

Interim Relief and Emergency Arbitration in Singapore, UK and UAE: A Comparative Review of Practices and Procedures

Dr. Chinyere Ezeoke & Mr. Ananya Pratap Singh***

Abstract

The limited powers of arbitrators in granting interim measures and the delay involved in constituting arbitral tribunals often mean that parties have to resort to the national courts, thereby undermining the objective in choosing arbitration. To deal with this, major arbitral institutions including the DIAC, SIAC and LCIA introduced expedited procedures and (for the latter two) emergency arbitration procedures for urgent interim relief where delay would otherwise prejudice a party. However, differences exist in the institutional rules and the arbitration statutes in Singapore, UK and UAE on the workings of these procedures. The paper discusses the concurrent jurisdiction of the courts and arbitral tribunals in granting interim measures and assesses the impact of the interplay of the roles. It evaluates the types of interim measures and the standards applied in granting them. Further, the nature of the decision of the emergency arbitrator and issues of enforceability are considered. It concludes with suggestions for more efficient administration of interim relief in arbitration. These include clarifying the position where relief is sought from the court which can be obtained from arbitration; providing for the standards to be satisfied for the grant of interim relief; standardizing the format in framing the decisions of emergency arbitrators and providing for the enforceability of their decisions.

Keywords: expedited procedure, emergency arbitrators, interim relief, UNCITRAL Model Law, arbitral institutions, UK, UAE, Singapore.

* DPhil (Buckingham, UK), LLM (Nottingham, UK), LLB (Benin, Nigeria), Senior Lecturer, Faculty of Law, University of Malaya, Kuala Lumpur, Malaysia.

Email: cmezeoke@um.edu.my and cmezeoke@gmail.com

** MCI Arb, MSI Arb, LLM (NUS, Singapore), Associate CSL Chambers, New Delhi, India.

Email: ananyaprtp@gmail.com

Introduction

It is important for the parties in arbitration that the evidence relevant to the claim and any assets from which an award will be satisfied are preserved pending the outcome of the arbitration. Traditionally, the courts at the seat of arbitration would, on the application of a party, grant interim and conservatory measures in the form of holding orders to protect such interests of the parties. In recent times, arbitral tribunals not only have been empowered to grant such relief, the rules of major arbitral institutions now allow for the appointment of emergency arbitrators to decide on applications for urgent interim measures that cannot wait until the eventual constitution of a tribunal.⁽¹⁾

The Rules of the Singapore International Arbitration Centre 2016 (SIAC Rules) has allowed for expedited formation of a tribunal and emergency arbitration procedures since 2010. It was the first Asian country to adopt such procedures and therefore can be seen as a model for other arbitral institutions in the region. The London Court of International Arbitration Rules (LCIA Rules) provided for emergency arbitration only in 2014, although its expedited formation procedures date back to 1998. The UK's position as a leading arbitral forum makes it necessary to evaluate LCIA's procedures on interim measures and emergency arbitration comparatively with those of Singapore and the UAE which has recently adopted a new federal law on arbitration. For the UAE, while the Rules of the Dubai International Arbitration Centre 2007 (DIAC Rules) do not have emergency arbitration procedures, it provides for interim measures and expedited procedures.

This paper discusses the laws and procedures on interim measures, expedited formation and emergency arbitration in Singapore, UK and the UAE. After identifying the various arbitration laws and rules of arbitral institutions prevalent in these regimes, the paper considers the concurrent powers of the courts and arbitral tribunals over interim measures as well as the types of measures that can be granted. It follows with a comparative assessment of the expedited arbitration rules in the three jurisdictions and the emergency arbitration procedures available under the SIAC and LCIA Rules. Further, the required conditions or standards to be satisfied by an applicant for interim

(1) Chartered Institute of Arbitrators, International Arbitration Practice Guidelines - Application for Interim Measure (London, 2015) preamble (CI Arb Guidelines) <https://www.ciarb.org/media/4194/guideline-4-applications-for-interim-measures-2015.pdf> (last visited May 15, 2019).

measure are discussed followed by the question of the enforceability of the decisions of the emergency arbitrator. The paper concludes with some recommendations that can be adopted to improve the procedures and practices in these regimes in the areas highlighted.

1. The Governing Laws and Institutional Rules

Arbitration in the UK is governed by the Arbitration Act of 1996 (UK Act). Section 38 empowers the arbitral tribunal to make orders relating to security for the costs of the arbitration; property which is the subject of proceedings (such as its inspection, preservation, custody, detention); the examination of witness by the parties and the preservation of evidence. The courts are equally given wide-ranging powers to order interim measures in these respects in support of arbitration.⁽²⁾ The LCIA Rules complement the statute with detailed provisions on interim relief, expedited formation of the arbitral tribunal and emergency arbitration.

International commercial arbitration in Singapore is governed by the International Arbitration Act⁽³⁾ (IAA). The UNCITRAL Model Law⁽⁴⁾ (Model Law) is incorporated in the IAA and has the force of law in Singapore.⁽⁵⁾ Article 17(2) of the Model Law which provides for interim measures is to be read with section 12 of the IAA on the powers of arbitral tribunals to grant interim and conservatory measures. The SIAC Rules 2016 contains provisions on interim measures, the expedited formation of arbitral tribunals and the appointment of emergency arbitrators.

In the UAE, arbitration is governed by the new Federal Law (No. 6) on Arbitration 2018 (UAE Arbitration Law) which replaced the Civil Procedure Law provisions on arbitration.⁽⁶⁾ This new law is largely based on the Model Law, but with some divergences.⁽⁷⁾ Although international commercial

(2) Section 44 of the UK Act.

(3) Cap 143A, 2002 Rev Ed.

(4) UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, applies in Singapore with the exception of Chapter VIII.

(5) Section 3 of IAA. See *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364.

(6) Articles 203 to 218 of the UAE Civil Procedures Law No. 11 of 1992.

(7) See Nasreddine M. et al, "The UNCITRAL Model Arbitration Law and the UAE Federal Arbitration Law: Points of Convergence and Divergence", *Kluwer Arbitration Blog* (November 22, 2018), <http://arbitrationblog.kluwerarbitration.com/201822/11/the-uncitral-model-arbitration-law-and-the-uae/> (last visited May 15, 2019).

arbitration can take place in a few centres in the UAE,⁽⁸⁾ this paper considers the Rules of the Dubai International Arbitration Centre (DIAC) 2007 which applies to arbitration outside the free zones created in the country (onshore Dubai).⁽⁹⁾

2. Power of the Courts and Arbitral Tribunals on Interim Measures

In each of the jurisdictions discussed, both the courts and arbitral tribunals have power to grant interim measures where the applicant is subject to an arbitration agreement. These powers are stipulated in the arbitration statutes and/or the rules of the arbitral institutions.⁽¹⁰⁾ This section discusses the concurrent jurisdiction of the courts and arbitral tribunals over interim measures. It also highlights the significance of the interplay between them as well as some of the pros and cons of applying for interim relief in each forum.⁽¹¹⁾

2.1 Concurrent Jurisdiction

Section 44(1) of the UK Act empowers the court in relation to arbitration proceedings to order any of the interim measures listed under subsection 2 as it would have in legal proceedings.⁽¹²⁾ The power of the courts in this regard may be excluded by the parties. The LCIA Rules preclude the parties from applying to the court for “any order for security for Legal Costs or Arbitration Costs”.⁽¹³⁾ Under Article 18(2) of the UAE Arbitration Law, the Chief Justice of the Court, may at the request of a party or the arbitral tribunal order interim or conservatory measures which he considers necessary in respect of existing or potential arbitral proceedings, whether before the commencement of the

(8) See Kehoe C. and Wren A., “Dubai: The Heart of Arbitration in the Middle East”, (21 February 2018), <https://www.herbertsmithfreehills.com/lang-ja/latest-thinking/dubai-the-heart-of-arbitration-in-the-middle-east> (last visited May 15, 2019); Gaffney J. and Al Houti D., “Arbitration in the UAE: Aiming for excellence”, (May 2014), <https://www.tamimi.com/law-update-articles/arbitration-in-the-uae-aiming-for-excellence-1/> (last visited May 15, 2019).

(9) Another popular centre is the DIFC-LCIA Arbitration and Mediation Centre (DIFC-LCIA), a joint venture established in 2008 between the Dubai International Financial Center (DIFC) and the LCIA.

(10) Article 25.3 LCIA Rules; Rule 30.3 SIAC Rules; Article 31.3 DIAC Rules. Article 9 of the Model Law is to the same effect.

(11) See generally Blackaby N. and Partasides C., *Redfern and Hunter on International Arbitration* (6th ed. 2015) Oxford University Press UK para 7.26.

(12) Such as taking witness evidence and preservation of evidence, ordering the inspection, preservation, custody, detention of property, ordering the sale of goods, granting of interim injunction and appointment of a receiver.

(13) Article 25.4 LCIA Rules.

arbitral proceedings or during its course.⁽¹⁴⁾

In Singapore, section 12A(2) of IAA deals with court-ordered interim measures. Like the UK equivalent, it provides that the court has the same power in making interim orders as it would have in legal proceedings. However, nothing is said about the court's jurisdiction being ousted by the parties' agreement.⁽¹⁵⁾ In the three jurisdictions, the courts can order an interim measure before the commencement of arbitration, especially in urgent cases. In non-urgent cases, the Singapore and the UK statutes provide that the courts can only act on the application of a party to the arbitral proceedings (that means that an arbitration must have been commenced).⁽¹⁶⁾ Also in both the UK and Singapore, the court will grant the interim measure for preserving evidence and assets on *ex parte* basis only in urgent cases.⁽¹⁷⁾ In non-urgent cases, the applicant must notify the opponent and the tribunal. The UAE Arbitration Law does not mention whether the court can hear an application for interim measure without notice to the opponent. However, it may be that it can do so⁽¹⁸⁾ given that an application can be brought before the commencement of arbitration proceedings and the fact that even an arbitral tribunal is empowered to grant an interim measure on its own motion.⁽¹⁹⁾

Before considering the powers of arbitral tribunals in granting interim measures, the meaning of the term 'arbitral tribunal' in the laws and rules should be noted. Under the UK Act and UAE Arbitration Law, an 'arbitral tribunal' is understood as an arbitrator or tribunal to which a dispute is referred for permanent resolution.⁽²⁰⁾ There is no provision for an emergency arbitrator with specific temporary jurisdiction to determine interim applications.⁽²¹⁾ Section 2(1) of Singapore's IAA, however provides for this. It defines an arbitral

(14) See *Asas OPCP Ltd v VIH Hotels Management Ltd.*, Cassation Case No. 8 of 2017.

(15) See Wong R., "Interim Relief in Aid of International Commercial Arbitration: A Critique of the International Arbitration Act" (2012) 24 SAclJ 499 at 527. The same appears to be the case with the UAE.

(16) Section 44(4) UK Act and Section 12A (5) IAA.

(17) Section 44(3) and (4) UK Act; Section 12A (4) and (5) IAA.

(18) See Gaffney J. and Al Marzouq M., "The Use of Emergency Arbitrator Procedures in the UAE: Some Practical Considerations", (February 2015), <https://www.tamimi.com/search/?&searchText=emergency%20arbitrator&searchSection=all> (last visited May 15, 2019), noting that *ex parte* emergency relief may be obtained in the Abu Dhabi courts.

(19) Article 21(1) of the UAE Arbitration Law.

(20) See Sections 1 and 15 of the UK Act; Article 1 of UAE Arbitration Law.

(21) Although the UK Act, under section 41(1) states that the tribunal has powers to act "in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration".

tribunal to mean “a sole arbitrator or a panel of arbitrators or a permanent arbitral institution, and includes an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation”.

Article 5.2 of the LCIA Rules states that the expression ‘arbitral tribunal’ “includes a sole arbitrator or all the arbitrators where more than one”. Rule 1.3 of SIAC Rules and Article 1.1 of DIAC Rules adopt similar wording, providing that ‘tribunal’ “includes a sole arbitrator or all the arbitrators where more than one arbitrator is appointed”. Thus, although the three Rules define the term similarly, the DIAC Rules’ provision will not extend to emergency arbitrator since this is neither provided for by the Rules nor the UAE legislation.

All the Rules provide arbitral tribunals with the power to grant interim relief. Under Article 25.1 of the LCIA Rules, the tribunal can grant interim and conservatory measures in an application in which all parties have been given the chance to respond. Measures that can be ordered include the provision of security for the amount in dispute and for legal costs; the custody and preservation of property or assets in the control of any parties and relating to the subject matter of the arbitration and any other provisional orders deemed appropriate. The requirement to give reasonable opportunity for all the parties to be heard implies that the interim measure is not to be obtained *ex parte*.⁽²²⁾ Rule 30.1 of SIAC Rules stipulates that “the Tribunal may, at the request of a party, issue an order or an award granting an injunction *or any other* interim relief it deems appropriate”. The tribunal may also order the applicant to provide appropriate security in connection with the relief sought. Article 31.1 of DIAC Rules states: “subject to any mandatory rules of the applicable law, at the request of a party, the tribunal may issue any provisional orders or take other interim or conservatory measures it deems necessary, including injunctions and measures for the conservation of goods which form part of the subject matter in dispute, such as an order for their deposit with a third person or for the sale of perishable goods.” The tribunal may equally request the applicant to furnish security for any measures sought.

In all the jurisdictions considered, the courts are statutorily required to support arbitration through the enforcement of arbitrators’ decisions. Section 42(1)

(22) See CIArb Guidelines Commentary on Article 1 para 4(a) for the view that interim measures are usually granted *inter partes*, but that in the case of *ex parte* application, the arbitrator should without delay allow submission to hear both parties.

of the UK Act states that “the court may make an order requiring a party to comply with a peremptory order made by the tribunal.” Article 21(4) of UAE Arbitration Law allows a party (with the permission of the tribunal which ordered an interim measure) to apply to the court to enforce an interim or conservatory measure. Section 19 of the IAA states in like manner that “an award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.” Furthermore, the institutional rules make it clear that arbitral awards are final and binding upon the parties⁽²³⁾ and in some cases expressly requires all involved (the institution, the tribunal and the parties) to ensure that any award is legally recognised and enforceable.⁽²⁴⁾

It has been argued that the fact that both the courts and tribunals have concurrent authority to grant interim measures can lead to problems as it may “result in conflicting decisions and duplicative parallel proceedings which may be costly, and perhaps encourage forum-shopping”.⁽²⁵⁾ An interesting provision, however, found in the UK Act and IAA is that the court’s order ceases to have effect where the tribunal “having power to act in relation to the subject-matter of the order, makes an order which expressly relates to the whole or part of the order”.⁽²⁶⁾ This upholds the court subsidiarity principle in which the courts, in general take a secondary and less interventionist stance on issues over which arbitrators are empowered.⁽²⁷⁾ It can be implied from the provision that where an application is first made to the court for interim measure, an arbitrator’s later decision on the same point trumps the court’s decision. The UAE Arbitration Law contains a contrary provision. Article 18(4) states that “if the chief justice of the Court issues an [interim or conservatory] order under section 2 of this article, the order shall only cease to have effect in whole or in part by a decision issued by the chief justice of the Court”. Article 21(3) provides that “the Arbitral Tribunal may, at the request of any party or on its own motion, amend, suspend, or cancel an interim measure it has ordered, in exceptional circumstances, by prior notice to be given to the Parties.” Thus, a tribunal can only contradict its own interim measure, not that of a court.

(23) See section 7 *supra*.

(24) Article 32.2 LCIA Rules; Article 31.3 DIAC Rules.

(25) Wong, *supra* fn. 15 at 516.

(26) Section 44(6) of the UK Act and section 12A (7) of IAA.

(27) See Lee J., “Court-subsidiarity and Interim Measures in Commercial Arbitration: A Comparative Study of UK, Singapore and Taiwan” [2013] 6(2) *Contemp. Asia Arb. J.* 227 at 229.

2.2 Should Interim Relief be obtained from the Courts or from Arbitral Tribunals?

Although the courts and arbitral tribunals have concurrent jurisdiction to grant interim measures and the court can order the measures prior to a tribunal being constituted, a party may still not wish to pursue an application from the court. There are a few reasons for this. First, going to court will likely bring the dispute to the public domain and thus destroy the confidentiality which is much prized by the parties in arbitration. Second, court processes are known to be much slower and expensive in many countries compared to arbitration. Third, the state courts can only offer non-customised justice by judges who may not be experts in the particular field relating to the dispute. It may also be a non-neutral territory for a party. Finally, the lack of choice in appointing the judges who preside over the matter in a state court and in determining the procedural rules may be inconvenient for the parties.

On the positive side of applying to the court is the fact that interim relief obtained from the courts have higher chances of recognition and enforcement compared with some arbitrators' decisions. Moreover, the courts are the only choice for some types of interim relief where arbitral tribunals lack the power. For instance, if the relief sought needs to be enforced against a third party,⁽²⁸⁾ where certain monetary and cost orders are required, if the order requires the sale of goods⁽²⁹⁾ or the application needs to be made *ex parte*, the applicant has no choice than to apply to the court for the relief.⁽³⁰⁾ Another factor that might propel a party to the court is that an arbitral tribunal is usually only able to act after it is formally constituted. Where a tribunal is not yet in place and it will take time to constitute one, the only realistic option is to pursue the interim relief in court.

A major limitation to seeking interim relief in arbitration is that not all measures can be provided by arbitrators. Additionally, enforcement of arbitral decisions can be problematic even in jurisdictions that have ratified the New York Convention.⁽³¹⁾ Nevertheless, there are advantages in applying for interim

(28) For instance, a freezing injunction on a third party which an arbitral tribunal cannot enforce: *DTEK Trading SA v Sergey Morozov* (2017) EWHC 94 (Comm).

(29) *Dainford Navigation Inc v PDVSA Petroleo SA* (2017) EWHC 2150 (Comm).

(30) See Wong, *supra* fn. 15 at 514; Al Mekhlafi N.M., "Interim Measures in International Commercial Arbitration: A Discourse in Continued Uncertainty", ICABML Conference Proceedings (2017), <http://publications.ud.ac.ae/index.php/ICABML-CP/article/view/1514/> (last visited May 15, 2019).

(31) Patton S., "The Enforcement of Arbitral Awards in Sub-Saharan Africa" *Lexicology* (21 Dec. 2016), <https://www.lexology.com/library/detail.aspx?g=95a2b5e697-a4440-c-92dc-1b63ce00f619> (last visited May 15, 2019) See also the discussion in Section 8.

measures in arbitration where the law and/or institutional rules permit. As the arbitral seat can be agreed by the parties, they can choose a neutral seat and venue. Furthermore, the arbitral process will preserve the parties' privacy and may turn out to be cheaper and quicker than court proceedings.⁽³²⁾

Moses⁽³³⁾ points out that arbitrators can feel reluctant to issue interim injunctions because of the fear of being perceived as prejudging the merits of the matter. This is because in order to grant interim relief, the test must be considered whether the applicant has a reasonable possibility of prevailing on the merits. The courts, on the other hand, do not feel such concern or hesitation when deciding on an interim measure since the merits of the matter will eventually be arbitrated.

3. Nature, Categories and Limitations on Interim Measures

This section discusses the types and essence of interim measures provided by the arbitral tribunals and the courts and the cases considering the statutory restriction on their availability in the UK and Singapore.

3.1 Types of Interim Measures

Despite the clear powers given to the courts and tribunals to grant interim and conservatory measures, the meaning of the terms 'interim measure', 'conservatory measure' or 'interim relief' is not given by the arbitration statutes and institutional rules. Only in the case of Singapore does a definition of 'interim measure' exist by virtue of the IAA's incorporation of the Model Law. Article 17(2) of the Model Law stipulates:

“An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to

- (a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral

(32) Doe J. and Wood R., “Emergency Arbitrators and Expedited Tribunals”, *Construction Law- Arbitration* (14 March 2017), <https://www.herbertsmithfreehills.com/latest-thinking/emergency-arbitrators-and-expedited-tribunals> (last visited May 15, 2019).

(33) Moses M. L., *The Principles and Practice of International Commercial Arbitration* (2nd ed. 2012), Cambridge University Press, New York at 110.

process itself;

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

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

Broadly, the above categories reflect the types of orders that arbitral tribunals can grant in the UK, Singapore and UAE. In general, arbitrators have power to grant measures necessary and appropriate in the circumstances of the case save as circumscribed by the national law and applicable arbitration rules.⁽³⁴⁾ The essence of such measures is “to minimise loss, damage, or prejudice during proceedings, or to facilitate the enforcement of a final award”.⁽³⁵⁾ According to Moses,⁽³⁶⁾ interim measures in arbitration include those “that would prevent the other side, for example, from hiding or removing assets, from using licensed intellectual property in a way that would devalue the licensor’s interest, or from dispersing or destroying evidence that the party needed to prove its case”. Further, they include orders where there is need to preserve the *status quo* or prevent the opponent from continuing the breach in question pending final resolution of the dispute.⁽³⁷⁾ In *Cetelem SA v Roust Holdings*,⁽³⁸⁾ for example, the English Court of Appeal granted a freezing order as an interim relief prior to the initiation of arbitration in order to preserve a contractual right and the value of that right to the applicant pending the final resolution of the dispute through arbitration.

It is noteworthy that arbitral tribunals are not limited to granting only interim measures that are recognised by the courts of the place of arbitration. They can, and indeed are encouraged to align any interim measure with the likely place of future performance and enforcement.⁽³⁹⁾ Depending on the parties’ need, interim and conservatory measures may be applied for at different times and stages of the procedure. Measures necessary for the preservation of evidence and prevention of the dissipation of assets are more likely to come up at the

(34) See Article 5 of CI Arb Guidelines.

(35) Lee, *supra* fn. 27.

(36) *Supra* fn. 33 at 105.

(37) Valasek J. and Anne de Jong J., “Enforceability of Interim Measures and Emergency Arbitrator Decisions” (May 2018), <https://www.nortonrosefulbright.com/en/knowledge/publications/6651d077/enforceability-of-interim-measures-and-emergency-arbitrator-decisions> (last visited May 15, 2019).

(38) [2005] EWCA Civ 618.

(39) Commentary to Article 5 CI Arb Guideline.

initial stage before the formation of a tribunal, and so more likely to be the subject of emergency arbitration.

3.2 Limitations on Availability of Interim Measures

A party may want to bypass the arbitral tribunal and apply to the court for an interim measure if the order sought is the type that will be better enforced through the courts (e.g. a freezing order against a bank).⁽⁴⁰⁾ The UK Act and the IAA, however, place some restrictions on the power of the court to grant interim measure where the parties are subject to an arbitration agreement. Section 44(5) of the UK Act (which is similar to section 12A(6) of the IAA) states:

“In any case the court shall act [i.e. make an interim order] only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.”

The implication of this provision is that interim relief must first be applied for through arbitration and the courts are the last resort.⁽⁴¹⁾ The secondary position of the courts has been rationalised on the basis of the party autonomy principle and the courts’ unwillingness to intervene in arbitration unless where necessary.⁽⁴²⁾ The subsidiary position of the courts support the arbitral process in granting relief where tribunals lack the power to do so and in enforcing measures granted by arbitrators.⁽⁴³⁾

By contrast to the UK and Singapore, there is no restriction on the UAE courts or requirement that they only grant interim relief where arbitral tribunals are unable to do so. In fact, Article 18(1) of the UAE Arbitration Law permits a competent court to grant an interim measure and to exercise jurisdiction until the conclusion of all arbitral proceedings. It is further provided that the arbitration shall not be stayed or prejudiced simply by the referral to court nor shall it be deemed to constitute a waiver of the arbitration agreement.⁽⁴⁴⁾

In the context of section 44(5) of the UK Act, it is recognised that an arbitral

(40) Doe and Wood, *supra* fn. 32.

(41) See Moses, *supra* fn. 33 at 107; Lee, *supra* fn. 27 at 233.

(42) Section 42(3) of the UK Act is another provision that can be similarly rationalised. It provides that the court shall not order the enforcement of peremptory orders unless an applicant has exhausted any available arbitral process concerning the opponent’s failure to comply with the order.

(43) *Channels Tunnel Group v Balfour Beatty Ltd* [1993] AC 334.

(44) Article 18(3).

tribunal cannot ‘act effectively’ when it is yet to be constituted. Thus, before the formation of an arbitral tribunal, the courts can grant an interim measure upon the application of a party.⁽⁴⁵⁾ Also since an arbitral tribunal cannot order the sale of goods as an interim relief, this lack of power satisfies the crucial requirement under section 44(5). So, a party requiring such an order can side-step the tribunal and apply to the courts.⁽⁴⁶⁾

The condition for applying to the court for interim measure under section 44(5) was satisfied in *Seele Middle East Fze v Drake & Scull Int SA Co.*⁽⁴⁷⁾ In this case, the application was made prior to the constitution of the tribunal. The contract was governed by English law and provided for arbitration under the ICC Rules in London. The claimant applied to the court for interim injunction pursuant to section 44(3) of the UK Act⁽⁴⁸⁾ to restrain the respondents from utilising certain documents on the claimant’s website. The court considered that because a tribunal was yet to be constituted, the condition that an arbitral tribunal “has no power or is unable for the time being to act effectively” was met. Hence, the court granted the interim measure to preserve the evidence requested in the case. Nevertheless, the point was reiterated that under section 44(5) the court would only act if and to the extent that the arbitral tribunal has no power or is unable to act effectively. It should be noted that by the time of this decision, emergency arbitration provisions were not yet available under the ICC Rules. Hence the claimant did not have the option of emergency arbitration.

By contrast in *Gerald Metals SA v Timis & others*⁽⁴⁹⁾ the parties’ arbitration agreement was governed by institutional rules which provided for emergency arbitration. The issue concerned the powers of the court to grant freezing injunction sought by a party in arbitration. In support of its claims for breach of contract, the claimant applied to the LCIA for the appointment of an emergency arbitrator. It intended to seek an order preventing the disposal of the respondent’s assets. The application was declined since the respondents had provided an

(45) *Maldives Airports Co Ltd and Another v GMR Malé International Airport Pte Ltd* [2013] SGCA 16.

See also *SabMiller Africa v East African Breweries Ltd* [2009] EWHC 2140 for a successful pre-arbitration application for interim injunction to prevent a party from implementing a transaction in breach of non-competition provisions (restrictive covenants) in a commercial agreement.

(46) *Dainford Navigation Inc v PDVSA Petroleo SA* (2017) EWHC 2150 (Comm).

(47) [2014] EWHC 435 (TCC).

(48) Section 44(3) states: “If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.”

(49) (2016) EWHC 2327 (Ch).

undertaking that it would not dispose of any assets without prior notice. Hence, there was no longer any urgency necessitating the relief. The claimants, however, applied to the court for a freezing injunction pursuant to section 44(3) of the Act. The court also rejected this, stating that in view of section 44(5), it was only if the emergency or expedited procedures available under the relevant arbitral rules are inadequate or it was practically not possible to utilise those powers of arbitrators that the court may act to grant the interim relief. Leggatt J. stated that since the LCIA had declined the appointment of the emergency arbitrator and expedited formation of a tribunal, the inference that could be drawn is that the case for emergency relief had not been made out in the circumstances of the case. According to the judge “the test of urgency under subsection (3) is to be assessed by reference to whether the arbitral tribunal has the power and the practical ability to grant effective relief within the relevant timescale”.⁽⁵⁰⁾

In view of the above, whereas the section 44(5) condition was theoretically met by the facts of *Seele Middle East Fze*, it was not in fact met in *Gerald Metals* case. As the section predates the LCIA Rules’ provisions on emergency arbitrator and expedited formation, it can be argued that limiting access to the courts for interim measures by reference to the Rules appears not to have been intended by section 44(5).

In terms of its effect, the *Gerald Metals* decision whittles down the much-valued use of the courts to enforce freezing orders against third parties and to sanction their non-compliance. Cooper⁽⁵¹⁾ points out that where relief which is also available under the institutional rules is sought from the court, the applicant, in order to succeed must clearly “show why relief from the tribunal or an emergency arbitrator is insufficient.” This could be by proving that relief could not be available within the required timescale; that the relief sought was beyond the reach of the tribunal or that there would be issues of enforceability of the arbitral relief. Failure to satisfy the court would result in its declining the interim relief. It can be argued that this impact of section 44(5) contradicts the rationale behind the provision of emergency procedures in institutional rules. Indeed, the LCIA and SIAC Rules allow the parties the alternative of pursuing interim measures through the courts. Article 9.12 of the LCIA Rules

(50) Ibid. para 3. See also *Starlight Shipping v Tai Ping Insurance* [2008] 1 Lloyd’s Rep 230.

(51) Cooper N., “Emergency Interim Relief: Where do you go?”, Arbitration Blog (12 December 2017), <http://arbitrationblog.practicallaw.com/emergency-interim-relief-where-do-you-go/> (last visited May 15, 2019).

specifically states that the “emergency arbitrator provision shall not prejudice any party’s right to apply to a state court for any interim or conservatory measures before the formation of the Arbitration Tribunal ... and shall not be treated as an alternative to or substitute for the exercise of such right”.

The difficulty of the *Gerald Metals* case has led commentators to recommend that where the parties envisage recourse to the courts for an interim measure and the institutional rules which they are subject to contain emergency arbitrator/expedited provisions, they should consider excluding or opting out of the provisions in order to retain access to section 44 reliefs.⁽⁵²⁾

Another notable restriction in the English courts’ powers under section 44 is their reluctance to grant interim relief in aid of foreign seated arbitration if doing so would interfere with the power of the arbitral tribunal and the supervisory court.⁽⁵³⁾ It recognises that the natural court for the grant of interim measures is the court of the seat of the arbitration.⁽⁵⁴⁾

In *Five Ocean Corporation v Cingler Ship Pte Ltd*,⁽⁵⁵⁾ the High Court of Singapore considered the IAA’s equivalent of section 44(5) of the UK Act. Since the subject matter of the interim relief (an order for the sale of goods) was beyond the powers of an arbitral tribunal, it was appropriate to apply to the court for interim measures. The application was for an order to sell the cargo on board a ship which had been detained pending resolution of the parties’ dispute. Granting the application, Belinda Ang Saw Ean J. stated that “the main legislative intention behind the enactment of s 12A [of the IAA, which is parallel to section 44(5) of the UK Act] was to give the court powers over assets and evidence situated in Singapore and to make orders in aid of

(52) Knowles B. et al., “Emergency Relief: Court or Tribunal? Your Options May Be More Limited Than You Thought” - Kluwer Arbitration Blog (22 October 2016), <http://arbitrationblog.kluwerarbitration.com/201622/10//emergency-relief-court-or-tribunal-your-options-may-be-more-limited-than-you-thought/> (last visited May 15, 2019); Peacock N. et al, “Protecting Party Rights by use of Interim Measures: Traps for the Unwary in Obtaining Court-Ordered Interim Relief”, (21 February 2018), <https://www.herbertsmithfreehills.com/latest-thinking/protecting-party-rights-by-use-of-interim-measures-traps-for-the-unwary-in-obtainingc> (last visited May 15, 2019); Honey D. and Kelly M, “English Court Support for Arbitration: Recent Developments”, (February 2018), <http://www.hfw.com/English-Court-Support-for-Arbitration-Recent-Developments-February-2018a> (last visited May 15, 2019).

(53) *Company 1 v. Company 2 and another* [2017] EWHC 2319 (QB).

(54) *Econet Wireless Ltd v Vee Networks Ltd* [2006] EWHC 1568.

(55) [2015] SGHC 311.

arbitrations that were seated in Singapore and overseas.”⁽⁵⁶⁾ Her Ladyship stated that in order to succeed, the applicant had “to satisfy the court on the following matters: (a) the application is an urgent one; and (b) that an order would be necessary for the purpose of preserving assets (i.e., under section 12(1)(d) of IAA, the property which is or forms part of the subject-matter of the dispute)”.⁽⁵⁷⁾ The judge pointed out several factors that were indicative of urgency in the circumstances of the case. These were that the vessel had been detained for over four months and the crew on board were falling sick; there was lack of fresh food and water for the crew; the cargo was deteriorating and could not remain on board indefinitely and that monsoon season was about to set in where the vessel was located.⁽⁵⁸⁾

It can be concluded that the court entertained the interim relief application in the case because an arbitral tribunal has no power to order the sale of cargo. To this extent, the decision of the Singapore High Court is consistent with the approach of the UK courts in *Seele Middle East Fze* case and *Gerald Metals* case.

4. Expedited Formation Procedures

The LCIA, SIAC and DIAC Rules provide for the expedited formation of the arbitral tribunal in matters of exceptional urgency. The expedited procedure may, in general, work out cheaper and involve more savings in time for the parties than regular arbitration, although it will still not be as fast as using an emergency arbitrator just to obtain an interim relief. Major differences between the expedited procedure and emergency arbitration are that the tribunal appointed under the former is the parties’ own choice, is permanent and its decision is final. Recognition and enforcement of an award under the expedited procedure will also generally be less problematic particularly in foreign courts.⁽⁵⁹⁾

Under the LCIA Rules, expedited formation of the tribunal is made on application in writing to the Registrar of the LCIA court upon notice to the other parties. A copy of the application or request which must set out the qualifying grounds of exceptional urgency must be delivered to the Registrar and the opponent. In a successful application, the court will appoint an arbitral

(56) *Ibid.* para 39.

(57) *Ibid.* para 41.

(58) *Ibid.* para 59.

(59) Bose R. and Meredith I., “Emergency Arbitration Procedures: A Comparative Analysis” (2012) 5 Int. A. L. R. 186 at 188.

tribunal as expeditiously as possible and “may abridge any period of time under the arbitration agreement or other agreement of the parties”.⁽⁶⁰⁾

What amounts to exceptional urgency is not defined in any of the Rules. Quite significantly also, the Rules do not distinguish this term from ‘emergency’, which is the term used in context of emergency arbitration.⁽⁶¹⁾ As there is no prescribed standard, the LCIA court determines whether there is exceptional urgency on a case by case basis.⁽⁶²⁾ The application is usually determined by a senior member of the court after allowing the opponent an opportunity to comment (although a decision may still proceed where the opponent fails to comment). Thus, the application cannot be made on *ex parte* basis.

The case studies provided by the LCIA demonstrate the kind of cases where expedited formation is possible. It was allowed in a case where the tribunal needed to expeditiously determine the parties’ substantive rights under the contract. The notice of termination under the contract contested by the applicant was due to take effect within a short time and this would have resulted in significant liability, financial losses and loss in reputation for the applicant. Following the abridgment of the period for the processes by the LCIA, a three-member panel of arbitrators was constituted in only 12 days.⁽⁶³⁾ In another case, the application for a temporary injunction restraining a bank from paying out on a guarantee was due to expire in 5 days and the applicant’s request for expedited formation of the arbitral tribunal was granted to enable the tribunal decide the case quickly. Expedited formation was, however, rejected where the applicant claimed that the respondent’s failure to advance credit to its business would cause it financial losses. The respondent argued that this was not a matter of expediency, how much more exceptional urgency. Accepting this, the LCIA denied the application.

Article 12 of the DIAC Rules provides for expedited formation of a tribunal.⁽⁶⁴⁾

(60) Article 9A.3.

(61) According to Bose and Meredith, *supra* fn. 59 at 192 ‘exceptional urgency’ is a higher threshold which might indicate that the provision is intended to be used rarely.

(62) *LCIA Notes on Emergency Procedure*, para 19 (June 29, 2015) (LCIA Notes), <https://www.lcia.org/adr-services/lcia-notes-on-emergency-procedures.aspx#3.%20EXPEDITED%20FORMATION%20OF%20THE%20TRIBUNAL> (last visited May 15, 2019).

(63) LCIA Notes, section 6.

(64) The provision on expedited procedure in the draft DIAC Rules 2018 requires an award to be made within three months of the commencement of arbitration. See Mulla H., et al, “The New DIAC 2018 Arbitration Rules” - Global Arbitration News (12 December 2017), <https://globalarbitrationnews.com/new-diac-2018-arbitration-rules/> (last visited May 15, 2019).

The application can be made in writing to the centre with notice to the other parties on or after the commencement of arbitration. The basic requirement is that there is exceptional urgency, the grounds of which must be set out in the application. On receipt of the application, the centre has complete discretion to adjust the time limit under the Rules for the formation of a tribunal. Although it has been stated that this provision has its roots from Article 9 of the LCIA Rules,⁽⁶⁵⁾ a significant difference between them is that the LCIA court does not have complete discretion in deciding on whether to allow an expedited formation application.⁽⁶⁶⁾ A complete discretion would seem to imply that there is no need to comply with laid down processes in the Rules.

Expedited formation of the arbitral tribunal is provided for under Rule 5 of the SIAC Rules. Unlike Article 12 of the DIAC Rules, which allows the application to be made after the commencement of the arbitration, the SIAC application for expedited formation must be filed prior to the constitution of the tribunal. This means that once the arbitrator(s) has been appointed and the tribunal duly formed, it will no longer be possible to request expedited procedure. Hence the conditions relied upon by a party as qualifying the matter for expedited formation must exist at this initial stage.

Furthermore, unlike under the LCIA and DIAC Rules where the only requisite condition is the exceptional urgency of the matter, under the SIAC Rules, in addition to exceptional urgency, two other conditions can qualify a case for the expedited procedure. If the amount in dispute (representing the aggregate of the claim, counterclaim and any defence of set-off) does not exceed the equivalent of S\$6 million or if the parties agree to the application, expedited formation can be granted. Since any of these conditions independently qualify a case for the procedure, it means that it can be utilised also in non-urgent cases.

As with the LCIA and DIAC Rules, expedited procedure under SIAC Rules can only be undertaken with notice to the other parties and proof to the Registrar of service to the opponent. The SIAC Rules provide more detailed requirements for the procedure than the LCIA and DCIA Rules. It states that any time limits under the Rules may be abbreviated by the Registrar, that the dispute may be referred to a sole arbitrator, that the final award must be made within 6 months from the date the tribunal is constituted unless exceptionally

(65) Schultze R.A., *Institutional Arbitration: A Commentary* (2013) C.H. Beck, Germany, 887.

(66) Note that under the 2016 Rules of the DIFC-LCIA, the expedited formation and emergency arbitration provisions are parallel to that of the LCIA Rules.

extended by the registrar and that documents only proceedings (as opposed to oral hearing) may be adopted.⁽⁶⁷⁾

It is noteworthy that unlike the case under the LCIA Rules,⁽⁶⁸⁾ decisions made by the Registrar and the tribunal pursuant to Rule 5 of SIAC in implementing the expedited procedure will override any contrary provisions in the parties' contract. In one case, despite the arbitration agreement providing for a panel of 3 arbitrators, the President of SIAC appointed a sole arbitrator under the expedited rules. This was contested by the respondent but the President's appointment was upheld by the court.⁽⁶⁹⁾ Rule 5.3 of SIAC provides that by agreeing to arbitration under the Rules the parties agree that expedited procedure rules "shall apply even in cases where the arbitration agreement contains contrary terms".

The SIAC Rules stipulate that upon the application of a party and after hearing both parties, the tribunal can in consultation with the Registrar (having regard to further information that subsequently became available) reverse the expedited proceedings. The arbitration will then continue to be conducted by the same tribunal but without the expedited rules applying.⁽⁷⁰⁾ While the SIAC Rules provide for a 6 month time frame for the arbitrator to render its final award under the expedited rules,⁽⁷¹⁾ no time frame is set for awards to be rendered under the LCIA and DIAC Rules. However, it must be implicit that the arbitrator's final decision should be rendered expeditiously.

5. Emergency Arbitration Procedures

Emergency arbitration has been provided for by the Rules of major arbitral institutions since its first adoption by the American Arbitrators Association under the International Centre for Dispute Resolution Rules in 2006.⁽⁷²⁾ Although emergency interim relief procedure has been around for a while, there are still not many decisions made public in order to effectively predict

(67) Rule 5.2.

(68) Bose and Meredith, *supra* fn. 59 at 192 for the view that "the LCIA is not authorised to override the right of the parties to nominate their own arbitrators".

(69) *AQZ v. ARA* [2015] SGHC 49. See Amin Z., "The Emergency Arbitrator and Expedited Procedure in SIAC: A New Direction for Arbitration in Asia", (2015), <http://www.siac.org.sg/2013-57-01-18-09-02-27-00-22-09-2013/20/articles/420-the-emergency-arbitrator-and-expedited-procedure-in-siac-a-new-direction-for-arbitration-in-asia> (last visited May 15, 2019).

(70) Rule 5.4.

(71) Rule 5.2(d).

(72) Cavalieros P. and Kim J., "Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations" (2018) 35(3) *Journal of International Arbitration* 275.

the grounds of granting or denying the relief sought and also how the courts of other jurisdictions treat the decisions in terms of enforcement.

The SIAC and LCIA Rules on emergency arbitration apply to the parties who are subject to the rules unless they opt out. The expedited formation and the emergency arbitrator procedures under both rules are not mutually exclusive.⁽⁷³⁾ The emergency procedure involves a single arbitrator appointed by the arbitral institution to determine urgent interim and conservatory measures which cannot wait the constitution of a regular or expedited tribunal. The Rules specify, among others, the requirements for the appointment, the nature of the emergency arbitrator's decision and timelines which the parties and the arbitrator must comply with.⁽⁷⁴⁾ The emergency arbitrator's powers though wide, does not extend to the merits of the case as that must be determined by the regular tribunal.⁽⁷⁵⁾

The decision of an emergency arbitrator is not permanent and may be varied, discharged or revoked by the merit (regular) tribunal in whole or in part, on the application of a party or on its own motion.⁽⁷⁶⁾ In other words, the decision does not bind the arbitral tribunal. In the case of Singapore, it is provided that the award or order of the emergency arbitrator "cease to be binding if the Tribunal is not constituted within 90 days of such order or award or when the Tribunal makes a final award or if the claim is withdrawn".⁽⁷⁷⁾ The arbitral institution can abridge the procedures and timescale of the processes involved.

The applicant under the emergency procedure must include all the grounds which it relies on for the relief sought and must notify all the parties of the application.⁽⁷⁸⁾ Thus consistently with other major arbitral institutions, the application for emergency arbitration relief under the LCIA and SIAC Rules is made *inter partes*.⁽⁷⁹⁾ Whereas under the LCIA Rules the application can be made before notice of arbitration is issued by the claimant, under the SIAC Rules, the application must be filed with or after the notice of arbitration.

(73) LCIA Notes para 31; Vivekananda N., "The SIAC Emergency Arbitrator Experience" (2013), <http://www.siac.org.sg/201302-27-00-22-09-2013/20-57-01-18-09-/articles/338-the-siac-emergency-arbitrator-experience> (last visited May 15, 2019).

(74) For comparative commentary on the emergency arbitrator rules of major arbitral institutions, see Cavalieros and Kim, *supra* fn. 72; Bose and Meredith, *supra* fn. 59.

(75) Cavalieros and Kim, *ibid* at 280.

(76) LCIA Rules, Article 9.11; SIAC Rules, Schedule 1 para 8 and para 10.

(77) SIAC Rules, Schedule 1 para 10.

(78) LCIA Rules, Article 9.5; SIAC Rules, Schedule 1, paras 1 and 7.

(79) CI Arb Guideline Commentary to Article 8 para 1(d).

Thus, it is envisaged under the SIAC Rules that regular arbitration will be commenced after the emergency arbitration if the matter is not settled.

After the provision of the details by the applicant, the LCIA court decides the application as soon as possible and appoints an emergency arbitrator within 3 days of the application or as soon as possible thereafter. The LCIA court at this stage makes a determination (which appears to be no more than administrative), whether a case is deserving of appointing an emergency arbitrator,⁽⁸⁰⁾ but in the case of SIAC, nothing suggests that the role of the SIAC's Registrar and President in deciding whether to appoint an emergency arbitrator is merely administrative.

It is noted that the Rules are silent on whether the arbitral institution (registrar, president or senior member of the court) bears responsibility if a decision regarding the appointment of an emergency arbitrator or expedited formation of an arbitral tribunal is wrongly made. Notably, it is provided in the SIAC Rules that the arbitral institution and its employees are exempt from liability for any negligence in the performance of their duties.⁽⁸¹⁾ The LCIA Rules exempt the institution, its employees and arbitrators from any act or omission in connection with the arbitration, but retain their liability for "(i) where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party; or (ii) to the extent that any part of this provision is shown to be prohibited by any applicable law".⁽⁸²⁾

The SIAC application is decided by the president of SIAC who appoints an emergency arbitrator in deserving cases within 1 day.⁽⁸³⁾ The emergency arbitrator must establish a schedule for the consideration of the application within 2 days of the appointment.⁽⁸⁴⁾ While SIAC Rules provide for an opportunity to challenge the appointment of the emergency arbitrator,⁽⁸⁵⁾ nothing is mentioned in the LCIA Rules on this. The emergency arbitrator has discretion on how to determine the case, provided that opportunity is given to all parties and they are consulted regarding the claim. There is no obligation to hold oral hearings.⁽⁸⁶⁾ There is a maximum of 14 days from the appointment in order for the emergency arbitrator to make a decision. This may only be

(80) LCIA Notes para 38.

(81) SIAC Rules, Rule 38.1

(82) LCIA Rules, Article 31.1.

(83) LCIA Rules, Article 9.6; SIAC Rules, Schedule 1, para 3.

(84) SIAC Rules, Schedule 1, para 7.

(85) SIAC Rules, Schedule 1, para 5.

(86) LCIA Rules, Article 9.7; SIAC Rules, Schedule 1 para 7.

extended in exceptional circumstances or with the agreement of the parties.⁽⁸⁷⁾ The award or order must be in writing and include reasons.⁽⁸⁸⁾

Although the UAE Arbitration Law and the DIAC Rules contain no provisions on emergency arbitrator, in terms of obtaining emergency relief from the court, Gaffney and Al Marzouq⁽⁸⁹⁾ argue that the threshold for *ex parte* interim relief may be lower than the threshold that apply in the case of institutional emergency arbitrator relief. The authors conclude that seeking an interim measure from the UAE courts in relation to a UAE-related arbitration is likely to be much faster than seeking relief from an emergency arbitrator. While the author's point on promptness cannot be discounted, seeking the relief from court still subjects the parties to those disadvantages which are attendant on court proceedings. Overall, considering that the DIAC Rules provide for expedited procedures, a sole arbitrator appointed under the expedited formation rules may be able to provide prompt interim relief similar to those obtainable through emergency arbitration.⁽⁹⁰⁾

The SIAC Rules provide that an emergency arbitrator can make any order that an arbitral tribunal can make, including adjourning the consideration of all or any part of the claim for the decision of the arbitral tribunal when formed.⁽⁹¹⁾ Although, literally, the ability to 'make any order' might suggest that an emergency arbitrator can rule even on the substance of the matter and thus can pre-empt the decision of the merits tribunal, this would be quite inconsistent with the intent behind the emergency procedure. The institutional rules specifically limit the power of the emergency arbitrator. His decision can be modified or revoked by the merit tribunal.⁽⁹²⁾ The emergency arbitrator usually becomes *functus officio* once the interim relief has been granted or denied, or when the merits tribunal renders its decision.⁽⁹³⁾

In terms of the actual use of the expedited formation and emergency procedures

(87) LCIA Rules, Article 9.8; SIAC Rules, Schedule 1 para 9.

(88) LCIA Rules, Article 9.9; SIAC Rules, Schedule 1 para 8; Article 41(1) UAE Arbitration Law.

(89) *Supra* fn. 18.

(90) Note that under the anticipated new DIAC Arbitration Rules, urgent interim relief by an emergency arbitrator will be available.

(91) SIAC Rules, Schedule 1 para 8.

(92) Lye K.C. et al, "Legal Status of the Emergency Arbitrator under the SIAC 2010 Rules – Neither Fish nor Fowl?" (2011) 23 SAclJ 93. See also Ghaffari A. and Walters E., "The Emergency Arbitrator: The Dawn of a New Age?" (2014) 30 Arbitration International 153 for the view that interim measures "are not intended to pre-judge the outcome of the dispute".

(93) SIAC Rule, Schedule 1, para 10. Nothing to this effect is expressly stated in the LCIA Rules but it seems implicit from the provisions.

under the LCIA and SIAC Rules, the number of appointments under the LCIA Rules remain quite low. In 2016 and 2017, only 2 out of 15 and 4 out of 16 applications respectively for the expedited procedure were granted by the LCIA court. In each of these years, only one application for emergency arbitrator was received and it was rejected.⁽⁹⁴⁾ The figures improved in 2018 as 8 out of 23 expedited formation applications were granted by the LCIA. In that year, 2 out of the 3 emergency arbitrator applications received were granted.⁽⁹⁵⁾ One possible reason for the low usage of the procedures may be that the regular and expedited tribunals and even the courts are already quite robust and timely in granting interim measures. Another reason might be the fact that following the *Gerald Metals* case,⁽⁹⁶⁾ parties to arbitration agreements are now advised to exclude the expedited and emergency arbitration provisions of the institutional rules if they want to retain the right of recourse to courts under section 44(5) of the UK Act.⁽⁹⁷⁾

According to the figures published by the SIAC, there is much higher use of its emergency and expedited arbitration provisions. It allowed all 6 emergency arbitration applications made in 2016. Cumulatively, over 50 arbitrators have been appointed under the emergency and expedited procedures since their inception.⁽⁹⁸⁾

6. Standards for Granting Interim Relief

National arbitration statutes and the Rules of arbitral institutions often do not prescribe the conditions that have to be satisfied in order for a court or tribunal to grant interim measures. The LCIA Notes on Emergency Procedures states that the emergency arbitrator in reaching his decision should have regard to all other standards and laws that apply in the context of the particular arbitration.⁽⁹⁹⁾ The interlocutory nature of interim reliefs, in general, makes them useful in urgent circumstances. The LCIA and SIAC Rules refer to the thresholds of ‘exceptional urgency’ and ‘emergency’ for expedited formation and emergency

(94) LCIA, “Facts and Figures - 2017 Casework Report”, <https://www.lcia.org/LCIA/reports.aspx>

(95) LCIA, “2018 Annual Casework Report”, <https://www.lcia.org/LCIA/reports.aspx>

(96) *Supra* fn. 49.

(97) See text to footnote 52 *infra*.

(98) Clarkson M., “International Asia Case Update: Gerald Metals S.A. v Timis & Ors” [2016] EWHC 2327 (Ch) International Arbitration Asia (27 February 2017), <http://www.internationalarbitrationasia.com/uncategorized/case-update-gerald-metals-s-a-v-timis-ors-2016-ewhc-2327-ch-2/> (last visited May 15, 2019).

(99) LCIA Notes, paras 48 and 49.

arbitrator applications respectively. Knowles⁽¹⁰⁰⁾ argues that the terms do not import the same standard and that “the standard of ‘emergency’ is stricter than the standard of ‘exceptional urgency’”. Nonetheless, it is trite that emergency arbitration is available only in cases of imminent need for relief that requires prompt attention.⁽¹⁰¹⁾ If the relief sought can wait the constitution of a merit tribunal, then it is not a case for emergency arbitration.⁽¹⁰²⁾ The converse is that delay in seeking emergency relief can be detrimental.⁽¹⁰³⁾ In any case, it is for the president of SIAC and LCIA to decide whether an application sufficiently merits the required level of emergency or urgency in order to appoint an emergency arbitrator or expedite the formation of the tribunal.

In addition to the requirement of urgency, other criteria must be satisfied before interim relief is granted in arbitration. The uncertainty is whether these should be dictated by the law of the seat or the substantive law of the contract. In Singapore seated arbitrations, although the applicable test could potentially vary from tribunal to tribunal the *lex arbitri* (i.e. Singapore law) is generally applied.⁽¹⁰⁴⁾ The test laid down by Lord Diplock in *American Cyanamid Co v Ethicon Ltd*⁽¹⁰⁵⁾ has been adopted.⁽¹⁰⁶⁾ In that case, the UK House of Lords stated the following guiding principles for the grant of interlocutory injunction:

1. The plaintiff must first satisfy the Court that there is a serious issue to decide and that if the defendants were not restrained and the plaintiff won the action, damages at common law would be inadequate compensation for the plaintiff’s loss.
2. The Court, once satisfied of these matters will then consider whether the balance of convenience lies in favour of granting injunction or not, that is, whether justice would be best served by an order of injunction.
3. The Court does not and cannot judge the merits of the parties’

(100) Knowles, *supra* fn. 52.

(101) Bassler W., “The Enforceability of Emergency Awards in the United States: or When Interim Means Final” (2016) 32 Arbitration International 559 at 563; Bose and Meredith, *supra* fn. 59 at 191.

(102) CI Arb Guidelines, Commentary to Article 8 para 1(c).

(103) *Swift-Fortune Ltd v Magnifica Marine SA* [2007] EWHC 1630 (Comm).

(104) Yeo A., “Interim and Provisional Measures in International Commercial Arbitration Law and Practice in Singapore” (2014), <https://cil.nus.edu.sg/wp-content/uploads/201411/Day-5-Alvin-Yeo-SC-Interim-and-Provisional-Measures-in-ICA.pdf> (last visited May 15, 2019)

(105) [1975] AC 396.

(106) *Brooks, Kenneth Williams v Millar, Christian Gurth Hoyer* [2006] SGHC 109; *Reed Exhibitions Pte Ltd v Khoo Yak Chuan Thomas & Anor.* [1995] 3 SLR(R) 383.

respective cases and that any decision of justice will be taken in a state of uncertainty about the parties' rights.

In *Maldives Airports Co Ltd and Another v GMR Malé International Airport Pte Ltd*,⁽¹⁰⁷⁾ the balance of convenience was held to lie in favour of not granting the injunction because damages would be an adequate remedy for the applicant's claim. It was established that the appellant had the financial ability to pay any damages that might be awarded. It was also found that there would be practical difficulty with the appellant complying with the injunction if ordered as well as difficulty with it being enforced. Vivekananda noted that "SIAC emergency arbitrators have used the real probability test or a good arguable case test in granting or denying interim relief in addition to considering the element of whether irreparable harm is likely to be caused if interim relief were not granted."⁽¹⁰⁸⁾

Recent UK cases affirm that an applicant for interim relief must demonstrate that there is a 'serious question to be tried'. In other words, that it is more likely than not that the applicant will establish the elements of the cause of action and succeed at trial.⁽¹⁰⁹⁾ Furthermore, where the relief applied for is to prevent a beneficiary of an on-demand performance bond from making any demand on the bond, a much higher and stricter standard is required, namely that the applicant has a 'strong case'.⁽¹¹⁰⁾

In *Ideal Standard International SA and another v Herbert*,⁽¹¹¹⁾ the application for interim injunction was to restrain the respondent from breach of the non-compete clause in a shareholders' agreement which prohibited him (for 18 months after disengagement) from carrying on any activity or business within the jurisdiction where it would be in competition with the business of the applicant. The court considered that it was necessary to determine whether there was a serious issue to be tried. This was decided in the positive as it could not be concluded at that stage that the applicant did not have any prospect of succeeding in its claim in the arbitration. As to where the balance of convenience lay, this was found in favour of granting the interim injunction. Sir Ross Cranston J. stated:

(107) [2013] SGCA 16.

(108) *Supra* fn. 73.

(109) *Linklaters LLP & Anor v Mellish* [2019] EWHC 177 (QB); *ABC v Telegraph Media Group Ltd* [2018] EWCA Civ 2329.

(110) *Doosan Babcock Ltd v Commercializidora de Equipos y Materiales Mabe* [2013] EWHC 3010 (TCC) where the claimant satisfied the higher standard of 'strong case' in an *ex parte* application for an injunction.

(111) [2018] EWHC 3326.

“Damages are unlikely to be an adequate remedy for the [applicant] given [the respondent’s] knowledge of confidential information, its business plan strategy, product development and so on. By contrast, damages are likely to be an adequate remedy for [the respondent], albeit that they may not be confined to his immediate loss of salary”.⁽¹¹²⁾

The Model Law fills the gap in national arbitration laws by expressly laying down the conditions for granting interim measures in Article 17A, thus:

“(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 this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.”

It is noted that there is no mention of ‘urgency’ as a requirement in the above provision. Also, the two conditions must be satisfied because they are not alternatives: the word ‘and’ suggests a conjunctive reading. According to Redfern, Article 17A encapsulated previous practice in international arbitration in granting interim relief, and tribunals such as ICSID have adopted such concepts common to most legal systems as the applicable test.⁽¹¹³⁾ Undoubtedly, such international concepts and standards will be better appreciated by arbitrators from non-common law backgrounds than the *American Cyanamid* principle.⁽¹¹⁴⁾

Given that the Model Law applies in Singapore by direct incorporation into the IAA, it is arguable that the “reasonable possibility” criterion stated in Article 17A(1)(b) should be applied in arbitration there. This benchmark represents a higher standard than *American Cyanamid’s* “serious issue to be

(112) Ibid. para 42.

(113) Redfern, supra fn. 11 at 315.

(114) See Steven L., “Interim Relief in International Arbitration”, SIAC Congress (6 June 2014) <http://siac.org.sg/201302-27-00-22-09-2013/20-57-01-18-09-/articles/444-interim-relief-in-international-arbitration>, (last visited May 15, 2019)

tried” but is still lower than the “real probability” test reportedly being applied by emergency arbitrators in Singapore.⁽¹¹⁵⁾

Non-common law jurisdictions, such as the UAE, may need to fall back on the international standards and concepts on interim relief as encapsulated by the Model Law. Additionally, they can refer to the Chartered Institute of Arbitrators’ International Arbitration Practice Guidelines on Applications for Interim Measures.⁽¹¹⁶⁾ These attempt to set out the current best practice in international commercial arbitration in relation to the arbitrators’ power to grant interim measures.⁽¹¹⁷⁾ It is specifically stated that arbitrators “are not bound to apply the procedures and principles developed in the national courts as these may not be relevant or suitable for arbitration”.⁽¹¹⁸⁾ Article 2(1) of the CI Arb Guidelines provides:

“When deciding whether to grant interim measures arbitrators should examine all of the following criteria: i) prima facie establishment of jurisdiction; ii) prima facie establishment of case on the merits; iii) a risk of harm which is not adequately reparable by an award of damages if the measure is denied; and iv) proportionality.”

Although all the above requirements may not apply and some may need to be relaxed in some circumstances, the arbitrator is regardless required to examine all the criteria. Article 2(1) of the CI Arb Guidelines stipulates more requirements to be satisfied by the applicant compared to the Model Law. The latter does not expressly mention prima facie establishment of jurisdiction and proportionality. In a recent construction case governed by English law, emergency interim relief was sought under the ICC Arbitration Rules⁽¹¹⁹⁾ for liquidated damages due to delay.⁽¹²⁰⁾ The emergency arbitrator accepted the views expressed by an author that an applicant for interim relief must establish that the emergency arbitrator has prima facie jurisdiction; that there is a prima facie case on the merits and that a threat of irreparable harm and urgency exist.⁽¹²¹⁾ Notably, these conditions are consistent with the requirements stated in the CI Arb Guidelines.

(115) See Vivekananda, *supra* text to fn.108.

(116) CI Arb Guidelines, *supra* fn. 1 at 1.

(117) *Ibid.*

(118) *Ibid.* preamble, para 3.

(119) International Chamber of Commerce Arbitration Rules 2012, as amended in 2014.

(120) See Doe and Wood, *supra* fn. 32.

(121) Yeşilirmak A., *Provisional Measures in International Commercial Arbitration*, Kluwer Law International, Hague (2005) para 4.2.7.

The condition to establish a prima facie case on the merits requires the applicant to have a good or reasonably good arguable case. This requires that without prejudging the case, the arbitrators must be “satisfied on a very preliminary review of the applicant’s case that it has a probability of succeeding on the merits of its claim”.⁽¹²²⁾ Whether there would be irreparable harm to the applicant if the *status quo* is not maintained is determined from the background of the parties’ contractual risk allocation on a case by case basis. The arbitrator only needs to be satisfied of the likelihood (as opposed to certainty) of harm if the measure applied for is not granted. Classic examples of irreparable harm to the applicant is where there is risk of dissipation of assets and where the applicant would suffer harm to its reputation as a result of a threatened breach.⁽¹²³⁾

Where security for the payment of an award is sought as a means of forestalling irreparable harm, the applicant needs to establish that it is highly unlikely that if it succeeded on the merits the respondent will pay the award. Ultimately, if the likely harm is capable of being compensated with monetary damages, the interim measure will not be granted.⁽¹²⁴⁾

7. Nature of the Emergency Arbitrator’s Decision

The unique features of emergency arbitration procedures has led to the questioning of the status of an emergency arbitrator as an arbitral tribunal.⁽¹²⁵⁾ This doubt is clearly resolved by the IAA including an emergency arbitrator within the definition of a ‘tribunal’.⁽¹²⁶⁾ In the UK and UAE, the statutes do not contain any provision on the emergency arbitrator. In the context of the former, a further issue has been raised whether the emergency arbitrator’s decision is enforceable.⁽¹²⁷⁾ Since as seen above, the UK courts are willing to take a subsidiary role on interim relief on the ground that an emergency arbitration empowered under the institutional rules can grant them,⁽¹²⁸⁾ it is

(122) CIArb Guidelines Commentary to Article 2, Paragraph 1(ii).

(123) Cf. Born G., *International Commercial Arbitration*, Kluwer Law International, Vol II (2nd ed. 2014) Netherland, 2472.

(124) Binder P, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdiction* (3rd ed. 2010) Sweet & Maxwell, London, para 4A-039.

(125) See Baigel B. “The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis” (2014) 1 *Journal of International Arbitration* 1 at 6.

(126) Section 2(1) of IAA.

(127) Ghaffari and Walters, *supra* fn. 92 at 159. The author concludes that the UK courts will likely follow the position of the US to the effect that the decisions of the emergency arbitrator are final for purposes of enforcement.

(128) *Gerald Metals* case.

implicit that an emergency arbitrator constitutes an arbitral tribunal and that its decisions are enforceable.

Lye et al⁽¹²⁹⁾ make an interesting argument that can be adopted in those countries, like the UK and UAE where the arbitration legislation and rules do not define arbitral tribunals widely to include an emergency arbitrator. In the authors' view, it could be considered that both "the Emergency Tribunal and the Merits tribunal are part of a single 'arbitral tribunal' ... within the law and that the Merits Tribunal is a continuum of the arbitral tribunal first constituted by the Emergency Arbitrator".

A further question has been posed as to whether the decision of an emergency arbitrator is juridical given the discretionary components of the procedures and the fact that the decision may not be final and can be altered or revoked by the merit tribunal. Features which have been pointed out in support of the juridical nature of the emergency arbitrator's decision include the fact that he must be impartial, rational and reasonable in making any decision on the case, and that such decisions affect the legal rights of the parties.⁽¹³⁰⁾

Depending on the applicable arbitral rules and/or law, an emergency arbitrator can make its decision in a number of ways:⁽¹³¹⁾ a preliminary order, a procedural order, a direction, an interim or partial award.⁽¹³²⁾ The LCIA Rules stipulates that "the Emergency Arbitrator may make any order or award which the Arbitral Tribunal could make under the Arbitration Agreement".⁽¹³³⁾ This, however, could not touch the substance of the dispute as that is specifically the reserve of the merits tribunal. Although not always expressly stated, preliminary orders would be included in what an emergency arbitrator can

(129) Lye et al, supra fn. 92 at 101.

(130) Mäenpää A., *Emergency Arbitrator Proceedings in International Commercial Law*, Bachelor thesis submitted to Tallinn University of Technology, Department of Law (2017) at 15.

(131) Note that under some forums, the emergency arbitrator can only make an order, for instance under the ICC Rules.

(132) Ter Haar R. and Holmes M., "Awards" in *The Guide to the Construction Arbitration*, Law Business Research, UK 2nd ed. (2018), <https://globalarbitrationreview.com/chapter/1145201/awards> (last visited May 15, 2019). It is stated that "in the course of an arbitration the tribunal will issue directions regulating the conduct of the arbitration. Some arbitrators will describe these as 'directions' and some as 'orders': the distinction is mere nomenclature and of no significance. What is important is that such directions or orders are not 'awards', as they do not formally determine matters of substance in issue between the parties ... In broad terms, if the decision is a management decision as to how the arbitration is to proceed, it is a procedural order."

(133) Article 9.8.

order. The SIAC Rules stipulates that the “emergency arbitrator shall have the power to order or award any interim relief that he deems necessary, including preliminary orders that may be made pending any hearing ... or written submissions by the parties”.⁽¹³⁴⁾

The IAA defines ‘award’ as meaning “a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any orders or directions made under section 12”.⁽¹³⁵⁾ Section 12(1) lists the things that a tribunal has “powers to make orders or give directions to any party for”. These are the usual interim and conservatory measures typically sought by applicants.⁽¹³⁶⁾ Rules 1.3 of the SIAC Rules states that ‘award’ “includes a partial, interim or final award and an award of an emergency arbitrator”. Although no definition of award is found in the UK Act and in the UAE Arbitration Law nor any distinction between awards and orders, it is noteworthy that section 44(2) of the former and Article 21 of the latter stipulated the interim and conservatory measures that a tribunal can make in the form of orders.

In all three jurisdictions, the awards of arbitral tribunals are final and binding on the parties. Section 58(1) of the UK Act states that an award made by the tribunal unless agreed by the parties is final and binding. Section 19B(1) of the IAA states that “an award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.” Article 52 of the UAE Arbitration Law stipulates that “an arbitral award made in accordance with this Law shall be binding on the Parties, shall constitute *res judicata*, and shall be as enforceable as a judicial ruling, although to be enforced, a decision confirming the award must be obtained from the Court.” Article 39 stipulates that an arbitral tribunal may issue “an interim award or awards on part of claims before rendering the award ending the entire dispute” and that interim awards are enforceable before the

(134) SIAC Rules, Schedule 1, para 8. Cf. Article 17C(4) Model Law which allows applications for preliminary orders valid for 70 days to be heard *ex parte*. Within this time *inter partes* application must be brought by the applicant.

(135) Section 2(1) of IAA.

(136) Such as security for costs and the claim; preservation, interim custody or sale of property which is the subject matter of the dispute; preservation and interim custody of evidence; prevent the dissipation of assets; interim injunction or other interim measure etc.

courts through an order made by the Chief judge or his delegate.⁽¹³⁷⁾

It is noteworthy that unlike awards, arbitrators' interim orders and directions are not expressly stated to be final and binding under these statutes.⁽¹³⁸⁾ Also, the institutional rules all provide that the parties undertake to carry out the award of the arbitral tribunal immediately and without delay.⁽¹³⁹⁾ The distinction between the effect of awards and orders is more acute in jurisdictions where the definition of awards expressly excludes arbitrators' orders.⁽¹⁴⁰⁾

The CI Arb Guidelines reiterates the point that interim measures granted by arbitrators can be in the form of procedural orders or interim awards.⁽¹⁴¹⁾ It states that the former is a quick and simple way to grant interim relief and is appropriate where interim measure is needed urgently as there is no need to comply with formalities which an award entails. The Guidelines suggest that the refusal of an interim measure should be stated by the tribunal in the form of an award.⁽¹⁴²⁾ This is obviously because such decision finally disposes of the particular application (not being a case management decision as to how the arbitration should proceed).⁽¹⁴³⁾ If enforcement will likely be an issue, the CI Arb Guidelines recommend describing the interim measure granted to the applicant as an award instead of an order.⁽¹⁴⁴⁾ This, however, may not be compatible with all national laws, especially those in which an award is defined narrowly and where an arbitrator must grant specific types of interim reliefs only in the form of orders or directions regardless of whether they finally dispose of the application.

8. Enforceability of the Emergency Arbitrator's Award

The form of an emergency arbitrator's decision (whether an order or award) impacts upon its enforceability.⁽¹⁴⁵⁾ It has been debated whether an interim

(137) See generally Burke S., "United Arab Emirate" in Carter J.H. eds, *The International Arbitration Review*, The Law Reviews 3rd ed. (2018) chapter 40.

(138) See for example Article 21 UAE Arbitration Law; Section 38 of the UK Act; Section 12 of the IAA.

(139) Article 26.8 LCIA Rules; Article 37.2 DIAC Rules; Rule 32.11 SIAC Rules.

(140) For example, Singapore. See Hill J. "Is an Interim Measure of Protection Ordered by an Arbitral Tribunal an Arbitral Award?" (2018) 9 *Journal of International Dispute Settlement* 99.

(141) CI Arb Guidelines, Article 6.

(142) *Ibid*, Commentary to Article 6 para 2.

(143) See Roger ter Haar, *supra* fn. 132.

(144) Commentary to Article 6 para 2(d).

(145) Ghaffari and Walters, *supra*, fn. 92 at 158.

relief granted by an emergency arbitrator is enforceable in the same manner as that of the substantive tribunal.⁽¹⁴⁶⁾ Cavalieros and Kim posit thus:

“While emergency arbitrators have the authority to grant orders for interim relief that are contractually binding upon the parties, they lack coercive powers to compel recalcitrant parties to comply with a decision. Although it is reported that most parties comply voluntarily with tribunal-ordered interim measures, there exists concerns about the enforceability of emergency arbitrator decisions in national courts in the event of non-compliance”.⁽¹⁴⁷⁾

The SIAC Rules puts the enforceability of the order or award of the emergency arbitrator beyond dispute by making it contractual for the parties to comply.⁽¹⁴⁸⁾ Para. 12 of Schedule 1 of the Rules states:

“The parties *agree* that an order or Award by an Emergency Arbitrator pursuant to this Schedule 1 shall be binding on the parties from the date it is made and undertake to carry out the interim order or Award immediately and without delay. 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.”⁽¹⁴⁹⁾

The Rules equally stipulate that the adjustment or application of the rules of procedure as deemed appropriate by the emergency arbitrator are final and binding and not subject to appeal.⁽¹⁵⁰⁾ The implication of the obligation to carry out an award or order immediately is that a party who fails to do so may be liable for breach of contract to the award creditor. Because an emergency arbitration proceeding necessarily precedes the

(146) Some jurisdictions, like Switzerland do not recognise and enforce the decisions or awards of emergency arbitrators. See Valasek and Anne de Jong, *supra*, fn. 37. In the US, it was held in *Yahoo! v Microsoft Corporation* 983 F. Supp. 2d 310 (S.D.N.Y. 2013) that the award of an emergency arbitrator is enforceable, the court rejecting that the interim award of the arbitrator was unenforceable on grounds of lack of finality.

(147) *Supra* fn. 72 at 287.

(148) See *HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studios Ltd*, Arbitration Petition No. 10622012/ (22 January 2014) where the High Court of Bombay (India) upheld and enforced the decision of a Singapore emergency arbitrator.

(149) Article 9.9 of the LCIA Rules states that the award of an emergency arbitrator is binding on parties and is to be carried out by them. Cf. Article 26.8 of the LCIA Rules and Article 37.2 of the DIAC Rules regarding the general enforceability of a merit tribunal’s award.

(150) SIAC Rules, Schedule 1, para 14.

real dispute before a merit tribunal, this encourages voluntary compliance of emergency arbitrator's order or award.⁽¹⁵¹⁾ An emergency arbitration award debtor will be ill-advised proceeding to the merit tribunal on the substantive dispute without having complied with the decision of the emergency arbitrator.

Under the DIAC Rules, the award of a tribunal can be "preliminary, interim, interlocutory, partial or final".⁽¹⁵²⁾ The Rules contain no provision on emergency arbitration or the enforceability of an emergency arbitrator's decision. Gaffney and Al Marzouq,⁽¹⁵³⁾ while noting that lack of finality might limit the enforceability of an emergency arbitrator's award in the UAE, opined that a party may still approach the UAE courts for enforcement where such rights are allowed under the law of the seat of arbitration and the law governing the arbitration agreement. The authors support this view with the fact that UAE courts exercise extensive power in relation to interim measures. They easily enforce interim and precautionary relief even where they lack jurisdiction in the substantive matter. The authors concluded that the parties "may be better served by resorting to the national courts from the beginning, rather than the Emergency Arbitrator, to obtain such measures in UAE-related arbitrations, since this may be more effective and avoid unnecessary cost and delay".⁽¹⁵⁴⁾ They further opine that "there may be merit to parties, who have consented to institutional arbitration in the UAE, to expressly opt out of such arrangements, at least as they are currently drafted and pending clarification of UAE judicial attitudes to the enforcement of such measures".⁽¹⁵⁵⁾

Where emergency arbitration is undertaken outside the institutional rules, the award debtor may not be contractually bound to carry out the award, so there might be more difficulty with enforcement especially outside the seat of arbitration. The arbitrator's decision might be resisted on the ground that it is not final,⁽¹⁵⁶⁾ and so not an arbitral award for purposes of the New York Convention.⁽¹⁵⁷⁾ However, it has been argued that any order of an emergency

(151) Fry J., "The Emergency Arbitrator - Flawed Fashion or Sensible Solution" (2013) 7:2 *Dispute Resolution International* 179 at 181; Lye et al, *supra* fn. 92 at 100.

(152) Article 37.1 DIAC Rules.

(153) Gaffney and Al Marzouq, *supra* fn. 18.

(154) *Ibid.*

(155) *Ibid.*

(156) Bassler, *supra* fn. 101 at 567.

(157) Article V(1)(e) Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) provides that an award may not be enforced where it has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in

arbitrator, to the extent that it concludes a self-contained issue of law for the time being as between the parties, ought to be considered final and thus enforceable.⁽¹⁵⁸⁾ This is consistent with the approach of the US courts where the temporary nature of emergency arbitrators' interim measures have not been relied upon to deny enforcement.⁽¹⁵⁹⁾ The courts consider the content of the decision (that is, whether it conclusively determines a self-contained issue) as relevant, not the nomenclature used to describe it.⁽¹⁶⁰⁾

The Model law provides in Article 17H(1):

“An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.”

This provision confirms that in international arbitration, there is really no need for an interim measure to be ‘final’ before being recognised and enforced. It paves the way in countries which are party to the Model Law for all interim measures granted by arbitral tribunals to be enforced irrespective of their nomenclature. As Moses⁽¹⁶¹⁾ puts it, the Model Law “avoids any need to establish whether the interim measure is an order or a final award. If the measure fits the model law definition of ‘interim measure’ then it is binding, and a court in a country that has adopted this provision of the model law should enforce it.”

The level of credibility that a foreign court accords to arbitrations conducted under an institution can determine whether it will recognise and enforce the awards of arbitrators appointed by that institution. Naturally, awards made under arbitral institutions that have tried and tested rules and whose administration is rigorous and diligent tend to command more respect and recognition in foreign courts. The SIAC and its Rules have gained the reputation of a tried and tested system. Of the three jurisdictions considered in this paper, it is the only one that

which, or under the law of which, that award was made.

(158) Yeşilirmak, supra fn. 121 paras 4.2.8. See also Ghaffari and Walters, supra fn. 92; Bassler, supra fn. 101 at 565; Bose and Meredith, supra fn. 59.

(159) *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir.) (1991); *Arrowhead Global Solutions v. Datapath Inc.* 166 Fed. Appx. 39 (4th Cir.) (2006).

(160) *Publicis Communication v True North Communications* 206 F.3d 725 (7th Cir 2000); *Metallgesellschaft A.G. v Capitan Constante* 790 F.2d 280 (2d Cir 1985).

(161) Moses, supra fn. 33 at 111. See also Hill, supra fn. 140 at 591 for the view that “the Model Law’s solution avoids the negative consequences, in terms of exposure to the risk of annulment, that flows from classifying interim measures as awards”.

provides for the scrutiny of the awards of arbitrators.⁽¹⁶²⁾ Rule 32.3 states:

“... the Tribunal shall submit the draft Award to the Registrar not later than 45 days from the date on which the Tribunal declares the proceedings closed. The Registrar may, as soon as possible, suggest modifications as to the form of the Award and, without affecting the Tribunal’s liberty to decide the dispute, draw the Tribunal’s attention to points of substance. No Award shall be made by the Tribunal until it has been approved by the Registrar as to its form”.

The above mechanism is not meant to interfere with or override the role of the arbitrator in resolving the dispute. However, the additional review of the draft of awards by the SIAC secretariat prior to its being published assures the high quality of the awards and adds to its credence, thus contributing to the overall tendency of foreign courts to recognise and enforce them.

Conclusion

This paper has comparatively analysed the nature, procedures, conditions and the enforceability of interim reliefs granted in expedited and emergency arbitration in Singapore, UK and the UAE. It was seen that Singapore’s provisions on expedited and emergency procedures are the most advanced and sufficiently detailed to cater for smooth administration of interim reliefs and their enforcement.⁽¹⁶³⁾ The following are suggested for improving the expedited and emergency arbitration regime of the three jurisdictions discussed.

Firstly, the inclusion of the emergency arbitrator as an arbitral tribunal under the IAA provides clarity as it resolves issues as to the status of the decisions of emergency arbitrators. The IAA’s definition of what an award is and even the express exclusion of interim orders from being awards are equally helpful. These should be emulated to augment the UK and UAE arbitration legislations. In other words, they should broaden the definition of ‘tribunal’ and ‘award’ to specifically include the emergency arbitration and the awards of emergency arbitrators.

Secondly, in order to align with the practice and guideline for international arbitration⁽¹⁶⁴⁾ and to improve the enforceability of both orders and awards of emergency arbitrators in foreign courts, the SIAC, LCIA and DIAC Rules

(162) Rule 32.3 SIAC 2016 Rules. The service is available under the ICC Rules (2012).

(163) For example, there is a 45-day deadline from closing the proceedings for a merits arbitrator to issue its award under SIAC Rules. Such deadline is not available under the LCIA and DIAC Rules. A deadline is also provided for the validity of the emergency arbitrator’s decision.

(164) CIArb Guidelines commentary on Article 1 Paragraph 3(d).

should enjoin arbitrators to consider the laws of the likely or possible place of execution and enforcement of the interim measure (*lex loci executionis*) before designating their decision either as an order or an award.

Thirdly, in line with CIArb Guidelines, emergency arbitrators should be required to make their final decisions in the form of interim awards as opposed to orders or directions for purposes of universal enforceability. Alternatively, the provision under Article 17H (1) of the Model Law should be adopted in each jurisdiction so that it is clear that regardless of whether the decision of an emergency arbitrator is termed an order or an award, it will be recognised locally and in foreign courts.

Fourthly, the arbitration laws and/or institutional rules in the UK, UAE and Singapore should expressly stipulate the standards (tests or conditions) for granting interim measures. Specifically, the requirement to establish prima facie jurisdiction and proportionality should be included as independent criteria. Further, the applicant should be required to prove reasonable probability of success on the merits and that irreparable harm that cannot be compensated by damages would result. It should equally be made clear by the law and/or rules that these criteria are conjunctive not disjunctive so that if a party fails on any of the conditions, the application will fail. These would redress the current situation where different standards and tests are applied by tribunals in different jurisdictions.

Fifthly, the UAE should include provisions for the emergency arbitrator both in its statute and the DIAC Rules. More specific details of timeline for the conduct of the expedited and emergency procedures and making of awards should be included in these Rules as the SIAC Rules have done. The LCIA and DIAC Rules provision on expedited procedure should stipulate a maximum length of time for the arbitrator to produce an award, say a period of 60 days from appointing the arbitrator. It is also recommended for the LCIA Rules to expressly provide for the power of an emergency arbitrator to make preliminary orders and perhaps also to limit the period of validity of such order as under the Model Law. It should provide a period of maximum validity of the emergency arbitrator's decision as the SIAC Rules do.

Finally, the credibility afforded to emergency arbitration awards by foreign courts and the chances of their recognition and enforcement could be enhanced by the additional system of the arbitral institution reviewing and scrutinising the awards prior to publication. This system, which is currently available under SIAC Rules should be emulated and adopted by the LCIA and DIAC in their Rules.

References

- Al Mekhlafi N.M., “Interim Measures in International Commercial Arbitration: A Discourse in Continued Uncertainty”, ICABML Conference Proceedings (2017),
<http://publications.ud.ac.ae/index.php/ICABML-CP/article/view/15/14>.
- Amin Z., “The Emergency Arbitrator and Expedited Procedure in SIAC: A New Direction for Arbitration in Asia”, (2015), <http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/420-the-emergency-arbitrator-and-expedited-procedure-in-siac-a-new-direction-for-arbitration-in-asia>.
- Baigel B. “The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis” (2014) 1 Journal of International Arbitration 1.
- Bassler W., “The Enforceability of Emergency Awards in the United States: or When Interim Means Final” (2016) 32 Arbitration International 559.
- Binder P, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdiction*, Sweet & Maxwell, London, 3rd ed. (2010).
- Blackaby N. and Partasides C., *Redfern and Hunter on International Arbitration*, Oxford University Press UK, 6th ed. (2015).
- Born G., *International Commercial Arbitration*, Kluwer Law International, Netherland Vol II 2nd ed. (2014).
- Bose R. and Meredith I., “Emergency Arbitration Procedures: A Comparative Analysis” (2012) 5 Int. A. L. R. 186.
- Burke S., “United Arab Emirate” in Carter J.H. eds, *The International Arbitration Review*, The Law Reviews UK, 9th ed. (2018).
- Cavalieros P. and Kim J., “Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations” (2018) 35(3) Journal of International Arbitration 275.
- Chartered Institute of Arbitrators, *International Arbitration Practice Guidelines - Application for Interim Measure*, London (2015) <https://www.ciarb.org/media/4194/guideline-4-applications-for-interim-measures-2015.pdf>.

- Clarkson M., “International Asia Case Update: Gerald Metals S.A. v Timis & Ors” [2016] EWHC 2327 (Ch) International Arbitration Asia (27 February 2017).
- <http://www.internationalarbitrationasia.com/uncategorized/case-update-gerald-metals-s-a-v-timis-ors-2016-ewhc-2327-ch-2/>.
- Cooper N., “Emergency Interim Relief: Where do you go?”, Arbitration Blog (12 December 2017), <http://arbitrationblog.practicallaw.com/emergency-interim-relief-where-do-you-go/>.
- Doe J. and Wood R., “Emergency Arbitrators and Expedited Tribunals”, Construction Law- Arbitration (14 March 2017), <https://www.herbertsmithfreehills.com/latest-thinking/emergency-arbitrators-and-expedited-tribunals>.
- Fry J., “The Emergency Arbitrator - Flawed Fashion or Sensible Solution” (2013) 7 Dispute Resolution International 179.
- Gaffney J. and Al Houti D., “Arbitration in the UAE: Aiming for excellence”, (May 2014), <https://www.tamimi.com/law-update-articles/arbitration-in-the-uae-aiming-for-excellence-1/>.
- Gaffney J. and Al Marzouq M., “The Use of Emergency Arbitrator Procedures in the UAE: Some Practical Considerations”, (February 2015).
<https://www.tamimi.com/search/?&searchText=emergency%20arbitrator&searchSection=all>.
- Ghaffari A. and Walters E., “The Emergency Arbitrator: The Dawn of a New Age?” (2014) 30 Arbitration International 153.
- Hill J., “Is an Interim Measure of Protection Ordered by an Arbitral Tribunal an Arbitral Award?” (2018) 9 Journal of International Dispute Settlement 590.
- Honey D. and Kelly M., “English Court Support for Arbitration: Recent Developments”, (February 2018), <http://www.hfw.com/English-Court-Support-for-Arbitration-Recent-Developments-February-2018a>.
- Kehoe C. and Wren A., “Dubai: The Heart of Arbitration in the Middle East”, (21 February 2018), <https://www.herbertsmithfreehills.com/lang-ja/latest-thinking/dubai-the-heart-of-arbitration-in-the-middle-east>.

- Knowles B. et al., “Emergency Relief: Court or Tribunal? Your Options May Be More Limited Than You Thought” - Kluwer Arbitration Blog (22 October 2016), <http://arbitrationblog.kluwerarbitration.com/2016/10/22/emergency-relief-court-or-tribunal-your-options-may-be-more-limited-than-you-thought/>.
- Lee J., “Court-subsidiarity and Interim Measures in Commercial Arbitration: A Comparative Study of UK, Singapore and Taiwan” [2013] 6(2) *Contemp. Asia Arb. J.* 227
- Lye K.C. et al, “Legal Status of the Emergency Arbitrator under the SIAC 2010 Rules – Neither Fish nor Fowl?” (2011) 23 *S. Ac. L. J.* 93.
- Mäenpää A., *Emergency Arbitrator Proceedings in International Commercial Law*, Bachelor thesis submitted to Tallinn University of Technology, Department of Law (2017)
- Moses M. L., *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, New York, 2nd ed. (2012).
- Mulla H., et al, “The New DIAC 2018 Arbitration Rules” - Global Arbitration News (12 December 2017), <https://globalarbitrationnews.com/new-diac-2018-arbitration-rules/>.
- Patton S., “The Enforcement of Arbitral Awards in Sub-Saharan Africa” *Lexicology* (21 Dec. 2016), <https://www.lexology.com/library/detail.aspx?g=95a2b5e6-97a4-440c-92dc-1b63ce00f619>.
- Peacock N. et al, “Protecting Party Rights by use of Interim Measures: Traps for the Unwary in Obtaining Court-Ordered Interim Relief”, (21 February 2018), <https://www.herbertsmithfreehills.com/latest-thinking/protecting-party-rights-by-use-of-interim-measures-traps-for-the-unwary-in-obtainingc>.
- Schultze R.A., *Institutional Arbitration: A Commentary* C.H. Beck, Germany, (2013).
- See Nasreddine M. et al, “The UNCITRAL Model Arbitration Law and the UAE Federal Arbitration Law: Points of Convergence and Divergence”, Kluwer Arbitration Blog (November 22, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/11/22/the-uncitral-model-arbitration-law-and-the-uae/>.

- Steven L., “Interim Relief in International Arbitration”, SIAC Congress (6 June 2014) <http://siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/444-interim-relief-in-international-arbitration>.
- Ter Haar R. and Holmes M., “Awards” in *The Guide to the Construction Arbitration*, Law Business Research, UK, 2nd ed. (2018), <https://globalarbitrationreview.com/chapter/1145201/awards>.
- Valasek J. and Anne de Jong J., “Enforceability of Interim Measures and Emergency Arbitrator Decisions” (May 2018).
<https://www.nortonrosefulbright.com/en/knowledge/publications/6651d077/enforceability-of-interim-measures-and-emergency-arbitrator-decisions>.
- Vivekananda N., “The SIAC Emergency Arbitrator Experience” (2013), <http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/338-the-siac-emergency-arbitrator-experience>.
- Wong R., “Interim Relief in Aid of International Commercial Arbitration: A Critique of the International Arbitration Act” (2012) 24 S. Ac. L. J. 499
- Yeo A., “Interim and Provisional Measures in International Commercial Arbitration Law and Practice in Singapore” (2014), <https://cil.nus.edu.sg/wp-content/uploads/2014/11/Day-5-Alvin-Yeo-SC-Interim-and-Provisional-Measures-in-ICA.pdf>.
- Yeşilirmak A., *Provisional Measures in International Commercial Arbitration*, Kluwer Law International, Netherland (2005).

Table of Contents

Subject	Page
Abstract	275
Introduction	276
1. The Governing Laws and Institutional Rules	277
2. Power of the Courts and Arbitral Tribunals on Interim Measures	278
2.1 Concurrent Jurisdiction	278
2.2 Should Interim Relief be obtained from the Courts or from Arbitral Tribunals?	282
3. Nature, Categories and Limitations on Interim Measures	283
3.1 Types of Interim Measures	283
3.2 Limitations on Availability of Interim Measures	285
4. Expedited Formation Procedures	289
5. Emergency Arbitration Procedures	292
6. Standards for Granting Interim Relief	296
7. Nature of the Emergency Arbitrator's Decision	301
8. Enforceability of the Emergency Arbitrator's Award	304
Conclusion	308
References	310