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The International Comparative Legal Guide to:

International Arbitration 2015

12th Edition

A practical cross-border insight into international arbitration work

Published by Global Legal Group, in association with CDR, with contributions from:

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London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
July 2015

ISBN 978-1-910083-56-7
ISSN 1741-4970

Strategic Partners

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Paper from responsible sources
FSC® C011748

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Emergency Arbitration: The Default Option for Pre-Arbitral Relief?

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Introduction

Until relatively recently, where a dispute was subject to arbitration, a party in need of emergency interim relief at the pre-arbitral stage only had two options. First, it could await the constitution of the arbitral tribunal and run the risk that any future order or award would be ineffective (because, for example, the respondent had dissipated assets or destroyed evidence in the meantime). Alternatively, a party could seek relief in the relevant national court, the very thing the party wished to avoid by entering into an arbitration agreement.

In light of this problem, a number of arbitral institutions have recently adopted "emergency arbitrator" provisions into their rules. These provisions permit parties to apply to an emergency arbitrator for urgently needed provisional relief before a request for arbitration has been filed or the arbitral tribunal has been constituted.

Emergency arbitration provisions attempt to address a real problem – a party's need to obtain effective emergency relief – without sacrificing the benefits of arbitration. However, existing arbitration provisions provide an imperfect solution, and are unlikely to replace completely recourse to national courts in the near future. Moreover, emergency arbitration may be more problematic in the context of investment treaty disputes than in commercial disputes, for the reasons explained below.

This article addresses the growth and effectiveness of emergency arbitration, as well as certain limitations and issues with emergency arbitration. In particular, this article focuses on:

- the common features of the emergency arbitration procedures adopted by the main arbitral institutions;
- the growth of emergency arbitration;
- issues regarding enforcement of the decisions of emergency arbitrators;
- the continuing role of the courts at the pre-arbitral stage; and
- emergency arbitration in investment treaty disputes.

The Common Features of Emergency Arbitration Procedures

The ICDR was the first major arbitral institution to introduce emergency arbitrator provisions, as part of its amended rules in 2006.[1] Now, most major arbitral institutions have adopted similar provisions, including the ICC, LCIA, SIAC and HKIAC.[2]

The provisions adopted by the major arbitral institutions are broadly similar:

- Within one or two business days of receiving an application, an arbitral tribunal will appoint a sole emergency arbitrator to rule on a request for emergency relief. In contrast to certain court proceedings, the respondent party must always be given notice of the application.
- The emergency arbitrator will usually have broad discretion to determine the conduct of the proceedings, including determining whether any kind of hearing is appropriate.
- An emergency arbitrator's decision can take the form of an order or an award depending on the institutional rules. Under some institutional rules (such as the SCC, SIAC and HKIAC Rules), the decision may automatically lapse if a request for arbitration is not filed, or if the arbitral tribunal is not constituted within a certain time period.[3] Under other institutional rules (such as the LCIA Rules), the decision will not automatically lapse.[4] All major institutions permit the arbitral tribunal, when constituted, to vary the emergency arbitrator's decision.
- Some institutions (including the ICC, LCIA and SCC) require the emergency arbitrator to issue the award or order within a defined period of time (ranging from five to 20 days from receipt of the file).[5] Other institutions (including SIAC, ICDR/AAA and CANACO) have no such requirement.
- As soon as the full tribunal is constituted, the emergency arbitrator ceases to play any further role in the arbitration.
- The emergency arbitrator provisions of the major arbitral institutions operate on an "opt-out" basis, so apply by default. The emergency arbitrator provisions of most institutions only take effect prospectively to arbitration agreements concluded after the rules came into force. However, the SCC provisions apply retroactively.

In addition to emergency arbitration procedures, some arbitral institutions (such as the LCIA and DIFC) allow for the expedited constitution of arbitral tribunals in appropriate cases, by, for instance, shortening the time for the respondent to file a response.[6] However, where exceptional urgency is required, emergency arbitration is potentially a better option.

The Growth of Emergency Arbitration

As the procedure has become more widely available, an increasing number of parties have made use of emergency arbitration. A recent survey shows the number of emergency arbitrator applications received as of March 2015 by an illustrative list of arbitral institutions:[7]

Arbitral Institution	Introduction of Emergency Arbitrator Provisions	Number of Applications Received
ICDR	2006	49
SCC	2010	13
SIAC	2010[8]	42
ICC	2012[9]	15
HKIAC	2013[10]	2
JAMS	2014[11]	6
LCIA	2014[12]	0

Unfortunately, it is impossible to make a comparison with the number of applications made to national courts for urgent, pre-arbitral relief because arbitral institutions do not publish records of such applications.

As more arbitral institutions adopt emergency arbitrator provisions (CIETAC's emergency arbitrator provisions took effect on 1 January 2015[13]), the use of these provisions by parties is also likely to increase. Indeed, the emergency arbitrator provisions of most major institutions, including the ICC and LCIA, only apply to arbitration agreements concluded after the new rules came into force (in January 2012 and October 2014, respectively), meaning that it is possible that the ICC and LCIA will soon start seeing a similar number of applications to SIAC (which introduced its emergency arbitrator provisions back in 2010). After all, many of the reasons why parties choose arbitration generally (such as confidentiality, procedural flexibility, and legal and national neutrality) are also reasons to choose emergency arbitration rather than seeking relief through the courts.

Enforcement of the Decisions of Emergency Arbitrators

Despite its growth, emergency arbitration has certain limitations and risks. Most arbitral rules, for instance, do not permit *ex parte* applications. Furthermore, many parties agree to arbitration because it permits them to choose an arbitrator, whereas parties are not able to choose their arbitrator in emergency arbitration.

However, perhaps the main concern raised by participants is whether the emergency arbitrator's decision can be enforced in national courts – in particular whether such decisions are enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), which ensures the enforceability of international arbitral awards in all 155 signatory countries.

The New York Convention obliges contracting States to grant recognition and enforcement to foreign arbitral awards. However, the decisions of emergency arbitrators are not always classified as "awards" under institutional rules: the ICC Rules state explicitly that the emergency arbitrator's decision shall take the form of an order,[14] while the rules of each of the LCIA,[15] SIAC,[16] HKIAC[17] and ICDR[18] provide that the decision may either take the form of an award or of an order. Where, under the relevant institutional rules, an emergency arbitrator's decision takes the form of an order, it seems unlikely that it will be enforceable under the New York Convention.

Even where an emergency arbitrator's decision takes the form of an award, it is possible that it will not be enforceable because it is insufficiently final or determinative. A recent decision of the Swiss Federal Tribunal held that an arbitral decision on interim measures was not an "award" because it did not finally determine any of the matters in dispute between the parties.[19] Some older authorities also held that provisional or interim measures by a tribunal are not enforceable on the grounds that they are not "final" because they can be subsequently varied by the tribunal.[20] Like interim and provisional measures, an emergency arbitrator's decision can be subsequently modified – or set aside entirely – by the arbitral tribunal under all of the relevant institutional rules.[21] Furthermore, as explained above, many institutional rules provide for an emergency arbitrator's decision to lapse after a set period, if a request for arbitration is not filed or if the arbitral tribunal is not constituted. For these reasons, national courts could determine that an emergency arbitrator's award is not "final".

The United States is one of the few countries whose national courts have considered the enforceability of emergency arbitrator awards, with the best-known case being *Yahoo! v. Microsoft*.[22] In that case, the emergency arbitrator ordered Yahoo! to continue to perform its contractual obligations owed to Microsoft, so that Microsoft would not suffer irreparable harm before the dispute could be resolved. Yahoo! brought an application to set aside the decision, which was made in the form of an award. The court held in Microsoft's favour, stating 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".[23] The court held that the decision of the emergency arbitrator was "final" in relation to the particular question put before him and therefore entitled to enforcement.

A similar decision was reached in *Blue Cross Blue Shield of Michigan v. Medimpact Healthcare Systems*.[24] The court held that the decision of the emergency arbitrator was final and determinative on one specific issue, namely the enforceability of the contract during the pendency of the arbitration. Therefore, it amounted to a "final award" for the purposes of the enforcement provisions of the Federal Arbitration Act and was entitled to recognition and enforcement.[25]

Although the two cases above are encouraging for parties considering emergency arbitration, two cases do not make a trend. Furthermore, the decisions of US district courts do not have any great precedential value. It is unclear that other US courts would follow the same reasoning – still less that courts in other jurisdictions would do so.

At this stage, there is no instance of a national court refusing to enforce an emergency arbitrator's decision.[26] It may be that courts will take a pragmatic view on the enforceability of emergency arbitrator decisions, and ignore the conceptual difficulties about "finality" in order to give teeth to an emergency procedure to which parties have agreed as part of their chosen arbitral rules.[27] However, emergency arbitration is in its infancy and there have been very few cases in which national courts have considered the enforceability of emergency arbitrator awards. This being so, it is too soon to say whether a consensus will emerge within or between jurisdictions on the effect of emergency arbitrator awards.

In light of the continuing ambiguity regarding enforcement under the New York Convention, some jurisdictions have enacted legislation providing that emergency arbitrator decisions are entitled to recognition and enforcement, removing any doubt about enforceability. In 2012, Singapore amended the definition of "arbitral award" in its International Arbitration Act to include decisions of emergency arbitrators.[28] Hong Kong adopted the same approach, amending its Arbitration Ordinance in 2013 to provide expressly that emergency relief could – with the leave of the court – be enforced in the same manner as an order or direction of the court.[29] The amended Ordinance limited the enforcement of emergency decisions rendered overseas to a specified list of orders.[30]

Other jurisdictions provide expressly for the enforcement of interim relief granted by tribunals, which might provide national

courts with a statutory basis for enforcing emergency arbitrator decisions (on the grounds that they are analogous to decisions on interim relief). For instance, following amendments in 2006, Article 17H of the UNCITRAL Model Law (the "Model Law") requires courts to enforce interim measures granted by the arbitral tribunal, irrespective of the seat of the arbitration.[31] A number of jurisdictions, including Australia and New Zealand, have updated their legislation to adopt these amendments to the Model Law.[32] England and Wales, Germany and Switzerland also have legislation providing for the enforcement of arbitral interim measures. However, these provisions only apply to arbitrations seated within the jurisdiction, not arbitrations seated outside the jurisdiction.[33]

Enforcement remains a concern to those considering whether to seek relief from an emergency arbitrator or the courts. If emergency arbitrator decisions are not enforceable, then their efficacy would be severely diminished. It is notable that the two jurisdictions where emergency arbitrator procedures have proved most popular (the US and Singapore) have legislation expressly permitting enforcement (Singapore) or a body of case law where emergency arbitrator decisions have been enforced (the US).

The Continuing Role of the Courts at the Pre-Arbitral Stage

The question of the enforceability of emergency arbitrator decisions is likely be resolved as legislation and case law adapt to the procedure. However, certain characteristics of the arbitral process make it inherently less suitable in circumstances where emergency relief is required. Indeed, even if emergency arbitration were to become the default means of obtaining interim relief at the pre-arbitral stage, there are a number of reasons why courts will continue to play a role:

- Emergency arbitration only allows relief to be sought against another party to an arbitration agreement. If interim relief is sought against a third party – for example, by means of a worldwide freezing order, which would bind third parties in possession of the respondent's assets – then the only option would be to seek relief from a court.
- Emergency arbitration does not allow *ex parte* relief to be sought (the Swiss Rules are a notable exception).[34] This is consistent with the underlying premise of arbitration as a consensual process. For this reason, a party is likely to seek *ex parte* relief through the courts, if there is a risk that giving notice of the application would render the relief ineffective (for example, if the applicant feared that the respondent would dissipate its assets).
- Emergency arbitrator decisions are not automatically binding in the same way as court orders. Even if relief is sought in a jurisdiction such as Singapore or Hong Kong – where the claimant could be confident that the decision of the emergency arbitrator would be enforced due to the applicable legislation – the fact remains that an extra step must be taken in order to ensure compliance with the decision of an emergency arbitrator. A party wishing to guarantee immediate compliance is therefore likely to choose to seek that relief from the court.
- In cases of extreme urgency, court procedures are still likely to be quicker. Emergency arbitration requires an arbitrator to be selected and, if a hearing is required, a hearing room to be reserved. By contrast, courts have full-time judges and courtrooms (and there are much less likely to be conflicts of interests).
- Emergency arbitration has not been incorporated in the UNCITRAL rules and may prove difficult in *ad hoc* arbitration, because there is no institution to appoint the emergency arbitrator. For *ad hoc* arbitration, seeking relief in the courts is currently the only option.
- There may be tactical reasons for pursuing court relief, if a party wishes to publicise its dispute despite an arbitration agreement.

Given these factors, it is unsurprising that emergency arbitration procedures acknowledge the ongoing role to be played by the courts. The emergency arbitration procedures of all the leading arbitral institutions provide that: (i) parties are entitled to seek relief from national courts as well as through emergency arbitration; and (ii) it does not constitute a breach of the arbitration agreement to seek relief from a court, rather than through emergency arbitration.

Nevertheless, the availability of emergency arbitration may affect the courts' willingness to grant pre-arbitral relief. In a number of leading jurisdictions, interim relief can only be sought from the court in circumstances where relief is not available from the arbitral tribunal or the relevant arbitral institution. In England and Wales and in Singapore, interim relief can only be sought from the court where the tribunal (or arbitral institution) is incapable at that time of acting effectively.[35] In France, an application can only be made to the court insofar as the tribunal has not yet been constituted.[36] Even in Hong Kong and the United States, where no such express legislative provision exists, courts are reluctant to grant interim relief once the arbitral tribunal is in place.[37]

In future cases, national courts may decide that the parties' decision to agree to emergency arbitration procedures is a relevant factor in determining whether to grant pre-arbitral relief. Notably, in one English decision, the court referred to the lack of emergency arbitration provisions in the agreed arbitral rules, when it granted an interim injunction on the grounds that an arbitral tribunal was incapable of acting effectively.[38]

It is likely that parties will continue to seek relief in the courts as an alternative to using emergency arbitration. However, the aim of arbitral institutions and national courts should be to support emergency arbitration so that recourse to the courts becomes less necessary (in particular, by making clear that the decisions of emergency arbitrators are enforceable in national courts). Arbitration relieves pressure on national courts, while allowing parties more freedom about the way their disputes are conducted. Emergency arbitration furthers both of these goals.

Emergency Arbitration in Investment Treaty Disputes

As emergency arbitration gains increasing acceptance from commercial parties, it is important to note that the emergency arbitrator procedure is not nearly so far developed in the context of investment treaty disputes. The majority of investment treaty disputes take place under the ICSID and UNCITRAL rules, with a smaller number of disputes under the ICC and SCC rules. However, neither ICSID[39] nor UNCITRAL have introduced emergency arbitrator provisions, and the ICC's emergency arbitrator provisions do not currently apply to investment treaty disputes.[40] Indeed, of the institutional rules commonly used in investment treaty arbitrations, only the SCC rules permit emergency arbitration.[41] Since the new SCC rules came into force on 1 January 2010, there have been at least two decisions made by emergency arbitrators in investment treaty disputes.[42] The availability of emergency arbitration under the SCC rules may be relevant to claimants deciding which rules to choose when initiating a dispute.

The nature of investment treaty disputes also makes it more challenging to devise a fair and workable emergency arbitration procedure. Investment treaty disputes often involve complex jurisdictional issues, which are not readily amenable to quick resolution. A decision from an emergency arbitrator may also have serious implications for a State's sovereignty (if, for example, the claimant's interim application is for the State to take positive action to protect the claimant's investment to maintain the *status quo* until the conclusion of the arbitration). On a practical level, State entities may find it more challenging to respond quickly to emergency applications (in one of the cases heard so far, the Respondent State was unrepresented).[43] Furthermore, a State entity might object that, when it entered into an investment treaty, it did not consent to an emergency procedure which did not exist at the time of the treaty and which is substantially different from other arbitral procedures.

Tribunals are slow to grant any interim or provisional measures in investment treaty arbitrations.[44] As discussed above, applications for emergency relief add further complications. The result is that only the SCC has introduced emergency arbitration for investment treaty disputes. Whether emergency arbitration becomes commonplace in investment treaty disputes in future will depend on whether ICSID and UNCITRAL introduce emergency arbitration procedures – which, in turn, will be influenced by the attitude of State entities. State entities, which are unlikely to be the beneficiaries of emergency arbitration, may be unenthusiastic about the widespread adoption of the procedure.[45]

Conclusion

Emergency arbitration may be relatively new, but it is here to stay (at least as far as commercial arbitrations are concerned). There will always be cases where parties need urgent relief in order, for example, to preserve the *status quo* or to preserve evidence pending the constitution of the arbitral tribunal. Seeking relief in the courts may sometimes be an inadequate solution: it means giving up many of the advantages (like national and legal neutrality) which led the parties to agree to arbitration in the first place. As parties become more familiar with emergency arbitration – and as case law and amending legislation gives further reassurance about its effectiveness – it is likely that the use of the procedure will grow.

However, there are objections to emergency arbitration, both in theory and in practice. Some parties choose arbitration because it allows them to influence the choice of arbitrator, including his or her nationality and qualifications. In emergency arbitration, this choice is lost and the arbitral institution makes the appointment. Moreover, the fact that arbitration is a consensual process based on an arbitration agreement means that emergency arbitrators can never completely replace the courts, particularly in instances where a party needs an order to bind third parties. Emergency arbitration is an option, but it is not yet the default option.

Endnotes

1. 2006 ICDR Rules, effective 1 May 2006, Article 37. (In the current edition of the ICDR Rules, effective 1 June 2014, the emergency arbitration procedures are contained within Article 6.)
2. ICC Rules, Article 29 and Appendix V; LCIA Rules, Article 9B; SIAC Rules, Article 26 and Schedule 1; HKIAC Rules, Article 23 and Schedule 4.
3. SCC Rules, Appendix II, Article 9(4)(iii) and (iv); SIAC Rules, Schedule 1, para. 7; HKIAC, Schedule 4, para. 19(d).
4. LCIA Rules, Article 9.9.
5. ICC Rules, Appendix V, Article 6(4) (15 days); LCIA Rules, Article 9.8 (14 days); SCC Rules, Appendix II, Article 8(1) (5 days).
6. LCIA Rules, Article 9A; DIFC Rules, Article 9.
7. Sussman and Dosman, "Evaluating the Advantages and Drawbacks of Emergency Arbitrators", *New York Law Journal*, 30 March 2015, at p. S3.
8. The emergency arbitrator provisions of the SIAC rules only apply to arbitration agreements entered into after 1 July 2010, when the 2010 SIAC Rules came into effect (SIAC Rules, Article 1.2).
9. The provisions only apply to arbitration agreements entered into after 1 January 2012 (ICC Rules, Article 6(a)).
10. The provisions only apply to arbitration agreements entered into after 1 November 2013 (HKIAC Rules, Article 1.3).
11. The provisions only apply to arbitration agreements entered into after 1 July 2014 (JAMS Rules, Rule 2(c)).
12. The provisions only apply to arbitration agreements entered into after 1 October 2014 (LCIA Rules, Article 9.14).
13. CIETAC Rules, Article 23(2).
14. ICC Rules, Article 29(2).
15. LCIA Rules, Article 9.8.
16. SIAC Rules, Schedule 1, Para. 6.
17. HKIAC Rules, Schedule 4, Para. 12.
18. ICDR Rules, Article 6(4).
19. *Judgment of 13 April 2010*, DFT 136 III 200. The case concerned whether a decision on interim measures was appealable. The court held that it was not appealable because the decision was not an award.
20. *See e.g. Michaels v. Mariforum Shipping SA*, 624 F.2d 411, 413-414 (2d Cir. 1980); *Resort Condominiums Int'l Inc. v. Bolwell*, XX Y.B. Comm. Arb. 628 (Queensland S.Ct. 1993) (1995). However, more recent US case law suggests that interim awards will be enforceable, and Australia has enacted legislation requiring the enforcement of interim awards and orders. *See below* at endnotes. 22, 24 and 32.
21. *See* ICC Rules, Article 29(3); LCIA Rules, Article 9.11; ICDR Rules, Article 6(5); SIAC Rules, Schedule 1, para. 7; HKIAC Rules, Schedule 4, para. 19.
22. 983 F.Supp. 2d 310 (S.D.N.Y. 2013).
23. *Yahoo! v. Microsoft*, 983 F.Supp. 2d 310 (S.D.N.Y. 2013), citing *Southern Seas Nav. Ltd. v. Petroleos Mexicanos*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985). However, the decision in *Yahoo! v. Microsoft* should be compared with the decision in *Chinmax* below. *See below* at endnote 26.
24. 2010 WL 2595340 (E.D. Mich. June 24, 2010).
25. The approach of the US courts in *Yahoo!* and *Blue Cross Blue Shield* is consistent with much of the more recent US case law on enforcement of interim awards, in which the issue of finality is judged in the context of the fact that interim measures are different in kind from final remedies, are sought for different reasons, and are therefore entitled to enforcement. *See e.g.*, *Arrowhead Global Solutions, Inc. v. Datapath, Inc.*, 166 F.Appx. 39, 41 (4th Cir. 2006); *Publicis Communications v. True N. Communications, Inc.* 206 F.3d 725, 729 (7th. Cir. 2000); *Yasuda Fire & Marine Ins. Co. of Europe v. Cont'l Cas. Co.*, 37 F.3d 345 (7th Cir. 1994).
26. However, in *Chinmax Medical Systems, Inc. v. Alere San Diego*, 2011 WL 2135350 (S.D. Ca. May 27, 2011), the court of the Southern District of California refused to hear an application to set aside the decision of the emergency arbitrator on the basis that it was not an "award". Following that reasoning, it could be argued that, since the decision was held not to be an award, the decision would be unenforceable under the New York Convention.

27. As has been the case with many jurisdictions, whose courts have considered the enforcement of interim measures. *See generally*, Born, *International Commercial Arbitration* (2014), at §17.03.
28. The change was effected by changing the definition of "arbitral tribunal" in Section 2(1) of the Singapore International Arbitration Act to include emergency arbitrators. Given that arbitral awards are defined elsewhere in Section 2(1) to as awards rendered by arbitral tribunals, this had the effect of broadening the definition of an arbitral award to include a decision of an emergency arbitrator.
29. Hong Kong Arbitration Ordinance, Section 22B(1).
30. Hong Kong Arbitration Ordinance, Section 22B(2).
31. UNCITRAL Model Law, Art. 17H. The updated Model Law also contains a dedicated provision (Article 17I), setting out the grounds on which a court can refuse to recognise and enforce an interim measure granted by the tribunal. The grounds specified include – but extend beyond – those for non-recognition and enforcement of foreign arbitral awards found at Article V of the New York Convention (and Article 36 of the Model Law).
32. Australian International Arbitration Act, 1974, Schedule 2, Article 17H; New Zealand Arbitration Act 1996, Schedule 1, Article 17L.
33. English Arbitration Act 1994, Sections 2(3) and 42; §1025(1) and §1041(2) ZPO; Swiss Private International Law Act, Articles 176(1) and 183(2). Under both Swiss and English law, a party or the arbitral tribunal can seek the court's assistance in enforcing an award if a party has not voluntarily complied with the award. *See* English Arbitration Act 1996, Sections 41(5) and 42 (1); Swiss Private International Law Act, Article 183(2). The need to give a party the opportunity to comply with an award voluntarily before seeking assistance from the court will necessarily entail further delay.
34. Swiss Rules 2012, Articles 26(3) and 43(1).
35. Arbitration Act 1996, section 44(5); Singapore International Arbitration Act, section 12(A)(6).
36. French Code of Civil Procedure, Article 1449(1). This provision applies to international arbitration by means of Article 1506(1) of the French Code of Civil Procedure.
37. *See e.g.*, *Leviathan Shipping Co. Ltd. v. Sky Sailing Overseas Co. Ltd.*, [1998] 4 HKC 347 (H.K. Ct. First Inst.); *Next Step Med. Co. v. Johnson & Johnson Int'l*, 619 F.3d 67, 70 (5th Cir. 2010); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999).
38. *Seele Middle East Fze v. Drake & Scull Int Sa Co* [2013] EWHC 4350 (TCC), at paras. 33-34.
39. ICSID does, however, permit parties to apply for provisional measures before the arbitral tribunal has been constituted (ICSID, Rule 39(1)). Even so, the application will not be heard until the constitution of the tribunal (ICSID, Rule 39(5)).
40. ICC Rules, Article 29(5). The emergency arbitrator provisions will only apply if the parties are "signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories". This will not be the case where an application is made under an investment treaty. The ICC's decision to restrict the application of emergency arbitration was explained in a bulletin published before the new rules took effect. Investment treaty cases raise difficult jurisdictional issues and it might exceed the power of the President of the ICC Court to rule on these issues. This gives rise to the risk that the subject matter of the emergency arbitration could later be found to be outside the jurisdiction of the arbitral tribunal. *See* Voser and Borg, "ICC Emergency Arbitrator Proceedings: An Overview", *ICC International Court of Arbitration Bulletin* (Vol. 22, 2011), at p. 83, para. 2.2.3.
41. SCC Rules, Appendix II, Article 1(1).
42. In *TSIKInvest LLC v. Republic of Moldova* (2014), the emergency arbitrator stayed Moldova's attempts to force to claimant to divest its shares in a bank. In *JKX Oil & Gas plc v. Ukraine* (2015), the emergency arbitrator ordered Ukraine to refrain from imposing additional royalties on the production of gas by JKX. See Peterson, "Investigation: in at least two investment treaty cases, foreign investors use emergency arbitrators to block tax hikes and share divestment order", IAReporter, 17 February 2015; Hepburn, "In-depth: Unpacking the reasoning of the first SCC Emergency Arbitrator ruling in a Russian investment treaty claim", IAReporter, 17 February 2015.
43. *TSIKInvest LLC v. Republic of Moldova* (2014). *See above* at endnote 42.
44. Malintoppi, "Provisional Measures in Recent Proceedings: What Parties Request and What Tribunals Order", *International Investment Law for the 21st Century* (2009), at p. 181.
45. In drafting the ICC Rules, the ICC took into account that the procedure was likely to be unattractive to State entities. *See* Voser and Borg, "ICC Emergency Arbitrator Proceedings: An Overview", *ICC International Court of Arbitration Bulletin* (Vol. 22, 2011), at p. 83, para. 2.2.3.

Acknowledgment

The authors would like to thank Michael Howe, senior associate at Wilmer Cutler Pickering Hale and Dorr LLP, for his assistance in the preparation of this chapter.

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