

# Challenging the Enforcement of Emergency Arbitrator Decisions

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## **Abstract**

There is a growing consensus that emergency arbitration is now a permanent and integral part of international arbitration. Commentators and practitioners recognise the significance of the emergency arbitrator mechanism in protecting the parties' assets and interests. In emergency arbitration, institutional rules give a solo arbitrator, called the emergency arbitrator, the power to grant an urgent or emergency interim measure prior to an arbitral tribunal's constitution. The enforcement of emergency arbitrator decisions, however, poses a pervasive doubt as to the efficacy of the mechanism.

This article discusses the three primary challenges to the enforcement of emergency arbitrator decisions: (A) the nature of emergency arbitrator decisions, (B) the requirement of finality of an arbitral award, and (C) the nature of an emergency arbitrator. These challenges to enforcement have posed and will continue to pose a significant challenge to courts. The limited number of cases, thus far, portend a landscape of conflicting decisions that pave the way for further challenges to the enforcement of emergency arbitrator decisions.

The article concludes by recommending measures that will increase the enforceability of emergency arbitrator decisions, highlighting the necessity of amending the New York Convention if emergency arbitration is to become a permanent feature of international arbitration.

**Keywords:** arbitration, emergency arbitration, enforcement, challenge, arbitration award.

### I. Introduction

Interim measures<sup>(1)</sup> are an essential feature of the international arbitral system, which often relies on the power of a state court, arbitral tribunal, emergency arbitrator, or referee to grant interim measures that aim to provide immediate and temporary protection of rights or property of the requesting party pending a final arbitral award on the merits<sup>(2)</sup>.

Yet, the enforceability of interim measures remains a major concern in international arbitration<sup>(3)</sup>. Emergency arbitration, though recognized as an important type of interim measure prior to the constitution of the arbitration tribunal, raises even more concerns relating to enforceability<sup>(4)</sup>.

This article examines nine cases<sup>(5)</sup> in particular on the enforcement (direct or

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(1) The concept of “interim measure” lacks a universally accepted definition. Mike Savola, ‘Interim Measures and Emergency Arbitrators Proceedings’ (2016) 23 *Croatian Arb Ybk* 73. While this article uses the term “interim measure” for the sake of consistency, the term has different names depending on jurisdiction.

ICC Arbitration Rules [2017] art 28 <[https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article\\_28](https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_28)> accessed 14 Aug 2019 (referred to as “interim or conservatory measures”); French New Code of Civil Procedure (Nouveau Code de procedure civile) [1981] Book IV, Arbitration (referred to as “*mesures*

*provisoires ou conservatoires*”); Swiss Private International Law Act [1987] c 12, art 183 (referred to as “provisional or protective measures”). See also William Wang, ‘International Arbitration: The Need for Uniform Interim Measures of Relief’ (2003) 28 *Brook J Intl L* 1059, 1072.

(2) Gary Born, *International Commercial Arbitration* (Kluwer 2009) 1942; Steven Finizo and Duncan Speller, *A Practical Guide to International Commercial Arbitration: Assessment, Planning and Strategy* (Sweet & Maxwell 2010) 220; Marianne Roth, ‘Interim Measures’ [2012] *J Disp Resol* at 425 (stating that interim measure is indispensable to the arbitral process).

(3) Alessandro Villani and Manuela Caccialanza, ‘Interim Relief through Emergency Arbitration: An Upcoming Goal or Still an Illusion?’ (*Kluwer Arbitration Blog*, 14 July 2017) <<http://kluwarbitration-blog.com/2017/07/14/interim-relief-emergency-arbitration-upcoming-goal-still-illusion/>> accessed 10 August 2019;

Douglas Rennie and Peter Sherwin, ‘Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis’ (2010) 20 *Am Rev of Intl Arb* 3, 317 (calling interim measures the “Achilles’ heel” of international arbitration); Roth (n 2) 424; Ank A. Santens and Jaroslav Kudrna, ‘The State of Play of Enforcement of Emergency Arbitrator Decisions’ (2017) 34 *J of Intl Arb* 1, 1 (stating that questions about the enforceability of emergency arbitrator decisions are “as old as the institution of emergency arbitration itself.”).

The UNCITRAL Secretariat stated that the effectiveness of arbitration increasingly relies on the enforceability of interim measures issued by an arbitral tribunal. See UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, Annex 1 (21 June 1985) UN Doc A/40/17, revised by Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, Annex (7 July 2006) UN Doc A/61/17, art 17(2) [hereinafter UNCITRAL Model Law].

(4) Villani and Caccialanza (n 3) 1; Santens and Kudrna (n 3) 14-15 (“emergency relief can only be a credible tool in the user’s toolkit if it can, if necessary, be enforced”).

(5) *Vodacom Intl Ltd v Namenco Energy Ltd* [2014] Tribunal de commerce de Kinshasa [TC] [Commercial Court], Order No 123/2014 of 28 March 2014 (Democratic Rep of Congo) in Santens and Kudrna (n 3)

indirect)<sup>(6)</sup> of an emergency arbitrator's decision<sup>(7)</sup>.

These cases hail from France, India, Democratic Republic of Congo, Ukraine, and the United States<sup>(8)</sup>, where almost half of the number of decisions came from. Commentators have largely interpreted these decisions positively since eight of the nine decisions, with one Indian case being the exception<sup>(9)</sup>, ruled in what is seemingly favourable to emergency arbitrator awards.

A closer reading of the cases upholding emergency arbitrator decisions, however, portend a landscape of conflicting decisions that pave the way for

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5-6; *Société Nationale des Pétroles du Congo v Société Total Fina Elf E&P Congo* [2003] Cour d'appel de Paris, 29 avril 2003 (Paris Court of Appeals, France) in Santens and Kudrna (n 3) 5; *Raffles Design International India Pvt Ltd & Anr v Educomp Professional Education Ltd & Ors* [2016] MANU/DE/2754/2016 (Delhi High Court, India), available at <<https://indiankanoon.org/doc/166921970/>> accessed 32 March 2020; *HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd & Ors* [2014] MANU/MH/0050/2014 (Bombay High Court, India), available in <<https://indiankanoon.org/doc/46336230/>> accessed 31 March 2020; *JKY Oil & Gas PLC and Poltava Gas BV v Ukraine* [2015] <[www.italaw.com/sites/default/files/case-documents/italaw6001.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw6001.pdf)> accessed 9 June 2015 (Pechersk District Court, Ukraine); *Chinmax Medical Systems v Alere San Diego*, 2011 WL 2135350 (SD Ca 2011), available at <[https://www.govinfo.gov/app/details/USCOURTS-casd-3\\_10-cv-02467](https://www.govinfo.gov/app/details/USCOURTS-casd-3_10-cv-02467)> accessed 31 March 2020; *Yahoo! v Microsoft*, 983 F Supp 2d 310 (SDNY 2013), available at <https://www.leagle.com/decision/infdco20131022b25> accessed 31 March 2020; *Draeger Safety Diagnostics v New Horizon Interlock*, 2011 WL 653651 (ED Mich 2011) available at [https://www.govinfo.gov/app/details/USCOURTS-mied-2\\_11-mc-50160/USCOURTS-mied-2\\_11-mc-50160-0](https://www.govinfo.gov/app/details/USCOURTS-mied-2_11-mc-50160/USCOURTS-mied-2_11-mc-50160-0) accessed 31 March 2020; *Blue Cross Blue Shield of Michigan v Medimpact Healthcare Systems*, WL 2595340 (ED Mich 2010), available at [https://www.govinfo.gov/content/pkg/USCOURTS-mied-2\\_09-cv-14260/pdf/USCOURTS-mied-2\\_09-cv-14260-0.pdf](https://www.govinfo.gov/content/pkg/USCOURTS-mied-2_09-cv-14260/pdf/USCOURTS-mied-2_09-cv-14260-0.pdf) accessed 31 March 2020.

- (6) See: Paata Simsvive, *Indirect Enforceability of Emergency Arbitrator's Orders*, Kluwer Arbitration Blog (15 Apr. 2015), available at <http://kluwerarbitrationblog.com/2015/04/15/indirect-enforceability-of-emergency-arbitrators-orders/> (last accessed 9 Aug. 2019) (explaining the potential for indirect enforceability of emergency arbitrator decisions under the Indian Arbitration Act after the Bombay High Court's decision in *HSBC v Avitel*). See also *HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd and others*, Arbitration Petition No 1062/2012, Judgment of 22 January 2014).
- (7) Santens and Kudrna expects a rise in cases relating to emergency arbitrator decision enforcement due to the widespread adoption of emergency arbitrator rules by the major international arbitration institutions. Santens and Kudrna (n 3) 2. The cases reported by Santens and Kudrna are from France, the United States, the Democratic Republic of Congo (DRC), and Ukraine. *ibid* at 2. Santens and Kudrna did not include two cases from India.
- (8) Savola (n 1) 93 (stating that U.S. courts have enforced emergency arbitrator decisions when necessary to avoid "irremediable harm to the applicant or to the integrity of the arbitral process.").
- (9) In *Raffles Design*, the Delhi High Court ruled that an emergency award in a foreign-seated arbitration is unenforceable under the Indian Arbitration Act. *Raffles* (n 5). See Adya Pandey, 'Tracing the Steps of Emergency Arbitration in India' (2017) *The World J on Juristic Polity* 7 <<http://jurip.org/wp-content/uploads/2017/03/Adya-Pandey.pdf>> accessed 9 August 2019; Kartikey Mahajan and Sagar Gupta, 'Uncertainty of Enforcement of Emergency Awards in India' (*Kluwer Arbitration Blog*, 7 December 2016) <<http://kluwerarbitrationblog.com/2016/12/07/uncertainty-of-enforcement-of-emergency-awards-in-india/>> accessed 9 August 2019.

further challenges to the enforceability of emergency arbitrator decisions<sup>(10)</sup>.

This article posits that while emergency arbitration provides a reasonable alternative from a court ordered injunctive relief, emergency arbitrator decisions face a number of potential challenges concerning enforcement. It should be noted that this article does not address setting aside or nullification challenges to emergency arbitrator decisions before national courts.

Before turning to the potential challenges facing the enforcement of emergency arbitrator decisions, part II of the article provides necessary background on the advent of the emergency arbitrator in the international arbitration scene from its pre-arbitral referee cousin, which could help explain both the nature of the challenges to its enforceability and its continued growing popularity in various arbitration fora. Part III then discusses the primary potential challenges to the enforcement of emergency arbitrator decisions.

The article only discusses the challenge based on (A) the nature of emergency arbitrator decisions, (B) the requirement of finality of an arbitral award, and (C) the nature of an emergency arbitrator. The article concludes by recommending measures that will increase the enforcement of emergency arbitrator decisions, suggesting that amendment of the New York Convention, enactment of national law dealing with emergency arbitration, or the adoption of UNCITRAL Model Law of 2006 amendments are necessary if emergency arbitration is to become a permanent feature of international arbitration.

## II. The Emergence of Emergency Arbitrators

While interim measures have become commonplace in the arbitral system for the past thirty years<sup>(11)</sup>, practitioners have noted a number of limitations of interim measures<sup>(12)</sup> within the context of international arbitration. One such

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(10) Janice Lee, 'Is the Emergency Arbitrator Procedure Suitable for Investment Arbitration?' (2017) 10(1) *Contemporary Asia Arb J* 71, 96 (calling cases on the enforceability of emergency arbitrator decisions thus far to be "inconclusive").

(11) Michelle Grando, 'The Coming of Age of Interim Relief in International Arbitration: A Report from the 28<sup>th</sup> Annual ITA Workshop' (*Kluwer Arbitration Blog*, 20 July 2016) <<http://kluwarbitration-blog.com/2016/07/20/the-coming-of-age-of-interim-relief-in-international-arbitration-a-report-from-the-28th-annual-ita-workshop/>> accessed 21 March 2019); Santens and Kudrna (n 3) 1.

(12) Wang (n 1) 1079; Savola (n 1) 73 (stating that "[t]he contractual nature of arbitration gives rise to several unique difficulties"); Nael G. Bunni, 'Interim Measures in International Commercial Arbitration: A Commentary on the Report of Luis Enrique Graham' in Albert Jan van den Berg (ed), *50 Years of the New York Convention* (ICCA Congress Series No 14, Kluwer 2009) 604–605 (arguing that courts are in a better position to safeguard against and sanction abuses of *ex parte* mechanism); Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer 2012) 628-630 (discussing limitations relating to enforceability).

set of limitations relate to instances where parties to an arbitration need urgent or emergency relief<sup>(13)</sup>.

An arbitral tribunal under a pertinent arbitral institutional rule normally issues an interim measure<sup>(14)</sup>. However, an arbitral tribunal would not be able to issue such an interim measure until it has been properly constituted, a process that can take weeks or months, depending on the size of the tribunal, arbitral tribunal rules, and cooperativeness of the parties<sup>(15)</sup>.

The delay in constituting the tribunal could have severe consequences in instance requiring emergency relief<sup>(16)</sup>. A party, for example, could dissipate assets or place them in a jurisdiction where enforcement is difficult to frustrate the arbitral tribunal's ability to provide effective relief<sup>(17)</sup>. The most crucial time to seek urgent interim measure is usually at the outset of the disputes<sup>(18)</sup>.

The need for urgent or emergency interim measure by parties to an arbitration gave rise to a new mechanism called the "emergency arbitrator"<sup>(19)</sup>. A number of arbitral institutions have allowed parties to apply for the appointment of a solo emergency arbitrator, who at very short notice<sup>(20)</sup>, the rules give the power to grant a specialized type of interim measure prior to an arbitral tribunal's constitution<sup>(21)</sup>. The rules usually give the emergency arbitrator the sole discretion to determine the appropriate relief, as long as the requirement

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(13) Peter Ashford, *Handbook on International Commercial Arbitration*, (2nd ed, Juris Publishing 2014) 59 (stating that a party may be concerned about the length of time and costs involved with national courts).

(14) The option of seeking both emergency and non-emergency interim measures from courts may also be problematic. Grando (n 11) 1; Savola (n 1) 73 ("in some instances, court-ordered interim relief may be unsatisfactory for various reasons").

(15) Savola (n 1) 74.

(16) *ibid.*

(17) See Gary Born, *International Commercial Arbitration* (2nd ed, Kluwer 2014) 2451; Roth (n 2) 425; Savola (n 1) 75.

(18) Savola (n 1) 75.

(19) "Emergency arbitrator" is the most commonly used term and used by most arbitral institution rules. However, CPR uses the term "special arbitrator" and CANACO uses the term "interim arbitrator." Santens and Kudrna (n 3) 12, fn 53; Savola (n 1) 75 (stating that "[t]he chief purpose of such rules is to provide the users of arbitration with an effective mechanism whereby a party in need of urgent interim relief that cannot await the constitution of an arbitral tribunal").

(20) Savola (n 1) 90 (explaining that appointment of an emergency arbitrator is "subject to the fulfilment of any applicable prima facie jurisdictional test").

(21) Grando (n 11) 1 (noting that "[t]he emergence of the emergency arbitrator...constitutes further evidence of the increased popularity and maturity of arbitral interim measures"); Savola (n 1) 75 (stating that a number of arbitral institution "have attempted to fill this void by adopting separate 'emergency arbitrator rules'").

for interim measures and urgency exists, and the parties have not constituted the arbitral tribunal<sup>(22)</sup>.

The first of such emergency arbitration was the pre-arbitral referee introduced under the International Court of Arbitration of the International Chamber of Commerce (ICC) in 1990<sup>(23)</sup>. Santens and Kudrna notes that for the next decade or two, the arbitration community largely ignored the ICC's opt-in pre-arbitral referee mechanism<sup>(24)</sup>.

In 1999, the American Arbitration Association (AAA) adopted the opt-in Optional Rules for Emergency Measures of Protection, which appeared to have been more popular in the United States in comparison to the ICC's pre-arbitral referee mechanism<sup>(25)</sup>. An opt in provision allows parties to choose to use emergency arbitration.

Major international arbitration rules did not incorporate provisions relating to the concept of an emergency arbitrator, as opposed to a pre-arbitral referee, until fairly recently<sup>(26)</sup>, starting with the 2006 amendment to the AAA's International Centre for Dispute Resolution, which included opt-out provisions in its arbitration rules for an emergency arbitrator<sup>(27)</sup>.

Since then, emergency arbitrators have proliferated as other major arbitral institutions followed suit by adopting specific rules covering emergency arbitration<sup>(28)</sup>. These arbitral institutions include the following: the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the Arbitration Rules of the Singapore International Arbitration Centre (SIAC) in 2010; the Rules of Arbitration of the Australian Centre for International Commercial Arbitration (ACICA) in 2011;

The Rules of Arbitration of the International Chamber of Commerce (ICC) and the Swiss Chambers' Arbitration Institution's (SCAI) Swiss Rules for International Arbitration in 2012 (Swiss Rules)<sup>(29)</sup>; the Hong Kong International

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(22) Savola (n 1) 90.

(23) Santens and Kudrna (n 3) 1.

(24) *ibid.*

(25) *ibid.*

(26) *ibid.*

(27) Santens and Kudrna (n 3) 2 (stating that the ICDR was "the first major arbitral institution to incorporate opt-out emergency arbitrator provisions in its arbitration rules"); Savola (n 1) 89-90; Grando (n 11) 1 (stating that the ICDR was "the first to adopt emergency arbitrator provisions in 2006").

(28) Savola (n 1) 89-90.

(29) Swiss Rules of International Arbitration <<https://www.swissarbitration.org/Arbitration/Arbitration->

Arbitration Centre (HKIAC) and the Arbitration Rules of the Finland Chamber of Commerce (FAI) in 2013; and the London Court of International Arbitration (LCIA), the World Intellectual Property Organization Arbitration Rules (WIPO); International Institute for Conflict Prevention and Resolution (CPR)<sup>(30)</sup> in 2014; and the DIFC-LCIA<sup>(31)</sup> in 2017<sup>(32)</sup>.

As Santens and Kudrna noted, “emergency arbitrator provisions [are] now present in all major arbitration rules”<sup>(33)</sup>.

In comparison to the pre-arbitral referee cousin of the emergency arbitrator, the emergency arbitrator has seen a rapid rise and popularity within the past half-decade. By mid-2016, there have been at least 180 emergency arbitrator applications in the various arbitral institutions, not a common occurrence by far<sup>(34)</sup>, but a significant number in comparison to its predecessor – the pre-

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Rules-and-Laws> accessed 27 March 2019; Santens and Kudrna (n 3) 2, fn 2; Mathias Scherer, ‘Revised Swiss Rules of International Arbitration Enter Into Force’ (*Kluwer Arbitration Blog*, 31 May 2012) <<http://kluwerarbitrationblog.com/2012/05/31/revised-swiss-rules-of-international-arbitration-enter-into-force/>> accessed 27 March 2019; T Zuberbühler, C Müller and P Habegger (eds), *Swiss Rules of International Arbitration – Commentary* (2nd ed, Schultess/Juris 2013); Philip Habegger, ‘The Revised Swiss Rules of International Arbitration – An Overview of the Major Changes’ (2012) *ASA Bulletin* 2/2012, 269-271; B. Ehle and W. Jähnel, ‘Revision der Swiss Rules – erhöhte Effizienz und Flexibilität, SchiedsVZ’ (2012) 4 *German Arb J* 170; Miguel Oural and Edgardo Munoz, ‘The 2012 Swiss Rules of International Arbitration More Efficiency and Effectiveness of Arbitration Proceedings’ (2013) 1 *Latin Am J of Intl Trade L* 441 (2013).

(30) International Institute for Conflict Prevention and Resolution (CPR) (2014) Rule 14; Santens and Kudrna (n 3) fn 2; Peter Silverman, ‘Are the New Emergency Relief Rules in Arbitration the Death Knell for Court Ordered Injunctions Pending Arbitration?’ (13 April 2016) *American Arbitration Association*, Webinar <<http://documents.jdsupra.com/9751b1d7-a86e-46aa-8b47-30cf7a1d08fc.pdf>> accessed 27 March 2019.

(31) Michael Dunmore, ‘2017: The Year of the Amended Arbitration Rules’ (*Hadef & Partners*, 2017) <<http://www.hadefpartners.com/News/248/2017--The-Year-of-The-Amended-Arbitration-Rules>> accessed 8 August 2019 (stating that “[t]he DIFC-LCIA has substantially upgraded its rules to ensure that they adopt best practice. One key amendment is the adoption of emergency arbitration provisions, which follows similar changes made by a number of leading arbitration organisations. The emergency arbitration provisions permit a party at any time before the formation of a tribunal, to apply for an emergency arbitration to obtain urgent relief.”).

(32) Tijana Kojovic, ‘Court Enforcement of Arbitral Decisions – How Final is Provisional?’ (2001) 18 *J of Intl Arb* 520; Savola (n 1) 89-90.

(33) Santens and Kudrna (n 3). The overwhelming majority of respondents (93%) to the Queen Mary University of London and White & Case favour inclusion of provisions on emergency arbitrators in institutional rules. Queen Mary University of London and White & Case, ‘2015 International Arbitration Survey: Improvements and Innovations in International Arbitration’ (2015) <[https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015\\_0.pdf](https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf)> 29 accessed 31 March 2020.

(34) Grando (n 11) 1 (explaining that emergency arbitration occurs only in a quarter or less of arbitrations, which may reflect that such relief may not necessarily apply in all arbitration cases).

arbitral referee<sup>(35)</sup>. The 2015 Queen Mary University of London and White & Case International Arbitration Survey predicts widespread use of the emergency arbitrator<sup>(36)</sup>.

One proffered reason for the relative success of the emergency arbitrator in comparison with the pre-arbitral referee is the built-in mechanism within the rule triggering the use of the emergency arbitrator. The AAA's pre-arbitral opt-in provisions stands in contrast to the more recent emergency arbitrator rules that instead have opt-out provisions that automatically applied to arbitration proceedings unless parties expressly stated in their arbitration agreement that the emergency rules would not apply<sup>(37)</sup>.

Determining when emergency arbitration automatically applies, however, depends on the language of the relevant arbitration rules. Some rules determined application of the automatic provision on the date in which the arbitration agreement entered into force. Other arbitral tribunals, on the other hand, look at the time the parties commenced the arbitration proceedings, creating a quasi-retroactive effect of the rules.

Another proffered rationale for the relative popularity of the nascent emergency arbitrator is the prevailing relevance and important utility of interim measures in international arbitration<sup>(38)</sup>. The obstacles posed by court ordered injunctive relief amplified when applied to cases needing urgent or emergency relief.

Despite the popularity of the emergency arbitrator, it is a worthwhile caution to remember that emergency arbitration is a relatively new mechanism<sup>(39)</sup>. Even

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(35) Grando (n 11) 1 (noting that in the ITA Workshop, Shaughnessy's research revealed that "as of June 2016, ICDR registered 67 emergency arbitrator requests, SIAC 50, ICC 34, SCC 23, and HKIAC 6 requests.").

(36) "This strong preference for provisions on emergency arbitrators in institutional rules, combined with the fact that 26% of respondents indicated that they were "undecided" as to whether they would go to a domestic court or an emergency arbitrator, may signal that the use of emergency arbitrators might become more widespread in the future. At the very least, respondents wish to have the option available even if they do not presently use it." *Queen Mary Survey* (2015) (n 33) 29.

(37) Interestingly, only 38% of respondents to the 2015 Queen Mary University of London and White & Case International Arbitration Survey favour a mandatory emergency arbitrator rule, and 55% favour emergency arbitration only if the parties previously agreed. *Queen Mary Survey* (2015) (n 33) 27.

(38) Steven Lim, 'Interim Relief in International Arbitration' (2013) Singapore International Arbitration Centre (SICA) <<http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/444-interim-relief-in-international-arbitration>> accessed 11 August 2019 (stating that "[t]he rise in the number of Emergency Arbitrator applications shows the popularity of the mechanism and, underpinning this, and need for and importance of interim relief in arbitration"). See, however, *Queen Mary Survey* (2015) (n 33) 27 (finding in the study that only a few respondents had experience with emergency arbitrators and lukewarm responses as to the effectiveness of emergency arbitrators).

(39) Savola (n 1) 92.



at its inception in 1990 with the pre-arbitral referee under the AAA's rules, commentators were quick to raise issues relating to the enforceability of such decisions, particularly under the New York Convention<sup>(40)</sup>. An examination, therefore, of the primary potential challenges to the enforceability of an emergency arbitrator decisions is a worthwhile undertaking.

### III. Three Primary Challenges to the Enforceability of Emergency Arbitrator Decisions

After the introduction in 1990 of the first type of emergency arbitration in international arbitration, the pre arbitral referee under the AAA, one of the first criticisms commentators lodged related to the enforceability of the referee's decision<sup>(41)</sup>. Two and a half decades later, the major concern regarding emergency arbitrator decisions remains its enforceability<sup>(42)</sup>.

In a study conducted by White and Case in 2015, 79% of respondents identified the uncertain enforceability of an emergency arbitrator decisions in a multitude of jurisdictions as a major concern, ranging from jurisdictions that are slow and cumbersome to those that deem emergency arbitration as unnecessarily duplicitous of its domestic court's effectiveness<sup>(43)</sup>.

That arbitral tribunals and emergency arbitrators, in particular, lack the coercive power to enforce interim measures elevate the concerns about enforceability<sup>(44)</sup>. The vast majority of jurisdictions, with the exception of

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(40) Jean-Jacques Arnaldez and Erik Schäfer, 'Le règlement de référé pré-arbitral de la chambre de commerce internationale' (1990) *Revue de l'Arbitrage* 835, 847; ICC Commission Report, "Emergency Arbitration Proceedings", 2019, online at <<https://iccwbo.org/publication/emergency-arbitrator-proceedings-icc-arbitration-and-adr-commission-report/>> accessed 3 March 2020, 30 (stating that "concerns about the enforceability of EA decisions have given rise to numerous debates").

(41) Santens and Kudrna (n 3) (stating that questions arose as to enforceability under the New York Convention).

(42) In the Queen Mary Survey, a substantial majority of respondents (78%) favoured making emergency arbitrator decisions equally enforceable as arbitral awards. *Queen Mary Survey* (2015) (n 33) 29; Ashford (n 13) 64.

(43) *Queen Mary Survey* (2015) (n 33) 28; Santens and Kudrna (n 3) 14, fn 65.

(44) Ashford (n 13) 63.

Hong Kong<sup>(45)</sup>, Singapore<sup>(46)</sup>, The Netherlands<sup>(47)</sup>, and New Zealand<sup>(48)</sup>, lack explicit legislation supporting the recognition and enforcement of emergency arbitrator decisions<sup>(49)</sup>.

The absence of supportive legislation, however, may be due to the infancy of emergency arbitration, and it seems a few jurisdictions like The Netherlands and New Zealand have already followed Hong Kong and Singapore's lead.

Practitioners are eager to remind, though, that concerns about the enforceability of emergency arbitrator decisions may be overblown, just as concerns about the enforceability of interim measures in general<sup>(50)</sup>, since parties normally voluntarily comply with the majority of these emergency arbitrator decisions<sup>(51)</sup>.

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(45) Hong Kong's Arbitration Ordinance provides a definition of "emergency arbitrator", recognises the enforceability of emergency arbitrator decisions in the same manner as interim awards ordered by courts, and allows for enforceability of an emergency arbitration decision even one issued outside of Hong Kong.

See Chiann Bao, 'Developing the Emergency Arbitrator Procedure: The Approach of the Hong Kong International Arbitration Centre' in Diora Ziayeva (ed), *Interim and Emergency Relief in International Arbitration* (Juris 2015) 282-283.

(46) Singapore's International Arbitration Act (IAA) clarified that an emergency arbitration falls under the definition of "arbitral tribunal" for purposes of enforcement. Unlike Hong Kong, however, Singapore does not explicitly state that an emergency arbitral decision rendered outside of Singapore would be enforceable, though practitioners argue that such decisions would be enforceable considering the language of Section 12(6) of the IAA.

Singapore International Arbitration Act (IAA) [2012] s 12(6); Bao (n 45) 282-283; Savola (n 1) 93, fn 63.

(47) The new Dutch Arbitration Act (forming part of the Dutch Code of Civil Procedure) under Article 1043b provides that "unless the arbitral tribunal provides otherwise, a decision by the arbitral tribunal on the request to grant provisional relief shall constitute an arbitral award."

Dutch Code of Civil Procedure [2015] art 1043b. That interim awards granting provisional relief constitutes an enforceable award has been interpreted to mean that the Dutch Arbitration Act has a legislative provision that is favourable to the enforcement of emergency arbitrator decisions. Raid Abu-Manneh, 'Emergency arbitrators: the case for enforcement', International Bar Association (Sept.4, 2019, available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=C39CA4AB-724F-4B30-BCD2-041CD0B9CC14> accessed 31 March 2020.

(48) Section 2(1) of the amended New Zealand Arbitration Act, which took effect on March 1, 2017, defines an "arbitral tribunal" as follows: (a) a sole arbitrator, a panel of arbitrators, or an arbitral institution; and (b) includes any emergency arbitrator appointed under (i) the arbitration agreement that the parties have entered into; or (ii) the arbitration rules of any institution or organization that the parties have adopted. New Zealand Arbitration Act [1999] s 2(1).

(49) Yet, jurisdictions like Sweden refuse to enforce interim measures whether in the form of an order or award. Villani and Caccialanza (n 3) 1; ICC Commission Report (n 40) 30 (stating that only Hong Kong, New Zealand, and Singapore refer to EA).

(50) Grando (n 11) 1.

(51) See Edna Sussman and Alexandra Dosman, 'Evaluating the Advantages and Drawbacks of Emergency Arbitrators' (30 March 2015) NYLJ <<http://www.newyorklawjournal.com/id=1202721577568/Evaluating-the-Advantages-and-Drawbacks-of-Emergency-Arbitrators?slreturn=20170706075115>>

It helps when some arbitral institution rules require parties to be bound by the decision, or “agree to undertake to comply with” the decision<sup>(52)</sup>. Parties may also comply fearing a later arbitral tribunal’s unfavourable view or negative inference drawn from such noncompliance<sup>(53)</sup>.

The 2012 Queen Mary University of London and White & Case International Arbitration Survey revealed that parties voluntarily complied in 62% of interim measures issued by an arbitral tribunal<sup>(54)</sup>.

Commentators like Santens and Kudrna have extended this “high” rate of compliance to emergency arbitrator decisions<sup>(55)</sup>. Compliance, however, is not always the case<sup>(56)</sup>. Indeed, 38% noncompliance remains troublesome, especially because there is a higher potential of irreparable harm in cases requiring urgent relief<sup>(57)</sup>.

Even in instances where the arbitral institution rules allow for sanctions for non-compliance<sup>(58)</sup>, there is an important distinction between sanctions and enforceability *per se*<sup>(59)</sup>. Sanctions may lead to a claim for damages, specific

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accessed 6 August 2019 (stating that “statistics from the arbitral institutions and anecdotal evidence suggest that parties often voluntarily comply with emergency arbitral awards or orders.”); Savola (n 1) 95; Santens and Kudrna (n 3) 13-14 (stating that there is high voluntary compliance with emergency arbitrator decisions, and parties who do not comply will appear in bad light to the tribunal); ICC Commission Report (n 40) 30 (stating that “most parties seem to comply voluntarily with EA decisions”).

(52) See SCC Rules, art 9(1), sch II; ICC Rules, art 29(2); SCC Rules, art 9(3), Annex II; SIAC Rules, sch 1, para 9; ACICA Rules, art 4.1-4.2, sch 2; Ashford (n 13) 64.

(53) Ashford (n 13) 64.

(54) Queen Mary University of London & White & Case, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* (2012) <[www.arbitration.qmul.ac.uk/research/2012/index.html](http://www.arbitration.qmul.ac.uk/research/2012/index.html)> accessed 8 August 2019) 17; Santens and Kudrna (n 3) 13.

(55) Santens and Kudrna (n 3) 13 (stating that voluntary compliance with interim measures and emergency arbitrator decisions is generally high).

(56) Savola (n 1) 95.

(57) Gordon Smith, ‘The Emergence of Emergency Arbitration’ (2015) *Arb and Med J*, updated version available at <[http://www.gordonsmithlegal.com.au/resources/Emergency%20Arbitrations%20\(12082016\).pdf](http://www.gordonsmithlegal.com.au/resources/Emergency%20Arbitrations%20(12082016).pdf)> accessed 10 August 2019) (stating that “a significant number of decisions on interim relief not complied with by parties... justify the need for an effective enforcement regime”); Savola (n 1) 95 (stating that “there may be instances where enforcement of pre-arbitral interim measures is critical so as to avoid the risk that a recalcitrant party will succeed in evading its obligations and frustrating the whole purpose of the arbitration. In such circumstances, a party may have no other choice but to resort to judicial authorities for their assistance.”).

(58) Savola (n 1) 94-95; Santens and Kudrna (n 3) 13.

(59) Some arbitral institution rules implicitly allow sanctions, while the ICC expressly allows sanctions for non-compliance. See ICDR Rules (2014) art 34; LCIA Rules (2014) art 28; SIAC Rules (2016) art 35; SIAC Rules (2013) art 33; SCC Rules (2010) art 44; and ICC Rules (2012) art 29(4). See, however, Savola (n 1) 94-95 (drawing a distinction between sanctions under arbitral institution rules versus

performance, or a later constituted tribunal drawing adverse inferences from the non-compliance<sup>(60)</sup>. Nevertheless, the granting of sanctions does not achieve the same result and does not equal to enforcement.

Santens and Kudrna notes that seeking emergency arbitration may nevertheless be worthwhile in countries with a strong record of enforcement despite the risk of non-compliance<sup>(61)</sup>. In reality, however, parties will most likely not have a real choice since the location of assets, property or evidence to be preserved will largely dictate where to seek emergency arbitration.

It is important to consider the development of cases on the enforcement of emergency arbitrator decisions in order to have a realistic assessment of the likelihood of success at enforcement. Unfortunately, the body of case law, thus far, is scant and conflicting. This article examines these cases and together with existing literature identifies three types of primary challenges to the enforceability of emergency arbitrator decisions: (A) challenges relating to the nature of emergency arbitrator decisions, (B) challenges relating to the finality of the decision, and (C) challenges relating to the nature of the emergency arbitrator.

### A. Nature of the Decision: Award or Order

One type of challenge to the enforceability of emergency arbitrator decisions relates to the nature of the decision<sup>(62)</sup>. In the majority of arbitral institution rules, an emergency arbitrator may render its decision either in the form of an “award” or an “order”<sup>(63)</sup>. That arbitral institutions give a choice hints at the uncertainty as to the nature of the decision.

The FAI Rules and the ICC Rules for emergency arbitrators are exceptions and

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enforceability).

(60) Savola (n 1) 94-95.

(61) Santens and Kudrna (n 3) 13 (referring to the United States, Hong Kong, and Singapore).

(62) Villani and Caccialanza (n 3) 1; ICC Commission Report (n 40) 31.

(63) An award could be defined as a final determination of a substantive issue, while an order is procedural in nature. Victoria Clark, ‘Decisions, decisions: order or award?’, Arbitration Blog (Nov. 7, 2019), available at <http://arbitrationblog.practicallaw.com/decisions-decisions-order-or-award/> accessed 31 March 2020; Charlie Caher and John McMillan, *Emergency Arbitration: The Default Option for Pre-Arbitral Relief?* in *The International Comparative Guide to International Arbitration 2015* (12<sup>th</sup> ed., Global Legal Group 2015) 2 <[https://www.wilmerhale.com/uploadedFiles/Shared\\_Content/Editorial/Publications/Documents/emergency-arbitration-the-default-option-for-pre-arbitral-relief.pdf](https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/emergency-arbitration-the-default-option-for-pre-arbitral-relief.pdf)> accessed 11 August 2019. See ICDR International Arbitration Rules (2014) art 6.4; CPR Rules for Administered Arbitration of International Disputes (2014) art 14.10; LCIA Arbitration Rules (2014) art 9B.8; SIAC Arbitration Rules (2016) sch 1, art 8; Swiss Rules of International Arbitration (2012) art 43(8), art 26(2).

do not provide for a choice, requiring instead the decision to be in the form of an order rather than an award<sup>(64)</sup>. One explanation for the ICC’s approach is that an award is subject to the ICC Court’s review, and could cause prejudicial delay to the party seeking emergency interim relief<sup>(65)</sup>. The ICC’s approach is even more telling that an emergency arbitrator’s decision is not an award<sup>(66)</sup>.

The SCC Arbitration Rules in both the 2010 and 2017 versions seems to avoid the issue of the nature of the award by not requiring a specific form, and by referring to the arbitrator’s “emergency decision on interim measures”<sup>(67)</sup>. The flexibility in the form allows an emergency arbitrator under the SCC to issue an “award,” an “emergency decision on interim measure,” or arguably any other form for that matter<sup>(68)</sup>.

Arguably, an emergency arbitrator’s decision in the form of an order under the majority of arbitral institutions would not be enforceable under the New York Convention and most national arbitration laws<sup>(69)</sup>. The New York Convention does not provide a definition for the term “arbitral award”<sup>(70)</sup>. Instead, Article I (1) of the New York Convention states in pertinent part as follows: “[t]his

(64) See ICC Arbitration Rules (2012) art 29.2; FAI Rules art 36.4; FAI Emergency Arbitrator Rules (set forth in Appendix III to FAI Rules) art 8; Villani and Caccialanza (n 3) 1; Mika Savola, *Guide to the Finnish Arbitration Rules* (Helsinki 2015) 334-335, 342-343; Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat’s Guide to ICC Arbitration* (ICC 2012) 302-305; Santens and Kudrna (n 3) 12-13; Nathalie Voser and Christopher Boog, ‘ICC Emergency Arbitrator Proceedings: An Overview’ (2011) ICC Intl Ct of Arb Bull, vol 22, Special Supplement, 85-86; Savola (n 1) 90.

(65) Jason Fry, ‘The Emergency Arbitrator – Flawed Fashion or Sensible Solution’ (2013) 7 *Disp Resol Intl* 179, 187; Santens and Kudrna (n 3) 13.

(66) Santens and Kudrna (n 3) 13 (arguing that while the ICC’s choice makes sense within the ICC’s framework, the approach puts into question the enforceability of an ICC issued emergency relief, suggesting instead to allow emergency arbitrators to issue “awards” but not subject to the ICC Court’s review); Fry (n 65) 187.

(67) 2010 SCC Arbitration Rules, Appendix II, art 8; 2107 SCC Rules for Expedited Arbitration, Appendix II, art 8, available at [https://sccinstitute.com/media/1407445/expeditedarbitrationrules\\_eng\\_2020.pdf](https://sccinstitute.com/media/1407445/expeditedarbitrationrules_eng_2020.pdf) accessed 31 March 2020.

(68) *TSIKinvest LLC v Republic of Moldova*, SCC Emergency Arbitration No EA (2014/053), available at <https://www.italaw.com/cases/2988> accessed 31 March 2020 (where the SCC emergency arbitrator issued an “emergency decision on interim measures”); *JKX Oil* (n 5) (where a Ukrainian court enforced an “award” issued by an SCC emergency arbitrator in the context of an investment treaty dispute); Grando (n 11) 1; Santens and Kudrna (n 3) 12-13.

(69) Savola (n 1) 90, 92 (questioning whether “the decision issued by an emergency arbitrator (whether in the form of an order or award) be enforced through the judicial system”); Santens and Kudrna (n 3) 12-13; Grando (n 11) 1.

(70) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) art I (1) (“[t]his Convention shall apply to the recognition and enforcement of arbitral awards”); Santens and Kudrna (n 3) 9-10 (stating that “only ‘arbitral awards’ are recognizable and enforceable”); Lee (n 10) 95-96; Caher and McMillan (n 63) 2-4.

Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought...<sup>(71)</sup> (Emphasis added).

A plain reading of article I (1)'s use of the term "arbitral award" and the word "award" is that the Convention applies only to arbitral awards and not to arbitral orders<sup>(72)</sup>. Any other interpretation would have to come from the drafter's intentions or commentaries. The drafters of the New York Convention did not intend its application to purely procedural orders, which are not enforceable under the New York Convention<sup>(73)</sup>.

Considering the above, an emergency arbitrator's "order" under the ICC's rules will likely be subject to a challenge based on the nature of the award. Under the SCC rules, whether a challenge will likely occur depends on two factors: (1) the various forms the relief issued takes, such as an "emergency decision," "award," or "order;" and (2) the jurisdiction where enforcement or set aside can take place.

As Peterson notes, "[d]epending on the jurisdiction where such [SCC emergency arbitrator] rulings might be presented for set-aside or enforcement, perhaps this difference might have concrete implications"<sup>(74)</sup>. Under the majority of arbitral institution rules, a challenge will be likely if the emergency arbitrator issued an "order" rather than an award<sup>(75)</sup>, though the jurisdiction where such non-enforcement or set aside proceeding is sought will likely temper such a challenge.

Whether a challenge to an emergency arbitrator's decision based on the form of the award will likely succeed is a similar issue as a challenge based on the nature of the arbitrator, mainly that it is as an argument over nomenclature<sup>(76)</sup>. In jurisdictions like the U.S., courts will likely reject a formalistic approach

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(71) New York Convention (n 70) art I (1).

(72) Lim (n 38) para 31 (stating that "[i]f the decision on interim relief was issued as an award, and was recognized as one, then enforcement would be available under the New York Convention").

(73) Santens and Kudrna (n 3) 9-10.

(74) Luke Peterson, 'In Fourth Documented Case, an SCC Emergency Arbitrator in a BIT Case Weighs in on Investor Request to Suspend Effects of Central Bank Measures' (3 June 2016) Investment Arb Rep <[www.iareporter.com/articles/in-fourth-documented-case-an-scc-emergency-arbitrator-in-a-bit-case-weighs-in-on-investor-request-to-suspend-effects-of-central-bank-measures/](http://www.iareporter.com/articles/in-fourth-documented-case-an-scc-emergency-arbitrator-in-a-bit-case-weighs-in-on-investor-request-to-suspend-effects-of-central-bank-measures/)> accessed 6 August 2019; Santens and Kudrna (n 3) 12-13.

(75) Santens and Kudrna (n 3) 12 (stating that "in view of the fact that only 'awards' are enforceable under the New York Convention, another important factor in favour of enforcement may be that the decision of the emergency arbitrator is called an award rather than an order.").

(76) Savola (n 1) 93, fn 64. See *infra* III (C).

and avoid making distinctions among the terms emergency arbitrators use to refer to the form of its emergency relief<sup>(77)</sup>.

Instead, U.S. courts look to its policy favouring arbitration<sup>(78)</sup>, the context of the setting aside or enforcement action<sup>(79)</sup>, the nature and content of the award, and the intent of the parties. In this regard, one could argue that the distinction is probably irrelevant because most jurisdictions will likely apply substance over form<sup>(80)</sup>.

However, Santens and Kudrna suggests that the nomenclature can be important, stating that what the emergency arbitrator calls the form of the decision signals the emergency arbitrator's confidence in the decision's enforceability<sup>(81)</sup>.

Certainly, while the majority of courts may avoid formalistic distinctions, some courts like *Chinmax* will look at nomenclature as a relevant factor in its decision whether to enforce or set aside the award<sup>(82)</sup>.

The U.S and Singapore are examples of jurisdictions where courts take a non-formalistic approach<sup>(83)</sup>. In France, on the other hand, the French New Code of Civil Procedure, Articles 1487 al 3 and 1516 al 3, requires decisions to be in

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(77) *Publicis Comm. v True North Comm, Inc, Publicis Comm v True North Comm, Inc*, 206 F 3d 725, 729 (7th Cir 2000) ('[c]ourts go beyond a document's heading and delve into its substance and impact to determine whether the decision is final.');

*Resort Condominiums Intl Inc v Bolwell* [1993] 118 ALR 655 (Supreme Court of Queensland, Austl) in (1995) 20 Ybk Comm Arb 628, 641; *Société Braspetro Oil Services (Brasoil) v GMRA*, Cour d'appel de Paris [1999] Revue de l'Arbitrage 834, 835; Savola (n 1) 93, fn 64 (stating that "U.S. courts have historically rejected a formalistic distinction between 'orders' and 'awards'"); Philip Habegger, 'Commentary on the Swiss Rules, Article 43 [Emergency Relief]' in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (Wolters Kluwer 2013) 644; Stefan Kroll, 'The Non-Enforceability of Decisions Rendered in Summary Arbitral Proceedings Pursuant to the NAI Rules Under the New-York Convention' (2012) 23 Am Rev Intl Arb 75, 95.

(78) See generally, *Chinmax* (n 5).

(79) Santens and Kudrna (n 3) 12.

(80) Savola (n 1) 93, fn 64 (stating that "[i]t is probably irrelevant, for the purposes of enforcement, whether an arbitrator-ordered or pre-arbitral decision on provisional measures has been issued in the form of an 'award' or simply as an 'order'."). Savola adds that "some European practitioners contend that the distinction between an "order" and an "award" is "[o]f little practical relevance when it comes to enforceability, since most jurisdictions apply the principle of 'substance over form' to any type of interim measure, regardless of the form in which it was ordered."

(81) Santens and Kudrna (n 3) 12.

(82) See generally *Chinmax* (n 5). Aside from *Chinmax*, the Paris Court of Appeals in *Société Nationale* also considered nomenclature as an important factor. *Société Nationale* (n 5).

(83) Villani and Caccialanza (n 3) 1; *PT Pukaafu Indah v Newmont Indonesia Ltd* [2012] SGHC 187, available at <https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/2012-sghc-187.pdf> accessed 31 March 2020 (where the Singapore High Court stated that substance is determinative, not the label given by the arbitral tribunal).

the form of an award to be recognized and enforced<sup>(84)</sup>.

Some commentators purport that Article 17H of the 2006 amendment to the UNCITRAL Model Law on International Arbitration requires recognition and enforcement of an interim measure “irrespective of the country in which it was issued” and regardless of the nature or form of the award<sup>(85)</sup>. To be clear, Article 17H does not expressly state that courts should make no formalistic distinction among the forms of the award.

Rather, Article 17H (1) states in pertinent part as follows: “[a]n interim measure issued by an arbitral tribunal shall be recognized as binding and [...] enforced upon application to the competent court [...]” That Article 17H(1) refers to the form of the award as “interim measure” in general, however, allows the argument that Article 17H did not contemplate the emergency arbitrator<sup>(86)</sup>, and also did not contemplate the potential challenge as to the form of the award.

Article 17H(1) could not have contemplated emergency arbitrator decisions because arbitral institutions were just beginning to adopt emergency arbitrator rules at that time<sup>(87)</sup>, the ICDR making the first applicable rule in the same year.

It is a corollary that Article 17H(1) could not have contemplated the potential challenge based on the nature of the award because arbitral institutions simply had not yet adopted rules stating the form of the emergency arbitrator decision at the time of the UNCITRAL’s 2006 amendment.

Although Article 17H only addresses interim measures in general, and not emergency arbitrator decisions, commentators persist that an adoption of

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(84) See Diana Paraguacuto-Mahéo and Christine Lecuyer-Thieffry, ‘Emergency Arbitrator: A New Player In The Field - The French Perspective’ (2017) 40 *Fordham Intl LJ* 749.

(85) UNCITRAL Model Law (2006) (n 3) art 17H, 17I. Prior to the 2006 amendment, the position of UNCITRAL Model Law on International Arbitration (1985) was that interim measures rendered by a foreign-seated arbitral tribunal was unenforceable under national laws.

Unfortunately, the majority of states that adopted the UNCITRAL Model Law have not enacted the 2006 amendments. This means that the majority of jurisdictions either follow the 1985 approach or does not follow the UNCITRAL approach at all. See UNCITRAL, *Status* <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)> accessed 11 August 2019). See Smith (n 57) 17 (noting that in 2010, only 17 states had enacted the 2006 amendments); Lim (n 38) par 31; Grando (n 11) 1.

See also, ICC Commission Report (n 40) 32 (stating that an EA award or order is more likely enforceable in countries that adopted UNCITRAL Model Law art 17).

(86) Savola (n 1) 93-94 (stating that “[t]he language used simply begs the question as to whether an “emergency arbitrator” equates with an “arbitral tribunal.”); Santens and Kudrna (n 3) 9; Fry (n 65) 187.

(87) Grando (n 11) 1.



Article 17H into a national arbitration law would also lead to the enforcement of emergency arbitrator decisions, regardless of its form<sup>(88)</sup>.

It remains to be seen, however, whether courts will extend Article 17H to emergency arbitrator decisions and to those decisions issued as an order, and recognise and enforce such decisions either under the New York Convention or its UNCITRAL based national legislation<sup>(89)</sup>.

While courts could recognise and enforce domestically issued emergency arbitrator decisions under its own national legislation, recognition and enforcement of foreign arbitral awards under the New York Convention is another matter. Lim noted that an arbitral tribunal could just as easily “take a different view on cross-border enforcement on this basis”<sup>(90)</sup>.

According to Savola, “[i]n the absence of a clear definition of “arbitral tribunal” and “arbitral award” in both the Model Law and the New York Convention, it remains unclear how the orders or awards issued by emergency arbitrators will be dealt with under these instruments by national courts at the place where enforcement is sought”<sup>(91)</sup>.

National legislation can do its part to clarify the matter. For example, Hong Kong amended its arbitration law to provide for the recognition and enforcement of emergency arbitrator orders whether Hong Kong or foreign seated<sup>(92)</sup>. Singapore, on the other hand, adopted a provision into its national arbitration law that does not explicitly state that an emergency arbitral decision rendered outside of Singapore would be enforceable<sup>(93)</sup>.

Existing case law relating to emergency arbitrator decisions portends conflicting decisions, and, at best, further avoidance of the question. In *Société Nationale des Pétroles du Congo v. Société Total Fina Elf E&P Congo*<sup>(94)</sup>, the Paris Court of Appeals held that the annulment or set aside proceeding was inadmissible because the court cannot set aside a pre-arbitral referee’s order

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(88) See Bao (n 45) 282-283; Savola (n 1) 95 (recognizing that “this argument is not necessarily full-proof”); Fry, Greenberg, and Mazza (n 64) 302-305; Voser and Boog (n 64) 85-86.

(89) Grando (n 11) 1 (stating that “[i]t will be interesting to see whether domestic courts will interpret provisions modelled on Article 17H of the Model Law as providing them authority to enforce such decisions.”).

(90) Lim (n 38) par 31.

(91) Savola (n 1) 93-94.

(92) Grando (n 11) 1.

(93) IAA (n 47) s 12(6).

(94) *Société Nationale* (n 5).

since it was not an award<sup>(95)</sup>.

To determine whether the pre-arbitral referee's order was an award, the court first had to determine whether the referee acted as an arbitrator<sup>(96)</sup>. The ICC Rules for a Pre-Arbitral Referee Procedure, however, carefully avoided calling the process an arbitration and the decision-maker an arbitrator<sup>(97)</sup>.

The court further found that it could not annul or set aside the pre-arbitral referee's order because the order was contractual, with the authority of an agreement, rather than judicial in nature<sup>(98)</sup>.

While *Société Nationale* essentially upheld the pre-arbitral referee's order, the court's refusal to recognise the order as an arbitral award stands in contrast to other cases addressing the enforcement or setting aside of an emergency arbitrator's decision. In *Vodacom Int'l Ltd. v. Namenco Energy Ltd.*<sup>99</sup> and in *JKX Oil & Gas PLC and Poltava Gas B.V. v. Ukraine*<sup>(100)</sup>, the courts enforced the emergency arbitrator's decision without analysing whether the emergency arbitrator's decision constituted an arbitral award under the New York Convention.

Likewise, the four cases from the U.S., two addressing a motion to vacate or set aside an emergency arbitrator's decision<sup>(101)</sup>, and two addressing the confirmation of an emergency arbitrator's decision<sup>(102)</sup>, did not directly address whether an emergency arbitrator's decision constitutes an arbitral award under the New York Convention or the applicable arbitral institution's rules. Instead, the cases from the U.S., unlike the ones from the Democratic Republic of Congo and the Ukraine, addressed an issue that relates closely to the enforceability of an arbitral award: whether the emergency arbitrator's decision is a final or binding award.

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(95) Emmanuel Gaillard and Philippe Pinsolle, 'The ICC Pre-Arbitral Referee: First Practical Experiences' (2004) 20 *Arb Intl* 13-37. Fourteen years later, under the French New Code of Civil Procedure, Articles 1487 al 3 and 1516 al 3, only decisions in the form of an award may be recognized and enforced in France. See Paraguacuto-Mahéo and Lecuyer-Thieffry (n 84) 749-750.

(96) Emmanuel Gaillard, 'First Court Decision on Pre-Arbitral Referee' (5 June 2003) 229 *NYLJ* 107 <[http://www.shearman.com/~media/Files/NewsInsights/Publications/2003/06/First-Court-Decision-on-PreArbitral-Referee/Files/Download-PDF-First-Court-Decision-on-PreArbitral\\_/FileAttachment/IA\\_060503.pdf](http://www.shearman.com/~media/Files/NewsInsights/Publications/2003/06/First-Court-Decision-on-PreArbitral-Referee/Files/Download-PDF-First-Court-Decision-on-PreArbitral_/FileAttachment/IA_060503.pdf)> accessed 7 August 2019.

(97) *Société Nationale* (n 5); Gaillard (n 96) 107.

(98) *Société Nationale* (n 6). See also Santens and Kudrna (n 3) 2-3; Gaillard (n 96) 107.

(99) *Vodacom* (n 5).

(100) *JKX Oil* (n 5).

(101) *Chinmax* (n 5); Yahoo! (n 5).

(102) *Draeger* (n 5); *Blue Cross* (n 5).

## B. Finality of the Decision

The finality of the decision is another type of primary challenge to the enforceability of an emergency arbitrator's decision<sup>(103)</sup>. Even if an emergency arbitrator renders its decision in the form of an award, it may still be unenforceable if a court finds that it lacks finality<sup>(104)</sup>.

In the context of interim measures in general, a Swiss Federal Tribunal held that an interim measure was not an award, and henceforth not appealable, because it was not finally determinative of the disputed issues<sup>(105)</sup>. While the issue of an award's finality also arises in the context of interim measures in general<sup>(106)</sup>, the same concerns seem amplified in the context of emergency arbitrator decisions<sup>(107)</sup>.

In the context of interim measures in general, the same arbitral tribunal that issued the interim measure may review the award and will not likely contradict its own issuance of the interim measure. In emergency arbitration, however, the decision is reviewable and modifiable by a later constituted arbitral tribunal<sup>(108)</sup>.

The majority of arbitral institution rules providing for emergency arbitrators state that such a decision do not bind the arbitral tribunal, which may revoke or modify the decision at any time<sup>(109)</sup>.

Some courts have also made a distinction, concerning interim awards in general, between those that are subject to ordinary versus extraordinary means of recourse to determine whether an award is final or binding<sup>(110)</sup>.

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(103) Villani and Caccialanza (n 3) 1.

(104) Caher and McMillan (n 63) 2-4; Villani and Caccialanza (n 3) 1; Santens and Kudrna (n 3) 10.

(105) Judgment of 13 April 2010, DFT 136 III 200, cited in Caher and McMillan (n 63) 2.

(106) *Michaels v Mariforum Shipping SA*, 624 F2d 411, 413-414 (2nd Cir 1980). In Australia, the Supreme Court of Queensland in *Resort Condominiums* did not recognise and enforce an interim award under the New York Convention because of the interlocutory and procedural nature of the award that did not finally settle the dispute. *Resort Condominiums* (n 77).

See also Savola (n 1) 73 (recognizing the prevailing view that interim measures are unenforceable under the New York Convention); Villani and Caccialanza (n 3) 1; Loukas Mistelis and Julian Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law 2006) 175.

(107) Santens and Kudrna (n 3) 10.

(108) *ibid.*

(109) Savola (n 1) 94; Dunmore (n 31) 1 (stating that under the DIFC-LCIA, as in other arbitral institution rules, an order rendered by an emergency arbitrator may later be modified by the arbitral tribunal, once it is constituted or appointed).

(110) See *Diag Human v Czech Republic* (2014) < <http://blogs.lexisnexis.co.uk/dr/commercial-court-finds-ny-convention-award-not-binding-under-aa-1996-s-1032f-diag-human-v-czech-republic/>>

According to the distinction, only awards that are subject to extraordinary measures are final, but those that are subject to ordinary recourse are not final. According to van den Berg,

the ordinary means of recourse were used for denoting a genuine appeal on the merits of the arbitral award to a second arbitral instance or to a court. Extraordinary means of recourse were reserved for other irregularities, and especially the procedural ones, tainting a final decision. The latter means of recourse were meant to correspond to setting aside or equivalent proceedings<sup>(111)</sup>.

Van den Berg further explains, however, that the proceedings of the New York Convention of 1958 rejected such a proposed distinction between ordinary and extraordinary measure because the distinction did not exist in other countries and had different meanings in those countries that had the distinction<sup>(112)</sup>.

Still, van den Berg notes, that the “essence of the distinction may be deemed to have been retained”<sup>(113)</sup>. Yet, under the ordinary versus extraordinary recourse distinction, an emergency arbitration decision would not be final or binding since it would be subject to an ordinary recourse – the yet to be formed arbitral tribunal, which is generally given the ordinary power to review the emergency arbitration decision.

While a minority of international arbitration commentators<sup>(114)</sup>, supported by cases from the U.S., opine that the possibility of review by a latter constituted arbitral tribunal ought not to determine finality<sup>(115)</sup>, the majority of commentators recognise the unenforceability of non-final awards under the

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accessed 21 April 2019 (a UK commercial court held that an award that is subject to ordinary recourse is not binding, while an award that is subject to extraordinary recourse is binding under the Arbitration Act of 1996, Section 103 (2)(f) and the New York Convention).

(111) Albert Van den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer 1981) 342.

(112) *ibid.*

(113) *ibid* at 342-343.

(114) See Fabio Santacroce, ‘The Emergency Arbitrator: A Fully-fledged Arbitrator Rendering an Enforceable Decision?’ (2015) 31 *Arb Intl* 2, 213; Savola (n 1) 86 (stating that it is a minority view outside the U.S. that interim measures are enforceable under the New York Convention); Villani and Caccialanza (n 3) 1 (stating that only U.S. courts seem to have taken the less formalistic approach); Smith (n 57) 17 (“currently a minority view”).

(115) See: Luis Perez and Francisco Rodriguez, ‘United States: The Rise of the Emergency Arbitrator’ (2015) 10(2) *Global Arb Rev* (stating that the FAA and the New York Convention “provide for the confirmation of an ‘award’ without any reference to its finality”).

New York Convention<sup>(116)</sup>. Some commentators further suggest that the same issue may be problematic under national arbitration laws<sup>(117)</sup>.

Under the majority view, Article V (1) (e) of the New York Convention only recognises final awards<sup>(118)</sup>. Article V(1)(e) allows a court in a signatory jurisdiction to refuse recognition and enforcement of an award, upon proof by the challenging party that “the award has not yet become binding...”<sup>(119)</sup> The word “binding” has been widely interpreted to mean that arbitral decisions must be “final and binding”<sup>(120)</sup>.

In other words, the decision must “finally resolve a dispute submitted to arbitration”<sup>(121)</sup>, which an emergency arbitration does not do. Instead, emergency arbitration is temporary or provisional in nature, and subject to subsequent review and modification<sup>(122)</sup>.

That arbitral institution rules on emergency arbitrators provide that such emergency arbitrator decisions do not bind arbitral tribunals, takes emergency arbitrator decisions outside the realm of finality<sup>(123)</sup>. According to the majority, therefore, emergency arbitrator decisions do not meet the finality requirement of Article V (1) (e)<sup>(124)</sup>.

There is a minority view<sup>(125)</sup>, however, that looks at finality less formalistically.

(116) Lee (n 10) 95-96; Savola (n 1) 73 (“most European arbitration practitioners arguably still think that the New York Convention is not applicable to provisional measures ordered by an arbitral tribunal, even if they were issued in the form of an ‘arbitral award’”); Jean-Francois Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2nd ed, Sweet & Maxwell 2007) 546 (stating that “[w]hatever interpretation is given to this term, the authors did not envisage that a decision of an arbitrator could be questioned by a subsequent decision, and this is precisely an essential characteristic of provisional measures”).

(117) Savola (n 1) 73; Caher and McMillan (n 63) 2-3 (stating that national courts could determine that an emergency arbitrator’s award is not final).

(118) Santens and Kudrna (n 3) 9-10 (“commentators tend to agree that only final decisions should be considered awards under the New York Convention”); Kroll (n 77) 95–96; Savola (n 1) 73.

(119) New York Convention (n 70) art V (1) (e).

(120) Savola (n 1) 94.

(121) Savola (n 1) 73.

(122) Santens and Kudrna (n 3) 9-10; Savola (n 1) 73.

(123) Santens and Kudrna (n 3) 9-10; Poudret and Besson (n 116) 546.

(124) Ashford (n 13) 64 (stating that it is unlikely that emergency arbitrator decisions would be considered final and binding under Article V); Savola (n 1) 73; Nathalie Voser, ‘Interim Relief in International Arbitration: The Tendency Towards a More Business-Oriented Approach’ (2007) 1 *Disp Resol Intl* 181-183.

(125) Savola (n 1); Villani and Caccialanza (n 3) 1 (stating that only U.S. courts seem to have taken the

According to Kojovic, the finality of an interim award “should be observed in its own terms”<sup>(126)</sup>. In other words, if the interim award is a final determination of the issue presented for the interim measure sought, then it is final<sup>(127)</sup>.

According to Born, “[t]he better view is that provisional measures should be and are enforceable as arbitral awards under generally applicable provisions for the recognition and enforcement of awards in the Convention and most national arbitration regimes. Provisional measures are ‘final’ in the sense that they dispose of a request for relief pending the conclusion of the arbitration”<sup>(128)</sup>. U.S. courts have supported this view and have found that an interim measure can be final or binding under the New York Convention or under the AAA rules<sup>(129)</sup>.

U.S. courts generally look at the substance and effect of the decision to determine finality, rather than mere technicalities<sup>(130)</sup>.

Of particular interest, however, are a series of U.S. cases dealing specifically with emergency arbitrator decisions. While three of these cases follow the approach of courts looking at the finality of interim measure in general, one case signals future tension and conflict<sup>(131)</sup>.

In three cases, the courts held the award to be final. In *Blue Cross Blue Shield of Michigan v. Medimpact Healthcare Systems*<sup>(132)</sup>, the court held that “[a]n ‘interim’ award may be sufficiently final to warrant review in federal district court when it finally and definitively disposes of a separate independent claim”.

In *Draeger Safety Diagnostics v. New Horizon Interlock*,<sup>133</sup> the court

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less formalistic approach); Smith (n 57) 17 (“currently a minority view”).

(126) Kojovic (n 32); see also Savola (n 1) 85.

(127) Kojovic (n 32) 523-524.

(128) Born (n 17) 2514-2515.

(129) *Publicis* (n 77); *Polydefkis Corp v Transcontinental Fertiliser Co*, 1996 WL 683629 (ED Pa 1996); *Pacific Reinsurance Management Corp v Ohio Rein Corp*, 935 F2d 1019, 1022-1023 (9th Cir 1991); *Southern Seas Navigation Ltd v Petroleos Mexicanos of Mexico City*, 606 F Supp 692 (SDNY 1985); *Sperry International Trade v Government of Israel*, 532 F Supp 901 (SDNY 1982). See Mistelis and Lew (n 106) 175; Villani and Caccialanza (n 3).

(130) *Publicis* (n 77) (stating that whether a decision is final will depend on the substance rather than the form); *Pacific Reinsurance* (n 129) (“finality should be judged by substance and effect, not by superficial technicalities”).

(131) See Santens and Kudrna (n 3) 10 (stating that the “tension becomes even greater in the context of decisions of emergency arbitrators, as most, if not all, emergency arbitrator rules expressly provide that the decision of the emergency arbitrator may be modified by the arbitral tribunal once constituted”).

(132) *Blue Cross* (n 5).

(133) *Draeger* (n 5).

confirmed an interim award that finally and definitely disposes of a separate and independent claim notwithstanding the absence of an award that finally disposes of all the claims that parties submitted to arbitration. In *Yahoo! v. Microsoft*<sup>(134)</sup>, the court confirmed the emergency arbitrator decision because the equitable relief awarded was final, noting that “if an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made.”

However, the court’s holding in *Chinmax*<sup>(135)</sup>, while leaving the emergency arbitrator’s decision intact due to its non-final nature, raises important concerns regarding the finality and enforceability of emergency arbitrator decisions<sup>(136)</sup>.

In holding that the emergency interim order was not final, and not subject to review<sup>(137)</sup>, the *Chinmax* court considered two factors: (1) that the arbitration panel had the authority to “reconsider, modify or vacate” the interim order under AAA rules, and (2) the intention of the arbitrator who issued the emergency interim order.

In *Chinmax*, the court noted that “the rules expressly retained jurisdiction... for further consideration by the full panel”, thereby reducing the impact of the interim order<sup>(138)</sup>. The court also noted that the substance of the interim order, which was to facilitate a conservancy order by the full panel, led to the interpretation that the arbitrator’s intention when issuing the interim order was of a temporary nature, and not a final award.

The case could be interpreted to mean that the interim order in *Chinmax* would also not be enforceable at the enforcement stage just as it could not be vacated at the setting aside stage. Such an interpretation, however, must take into account the different postures courts will take when at the enforcement versus the setting aside stage. The procedures and factors for challenging an arbitral award will differ at the enforcement stage versus at the setting aside stage<sup>(139)</sup>.

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(134) *Yahoo!* (n 5).

(135) *Chinmax* (n 5).

(136) Santens and Kudrna (n 3) 10.

(137) *Chinmax* (n 5), citing *Publicis* (n 77) (stating that “although the Federal Arbitration Act uses the word award in conjunction with finality, courts go beyond a document’s heading and delve into its substance and impact to determine whether the decision is final.”).

(138) *Chinmax* (n 5), citing *Orion Pictures Corp v Writers Guild of Am, W, Inc*, 946 F2d 722 at 724.

(139) Amazu Asouzu, *The National Arbitration Law and International Commercial Arbitration: The Indispensability of the National Court and the Setting Aside Procedure*, 7 Afr J Intl & Comp L 68, 90 (1995) (stating that “the setting aside of an award or its annulment and the recognition or enforce-

Additionally, one must take into account the substance analysis in *Chinmax*, where the court analysed both the intention of the arbitrator and the type of interim order the arbitrator issued<sup>(140)</sup>. One could interpret *Chinmax* to mean either (1) that the *type* of emergency interim order will have greater impact on the determination of finality, or (2) that the *intention* of the arbitrator will have greater impact on the determination of finality.

It seems most reasonable, however, to consider the interplay between both factors. One could extend *Chinmax* to the enforcement stage by stating that the type of interim award will be a sufficient factor to determine finality.

However, one should also consider the intent of the arbitrator. In this regard, the intent of an arbitrator may differ concerning the effect of its order at the enforcement or setting aside stage, depending on the type of interim order issued.

Jurisdictions that adopted Article 17H (1) of the UNCITRAL Model Law (2006)<sup>(141)</sup> may be able to avoid the issue of finality of an award. Under Article 17H(1), “[a]n 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”<sup>(142)</sup>.

As Santens and Kudrna notes, the language of Article 17H (1) expressly requires that an “arbitral tribunal” issue the interim measure<sup>(143)</sup>. The use of the terms “arbitral tribunal” or “arbitrator” raises the other primary potential challenge to an emergency arbitrator’s decision: the nature of the emergency arbitrator.

### C. The Nature of an Emergency Arbitrator

The third type of primary challenge to an emergency arbitrator’s decision goes to the heart of the emergency arbitrator’s authority and identity: whether an emergency arbitrator is an “arbitrator” or an “arbitral tribunal” as conceptualized under the New York Convention or domestic arbitration

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ment of an award are two distinct procedures, though closely inter-related...”).

(140) *Chinmax* (n 5), citing *Hyosung (America) Inc v Tranax Tech Inc*, Case No C 10-0793 VRW, 2010 WL 1853764, at \*4 (ND Cal May 6, 2010); *New United Motor Mfg, Inc v United Auto Workers Local*, 617 FSupp2d 948, 958 (ND Cal 2008).

(141) UNCITRAL Model Law (2006) (n 3) art 17H.

(142) *ibid.*

(143) Santens and Kudrna (n 3) 10-11.



laws<sup>(144)</sup>.

The answer to the question is that an emergency arbitrator is not an arbitrator as contemplated by arbitration laws or statutory definition<sup>(145)</sup>. While it may help to examine the various statutory definitions of “arbitrator” under national legislations, such definitions will not likely have intended to include an emergency arbitrator, the concept of which emerged much later than when most arbitration laws were enacted<sup>(146)</sup>.

Normative understanding that interim measure, much less an emergency arbitrator’s decision, is within the province of the courts would have also likely dictated legislative intent as to the scope of the definition.

Exceptions, of course, are the recent amendments to the arbitration laws in Hong Kong, Singapore, The Netherlands, and New Zealand<sup>(147)</sup>. These recent amendments further support the argument that statutory definitions of “arbitrator” did not contemplate the concept of an emergency arbitrator, and that amendment to statutory definitions in the majority of jurisdictions will be necessary<sup>(148)</sup>.

Likewise, the New York Convention did not likely contemplate in its definition the concept of an emergency arbitrator because the Convention also predates the more recent phenomenon of the emergency arbitrator. A change in the New York Convention would be necessary to compensate for such a gap.

Instead of the more limited definitional analysis, however, a better approach is to examine the nature of an arbitrator through a more fundamental philosophical question: what *is* an arbitrator? While the approach does not redeem the fact that the New York Convention and domestic arbitration laws did not contemplate the concept of an emergency arbitrator by definition, the approach allows us to reconsider the nature of an arbitrator beyond the pre-conceived notions of an arbitrator and to include in the analysis an examination

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(144) Santacroce (n 114) 213 (using the term “full-fledged” arbitrator); Santens and Kudrna (n 3) 9 (stating that the New York Convention and national laws predate and did not envision the emergency arbitrator); Fry (n 65) 187; Savola (n 1) 92 (asking whether an emergency arbitrator qualifies as an arbitrator); Smith (n 57) 16 (asking whether “an emergency arbitrator has the same status as an arbitral tribunal for the purposes of enforcement of interim relief”).

(145) Santens and Kudrna (n 3) 9; Fry (n 65) 187.

(146) Santens and Kudrna (n 3) fn 40; Fry (n 65) 187.

(147) *Supra* (n 45-48).

(148) See Villani and Caccialanza (n 3) 1 (stating that in Italy, for example, the requirement of arbitrability under Italian law precludes the recognition and enforcement of emergency measures because the granting of emergency measures is outside the power of an arbitrator).

of the arbitrator's role and purpose.

Notably, the nature of an arbitrator does not raise a serious challenge to the enforceability of interim measure in general because arbitral institution rules give "arbitral tribunals" the authority to grant interim measures, remaining consistent with the nature of an arbitrator. That there is no definitional issue with interim measure in general is poignant to understanding the issue.

It becomes necessary to articulate the exact concepts that give rise to the distinct treatment. It is then apparent that the distinction is not due to the emergency arbitrator granting an interim measure in general, as the phrase encompasses other types of relief, an urgent one being among others. Instead, the distinction stems from three factors: (1) an objection to the nomenclature with the use of the word "emergency" to describe "arbitrator", (2) an objection to the temporary or preliminary nature of the emergency arbitrator's role, and (3) an objection to the structural change created by the emergency arbitrator in the arbitral process.

Regarding the first factor, one could argue that changing the nomenclature to the simple and normative word "arbitrator" would help sway courts. Santens and Kudrna recognise that an adjustment of nomenclature is helpful but not dispositive of the matter<sup>(149)</sup>.

On the other hand, the existing nomenclature helps distinguish the special type of interim measure sought and avoids confusion between an emergency arbitrator and the soon to be constituted arbitral tribunal.

More importantly, the phrase "emergency arbitrator" already uses the word arbitrator. The qualifier "emergency" ought not to overshadow the word "arbitrator," which remains the primary concept in the nomenclature. In short, the plain meaning of the phrase "emergency arbitrator" is that of an "arbitrator".

Further, the change from the AAA's "pre-arbitral referee," which on nomenclature alone already distinguishes itself from the term arbitrator, signals that the phrase "emergency arbitrator" means arbitrator first, and emergency relief second. Such a reading of the phrase would be consistent with *Société Nationale*<sup>(150)</sup>, where the Paris Court of Appeals raised the issue of the nature of the emergency arbitrator when it considered in its judgment the ICC's use

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(149) Santens and Kudrna (n 3) 12.

(150) *Société Nationale* (n 5).

of the phrase “pre-arbitral referee”<sup>(151)</sup>.

The Paris Court of Appeal’s emphasis on the fact that the rules did not refer to the pre-arbitral referee as an arbitrator, and did not call the process an arbitration may not extend to the modern emergency arbitrator since the ICC Arbitration Rules has fully embraced the concept of “emergency arbitrator”<sup>(152)</sup>.

According to Santens and Kudrna, all the major arbitral institutions use the word “arbitrator” in its arbitration rules instead of the phrase “pre-arbitral referee”<sup>(153)</sup>. Notably, cases in the U.S. relating to the confirmation or vacation of an emergency arbitrator decision do not address the issue of the nature of the emergency arbitrator.

As to the second factor, which gives rise to the distinction between the nature of an arbitrator under interim measure in general and emergency arbitration specifically, one could argue that an emergency arbitrator is not an arbitrator because he or she does not do what an arbitrator does<sup>(154)</sup>. A substantial difference between an emergency arbitrator and the traditional arbitrator is that an emergency arbitrator does not decide the merits of the case, but only temporary or preliminary issues of urgent relief in aid of an arbitration that has not yet begun<sup>(155)</sup>. This argument takes us back to our fundamental philosophical question of what an arbitrator *is*. One could look to function to determine the nature of an arbitrator.

In this regard, either consensus within the arbitration community or by the parties’ intent could identify the arbitrator’s function. If one were to rely on some normative consensus of what an arbitrator does, the analysis leads to the conclusion that an arbitrator essentially decides the final merits of an arbitration proceedings and not merely some preliminary, provisional, or temporary decision, as in the case of an emergency arbitrator. To view, otherwise, would be to ignore how the arbitration community has historically understood the role of an arbitrator.

An alternative approach is to rely on the intent of the parties. In this view, one could peg the analysis within the contractual nature of arbitration. What an arbitration does, therefore, depends on what the parties contemplated. Such a

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(151) *Ibid.*

(152) *Ibid.*

(153) Santens and Kudrna (n 3) 12.

(154) See Villani and Caccialanza (n 3) 1 (stating that the recognition and enforcement of emergency measures is doubtful because the granting of emergency measures is outside the power of an arbitrator).

(155) Santens and Kudrna (n 3) 9; Fry (n 65) 187.

paradigm gives an ever-evolving view of the arbitrator's role as dependent on the parties' needs and understanding. Under this view, therefore, arbitrators can give both final decisions on the merits and preliminary decisions.

As to the third factor, even assuming *arguendo* that an arbitrator's role extends to preliminary decisions, the emergency arbitrator essentially creates two sets of arbitrators: the arbitral tribunal and the emergency arbitrator. One could argue that parties could not have foreseen such a structural change to the arbitral process unless they explicitly provide for it in the arbitration agreement.

The parties, however, do normally provide for the seat of arbitration, and the parties would have therefore consented to arbitration rules providing for such emergency arbitration. Such amendments to the rules are arguably foreseeable.

However, some commentators argue that an emergency arbitrator lacks a jurisdictional nature because it is a creature of contract under the parties' agreement<sup>(156)</sup>. The *Société Nationale* case, which essentially held that the pre-arbitral referee decision was contractual and not of a judicial nature, supports such a view<sup>(157)</sup>.

Santa Croce argues that while an emergency arbitrator is a contractual figure because its authority derives from the parties' agreement or choice of institutional rules, the emergency arbitrator also possesses a jurisdictional nature under the institutional rules, giving the emergency power to rule over its jurisdiction, competence-competence, independence, due process, and the arbitral seat<sup>(158)</sup>. Santa Croce points to a trend towards a definition of an arbitrator that incorporates both its contractual and jurisdictional nature<sup>(159)</sup>.

Further, under this new arbitration structure, any preliminary decisions by the emergency arbitrator is subject to review by the arbitral tribunal once constituted. This leads to a simple observation – that an arbitral tribunal is inherently different from an emergency arbitrator, the latter lacking a jurisdictional nature. The *Chinmax* case, which considered the latter review by an arbitral tribunal significant in determining finality, supports such a view<sup>(160)</sup>.

The inherent difference is also apparent in the singularity of the emergency

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(156) See Jean-Paul Beraudo, 'Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals' (2005) 22 J of Intl Arb 245; Baruch Baigel, 'The Emergency Arbitrator Procedure Under the 2012 ICC Rules: A Juridical Analysis' (2014) 31 J of Intl Arb 1.

(157) *Société Nationale* (n 5).

(158) Santacroce (n 114) 213.

(159) Santacroce (n 114) 213; Smith (n 57) 18.

(160) *Chinmax* (n 5).

arbitrator as opposed to a tribunal. As Santens and Kudrna aptly point out, an emergency arbitrator certainly is “not the ‘arbitral tribunal’ under most applicable arbitration rules”<sup>(161)</sup>.

Perhaps, a uniform transnational approach will likely emerge as to whether an emergency arbitrator is within the nature of an arbitrator. Article 17H of the UNCITRAL Model Law of Arbitration as amended in 2006, is the first step towards such uniformity.

Although, Article 17H did not contemplate the emergency arbitrator<sup>(162)</sup>, but instead refers to “interim measure” in general because arbitral institutions were just beginning to adopt emergency arbitrator rules at that time Article 17H was adopted<sup>(163)</sup>, the ICDR making the first applicable rule in same year. Notably, Article 2(b) of the UNCITRAL Model Law continues to define an “arbitral tribunal” as “a sole arbitrator or a panel of arbitrators”<sup>(164)</sup>.

In the meantime, this author predicts the challenge to arise in future cases as it did in *Société Nationale*<sup>(165)</sup>. Courts in jurisdictions like Hong Kong and Singapore with updated definitions of arbitrator will avoid the controversy. Courts in jurisdictions like the U.S., which look to both its policy favouring arbitration<sup>(166)</sup> and the intent of the parties<sup>(167)</sup>, will likely hold that an emergency arbitrator is an arbitrator, if ever a party raises such a challenge.

Courts in jurisdictions like France or India<sup>(168)</sup>, which strictly interprets the word arbitrator, may hold that an emergency arbitrator is not an arbitrator without explicit language in the arbitration agreement, national arbitration legislation, or the New York Convention.

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(161) Santens and Kudrna (n 3) 9; Fry (n 65) 187.

(162) Savola (n 1) 93-94 (questioning whether an emergency arbitrator equates with an arbitral tribunal); Santens and Kudrna (n 3) 9; Fry (n 65) 187.

(163) Grando (n 11) 1.

(164) Savola (n 1) 93-94.

(165) *Société Nationale* (n 5).

(166) *See Chinmax* (n 5).

(167) Savola (n 1) 93, fn 64.

(168) So far, cases from India on the enforceability of emergency arbitrator decisions have only dealt with the issue of whether an emergency arbitrator decision rendered in a foreign jurisdiction is enforceable under its arbitration law. *See Raffles Design* (n 5). In the U.K., Section 42(1) of the English Arbitration Act, which requires enforcement of interim measures, does not apply to foreign issued interim measures. Smith (n 57) 17.

### IV. Conclusion

Commentators and practitioners largely agree as to the necessity of emergency arbitration in international arbitration<sup>(169)</sup>. Emergency arbitration offers a speedy and cost-efficient benefits to the international arbitration regime. There is also a growing consensus that emergency arbitration is here to stay<sup>(170)</sup>. However, the efficacy of emergency arbitration will depend on its enforceability<sup>(171)</sup>.

Regardless of the benefits to international arbitration, the adversarial context of legal disputes, including those in arbitration, make it inevitable for parties to challenges the enforceability of decisions rendered against it.

Emergency arbitrator decisions will not avoid such a fate. The three primary challenges that face the enforceability of emergency arbitrator decisions are (1) the nature of the decision, (2) the finality of the decision, and (3) the nature of an emergency arbitrator.

For now, case law has only raised additional questions regarding these challenges. It remains unknown what consensus will form around these issues.

The only approach that has limited these challenges have been to the amendment of national laws expressly recognizing and enforcing emergency arbitrator decisions. Still, even awards issued in jurisdictions that enforce such decisions may not be enforceable in other jurisdictions as was seen in India. Even if countries follow the approach by Singapore, Hong Kong, The Netherlands, and New Zealand, the questions raised by the enforceability of foreign rendered emergency arbitrator decisions will persist.

Emergency arbitrator decisions will likely have a better chance at overcoming primary potential challenges to enforceability, and settle doubts as to its efficacy with the following recommendations: (A) the New York Convention is amended to expressly include the recognition and enforcement of interim measures, including emergency arbitrator decisions, (B) countries amend

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(169) Santacrose (n 114) 213.

(170) William Bassler, 'The enforceability of emergency awards in the United States: or when interim means final' (2016) 32 Arb Intl 559–574; Kassi Tallent, 'Emergency Relief Pending Arbitration in the U.S. Context' in Diora Ziyayeva (ed), *Interim and Emergency Relief in International Arbitration* (Jurisnet 2015) 301 (stating that the widespread adoption by arbitral institutions make it likely emergency arbitration is here to stay); William Bassler, 'Are Emergency Awards Enforceable in the United States? A Guide for the Perplexed' in Arthur Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2015* (Brill 2017) 31, 49; Caher and McMillan (n 63) 4.

(171) Caher and McMillan (n 63) 3 (stating that the efficacy of emergency arbitration would be "severely diminished" if unenforceable); Wang (n 1) 1098.

their national arbitration laws expressly recognizing and enforcing emergency arbitrator decisions regardless of the seat where it was rendered, and (C) UNCITRAL Model Law jurisdictions enact the 2006 amendments.

### A. Amend the New York Convention

The proposal to amend the New York Convention to strengthen the enforceability of interim measures in general is not new<sup>(172)</sup>. While commentators recognise that the majority of courts today enforce interim measures, adding an express provision in the New York Convention that requires courts to recognise and enforce interim awards, including emergency arbitrator awards, would eliminate conflicting decisions among courts and reduce the need for recourse to courts<sup>(173)</sup>. It is important, however, that such an amendment would add language that specifically addressed emergency arbitration.

An amendment to the New York Convention would have to consider the language under Article I (1)<sup>(174)</sup>. The easiest approach seems to be the addition of an article that defines or clarifies the term “arbitral award.” The definition ought to take into account the confusion that had arisen as to the nature of the award, the finality of the award, and the nature of an arbitrator.

The nature of the award may be the easiest challenge to overcome with an amendment. The New York Convention, for example, could require that an interim measure must be in the form of an “award,” forcing arbitral institutions to amend their respective rules. Alternatively, the amendment could expand the definition of an award to include “orders”. Allowing the enforceability of an “arbitral order,” however, would raise new questions relating, for example, to the finality of an arbitral order versus an arbitral award. Expanding the definition of an arbitral award to include other types of decisions would also create further similar issues.

The nature of the arbitrator will likely be a contentious aspect of such proposed amendment. The issue of whether an arbitrator must have a jurisdictional nature, a contractual nature, or both, remains a difficult question in international arbitration, although Santacrose’s observation of a trend towards a definition

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(172) See VV Veeder, ‘Provisional and Conservatory Measures’ in *Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects*, New York Convention Day Colloquial (UN Publication 1998) <<https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>> accessed 15 March 2019.

(173) Wang (n 1) 1098; Villani and Caccialanza (n 3) 1.

(174) New York Convention (n 70) art I (1).

that embraces both aspects is promising<sup>(175)</sup>.

This author agrees with Santacroce's definitional approach, i.e.: "[a]n independent and impartial third subject entrusted by the parties with the resolution of their dispute, who will exercise his task in an adjudicatory manner and whose decision will yield the effects of a judgment rendered by state courts"<sup>(176)</sup>.

The most difficult aspect of any proposed amendment will be the issue of finality of an award. Commentators largely agree that the New York Convention requires a final award<sup>(177)</sup>.

The amendment, however, could clarify the effect of a review by a latter constituted arbitral tribunal or the same arbitral tribunal on the finality of the award.

In this regard, the New York Convention ought to adopt the approach by U.S. courts that look to the policy favouring arbitration when determining finality. A contrary approach would render interim measures, including emergency arbitration decisions, untenable and weaken the international arbitration regime, which would have to rely on court ordered interim measures.

### **B. Amend National Arbitration Laws**

Whether a court will enforce an emergency arbitrator's decision will depend largely on the "particular provisions of that country's arbitration laws"<sup>(178)</sup>. In this regard, arbitral friendly countries must amend their national arbitration laws to include express provisions that recognise the enforceability of decisions issued by an emergency arbitrator regardless of the seat<sup>(179)</sup>.

This is the approach taken by Singapore, Hong Kong, Australia, and New Zealand. Such an amendment should include a definition of "arbitral tribunal" or "arbitrator" to include an "emergency arbitrator" akin to the approach adopted by New Zealand<sup>(180)</sup>. Hong Kong's approach, which provides for a definition of "emergency arbitrator", is likewise effective.

Additionally, such an amendment must recognise the enforceability of

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(175) Santacroce (n 114) 213.

(176) *ibid.*

(177) Santens and Kudrna (n 3) 9-10; Kroll (n 77) 95-96; Savola (n 1) 73-96.

(178) Ashford (n 13) 63.

(179) Smith (n 57) 17.

(180) New Zealand Arbitration Act (1999) s 2(1).



an emergency arbitrator decision regardless of the form of the award, and regardless of the seat. Unfortunately, a number of jurisdictions like the U.K. and India, though enforcing domestic interim measures, will not enforce interim measures, including emergency arbitration decisions, rendered in a foreign seat.

### **C. Enactment by UNCITRAL Model Law Jurisdictions of the 2006 Amendments**

Some commentators argue that jurisdictions that follow the UNCITRAL Model Law's 2006 Amendments will likely enforce emergency arbitration decisions under Article 17H(1)<sup>(181)</sup>. That Article 17H will lead to the enforcement of emergency arbitral decisions remains controversial absent a consensus among courts from jurisdictions that have adopted the UNCITRAL Model Law and enacted the 2006 amendments.

However, only a small number of countries that adopted the UNCITRAL Model Law have enacted the 2006 amendments<sup>(182)</sup>. This means that the majority of these countries still follow the 1985 UNCITRAL Model Law, which does not have specific provisions relating to the enforcement of interim measures<sup>(183)</sup>.

In time, it is likely that these jurisdictions will enact the 2006 amendments. To avoid conflicting decisions as to the applicability of Article 17H to emergency arbitrator decisions, it will become necessary to amend the UNCITRAL Model Law to provide explicitly for its application to emergency arbitrator decisions.

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(181) See Bao (n 45) 282-283; Savola (n 1) 95 (recognizing that "this argument is not necessarily full-proof"); Fry, Greenberg, and Mazza (n 64) 302-305; Voser and Boog (n 64) 85-86; Grando (n 11) 1.

(182) See Smith (n 57) 17 (noting that in 2010, only 17 states had enacted the 2006 amendments).

(183) *ibid.*

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