[240] This power is not limited to the court enforcing its own decisions, but it is usually necessary that the emergency arbitral order envisions such sanctions.[241]

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235 190Code de procédure civile [C.P.C.] [Civil Procedure Code)] Art. 809 al 2 (Fr.). *See also* Paraguacuto-Mahéo & Lecuyer-Thieffry, *supra* note 190, at 775. Article 1468 also grants the emergency arbitral tribunals powers to penalize non-compliance with its order, but the tribunal cannot enforce compliance with the fine. *See* Amir Ghaffari & Emmylou Walters, *The Emergency Arbitrator: The Dawn of a New Age,* 30 ARB. INT'L 153, 165 (2014).

236 190*See* Paraguacuto-Mahéo & Lecuyer-Thieffry, *supra* note 190, at 775.

237 Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., July 4, 2007, Bull civ. I, No. 05-16586 (Fr.)).

238 4*See infra* Part III.A. *See also* Gaillard, *supra* note 1, at 316-17.

239 190*See* Paraguacuto-Mahéo & Lecuyer-Thieffry, *supra* note 190, at 776-78.

240 9*See* James E. Castello & Rami Chahine, *Enforcement of Interim Measures*, *in* THE GUIDE TO CHALLENGING AND ENFORCING ARBITRATION AWARDS (2d. ed.), https://www.kslaw.com/attachments/000/007/039/original/Enfocement_of_Interim_Measures_book_chapter_in_GAR_Guide_to_Challenging_and_Enforcing_Arbitration_Awards.pdf?1561046757 [perma.cc/AV63-UCGV]; *see also* ICC EA REPORT 2019, *supra* note 9, at 33.

241 *See id.*

4. *India*

Emergency awards are enforceable in India if the seat of the arbitration is also in India.[242] The situation is more complicated with respect to foreign arbitration. The Delhi High Court found in *Raffles Design International v. Educomp* that emergency arbitral awards from foreign-seated arbitrations cannot be enforced under the Indian Arbitration Act.[243] The Indian courts, nevertheless, took a somewhat favorable stance to enforce emergency arbitral awards indirectly, through the court's own orders.

For example, in *HSBC v. Avital*, a party sought to enforce an emergency arbitral order granted in Singapore under Section 9 of the 1996 Indian Arbitration Act.[244] In this case, the emergency arbitrator appointed under the SIAC rules made an interim award requiring freezing the respondent's accounts and disclosing information related to the respondent's assets.[245] The Bombay High Court upheld the award but noted that the relief requested was not direct enforcement of the interim award.[246]

A second important case that showcases the possibility of indirect enforcement of emergency arbitral awards is the already mentioned case, *Raffles Design International v. Educomp*.[247] In *Raffles*, a party sought to enforce a favorable award from emergency arbitration proceedings seated in Singapore, this time directly under Section 9 of the Indian Arbitration and Conciliation Act.[248] The Delhi High Court found that the award is not directly enforceable under the Arbitration Act, but that parties nevertheless address the court under Section 9 for relief and that court may grant the requested relief independently of the emergency arbitrator.[249]

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242 *See* Nadine Lederer, Benson Lim, Kent Phillips & Karl Pörnbacher, *Enforcement of Emergency Awards – India Takes a Leap*, JDSUPRA (Sept. 20, 2021), https://www.jdsupra.com/legalnews/enforcement-of-emergency-awards-india-3040455/ [https://perma.cc/ZXV8-8JPQ].

243 Raffles Design Int'l India Pvt. Ltd. & Anr. v. Educomp Professional Education Ltd.& Ors, MANU/DE/2754/2016. *See also* Indian Arbitration and Conciliation Act, 1996, Part II.

244 HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd & Ors., Arbitration Petition No. 1062/2012 (Jan. 22, 2014).

245 *Id.* ¶ 11.

246 *Id.* ¶ 50-57.

247 Raffles Design Int'l India Pvt. Ltd. & Anr. v. Educomp Professional Education Ltd.& Ors, MANU/DE/2754/2016. *See also* Indian Arbitration and Conciliation Act, 1996.

248 *Id.*

249 *Id.*

Commentators point out that the best solution for the enforceability question of foreign-seated emergency arbitration would be a legislative amendment that would expressly recognize such emergency awards, just as Section 17(2) recognizes domestic awards.[250] But in the interim, parties can resort to Indian courts in several actions in aid of arbitration. The first one is an application under Section 9 of the Arbitration Act outlined in *HCBC* and *Raffles* for "indirect" enforcement. Of course, this also means that the court would independently assess the claims for emergency measures, but this does not mean a court will not find the emergency arbitrator's reasoning persuasive. Second, similar to the punitive actions discussed earlier, a party can also approach a court under Section 27 of the Arbitration Act, requesting "penalties and punishments by order of the Court" for contempt of the arbitral tribunal, which applies not only to foreign but also to domestic arbitration proceedings.[251]

CONCLUSION

International arbitration owes its existence to private contractual arrangements but is also anchored in a plurality of sovereign legal orders that validate its existence. The survival or the demise of a particular feature within private international law depends on its ability to evolve and respond to these competing demands. The critics of the procedure not only view arbitration rules as a static regime, but they also demand what is impossible of it—complete uniformity. International rules and standards, even within one procedure, do not evolve at the same pace. This, however, does not prevent us from discerning trends and milestones. Because emergency arbitration rules and standards did evolve and are widely used by parties in a transnational setting, the academic discourse must evolve with it to identify which features enabled it to do so to stay relevant.

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250 *See* Kartikey Mahajan & Sagar Gupta, *Uncertainty of Enforcement of Emergency Awards in India,* KLUWER ARB. BLOG (Dec. 7, 2016), http://arbitrationblog.kluwerarbitration.com/2016/12/07/uncertainty-of-enforcement-of-emergency-awards-in-india/ [https://perma.cc/EMZ5-ENPV].

251 Alka Chandewar v. Shamshul Ishrar Khan, S.L.P. (Civil) No.3576 of 2016 (India) (finding that a party not complying with an interim order can be held liable under Section 27(5) of the Indian Arbitration and Reconciliation Act 2015). *See generally* Ana Sura, *Emergency Arbitration: To be or not to be (Enforced)*, BW LEGAL WORLD (July 16, 2020), http://bwlegalworld.businessworld.in/article/Status-of-emergency-arbitration-in-India/17-07-2020-298310/ [https://perma.cc/8UQ6-AQ8X].

This Article identified three areas that contributed to emergency arbitration's permanence: (1) establishment of a basic harmonized structural framework and institutional responsiveness to respond to changing demands; (2) adoption of a flexible standard; and (3) institutional, national, and judicial responses to issues of enforceability. None of these developments provided or will provide complete uniformity, but they nevertheless created a framework accepted or tolerated by private parties and sovereign regimes while carving out a space for further developments and change.