TALLINN UNIVERSITY OF TECHNOLOGY
School of Business and Governance
Department of Law

Anna-Kaisa Mäenpää

EMERGENCY ARBITRATOR PROCEEDINGS IN INTERNATIONAL COMMERCIAL LAW

Bachelor Thesis

Supervisor: Agnes Kasper, Ph.D.

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I hereby declare that I am the sole author
of this Bachelor Thesis and it has
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Anna-Kaisa Mäenpää
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Abbreviations

HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
SIAC	Singapore International Arbitration Centre
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	Model Law for International Commercial Arbitration

Introduction

In the last few years there has been a rise in popularity of emergency arbitrator proceedings in international commercial arbitration. During the time when claimant is waiting for an award to be made by the arbitral tribunal, there exists the possibility of the respondent using this time to avoid any effects that might follow this decision.[1] More and more often parties are facing a situation where they are forced to seek urgent interim relief, but usually any interim relief sought requires an arbitral tribunal which has already been established. In some cases this is not quick enough. Before emergency arbitrators, there existed only the option to seek these measures through local courts, but this killed the idea of privacy of the proceedings that usually is the main reason for choosing arbitration over litigation.[2]

With emergency arbitrator, arbitral institutions have introduced an effective alternative way to manage these situations. These emergency proceedings provide parties the opportunity to seek interim measures before the constitution of an arbitral tribunal for example in situations where there exists a possibility that certain evidence that is crucial for the final outcome of the arbitral proceeding may be destroyed.[3] Adding emergency arbitrator proceedings in their rules, arbitral institutions have also increased the effectivity and attractiveness of arbitration in general level. The fact that these institutions have reacted to the problem is extremely important as international commercial arbitration is one of the most popular alternative dispute resolution methods when it comes to resolving a dispute of actors coming from different countries.[4]

Emergency arbitrator rules respond to the need of the parties. Putting together an arbitral tribunal is known to take time, and this time can be enough for the destruction of essential evidence or placing assets out of reach of the other party. This underlines the importance of access to urgent interim relief, as the issuance of these measures can have a major effect on the outcome of arbitral proceedings. [5]

1 Moens, G., Luttrell, S. Interim Measures of Protection under the Arbitration Rules of the Australian Centre for International Commercial Arbitration. Asian International Arbitration Journal 2010, 6 (1), pp 74-96, p 74.
2 Roth, M. Interim Measures. Journal of Dispute Resolution 2012, 2012 (2), pp 425-435, p 432.
3 Roth, M., Reith, C. Emergency Rules. Yearbook on International Arbitration (Eds. Roth, M., Geistlinger, M.). Vienna, NWV Neuer Wissenschaftlicher Verlag 2012, pp 65-74, p 66.
4 Nelson, S. C. International Commercial Arbitration Section Recommendations and Reports - American Bar Association Section of International Law and Practice Reports of the House of Delegates. International Lawyer (ABA) 1990, 24 (2), pp 599-604, p 599.
5 Roth, Reith. Emergency Rules, *supra* nota 3, p 66.

It is essential to emphasize these points, as there still exists arbitral institutions that have not yet adopted any kind of emergency proceedings. This poses a true problem for the institutions themselves as well as for the parties deciding on which institution's rules to choose for their contract. Also, it remains unclear for some of the previously mentioned how pre-arbitral interim relief can benefit them. In other cases, there exists scepticism towards emergency arbitrator, especially in relation to the status of it and enforceability of its decisions.

The purpose of this thesis is to demonstrate why pre-arbitral interim relief is beneficial for the arbitral institutions and parties using the rules of these institutions. This research also strives to open, examine and explain the main problems related to emergency arbitral proceedings. These aims are to be achieved with the help of a research question: **What legal factors support the introduction of pre-arbitral interim relief into the international commercial arbitration rules?** The hypothesis of the thesis is: **There are legal obstacles to the recognition and enforceability of pre-arbitral interim relief in international commercial arbitration.**

This research consists of qualitative methods and analysing legal texts. Furthermore comparative method is employed between different arbitration institutions. The main sources chosen for the thesis contain academic books and journals published in well-known publications, as well as the arbitration rules of different arbitral institutions. Major emphasis lies on academic journals as the subject of the emergency arbitrator is still rather new and therefore cannot be found in many books. The first chapter of the thesis deals with the concepts of arbitration and emergency arbitrator, and why arbitration proceedings are often chosen over traditional litigation in international commercial law. It also focuses to demonstrate those legal factors that support the introduction of an emergency arbitrator provisions in arbitration rules. The second chapter addresses two major problems often connected with emergency arbitrator; its status and enforceability of its decisions. In chapter three the author lays down new recommendations for institutional emergency arbitrator rules and examines the relationship between emergency relief and *ad ho*c arbitration.

1. The Need for Emergency Relief

Commercial law is an area of law that has always seeked harmonisation and unification.[6] However, despite all the efforts it still remains largely un-unified.[7] This, and the fact that disputes have been and will be an inevitable part of any kind of international relations is why different kind of dispute resolution methods are always needed.[8] Traditional litigation in court works well in certain situations. However, within the international business community it has never been a popular option of solving disputes for several reasons. First of all, traditional litigation is usually public. This means that if commercial companies would have to handle their disputes through it, their reputation might hurt and confidental information would be made public.[9] Commercial arbitration provides an alternative option and is widely used throughout the world within this community. While traditional litigation and its docket is public, with very slim chances to make a portion or all of it confidential, arbitrations are usually private and confidental.[10] Within arbitration, the proceeding itself alongside with all of the documents, filings and transcripts associated with it are very rarely made public.[11] Some of the most critical differences between litigation and arbitration concern interim measures. As interim relief has always been an essential feature of commercial litigation, it is no surprise that it has achieved increasing appreciation of its significance and availability in commercial arbitration also.[12]

6 Karton, J. The Culture of International Arbitration and the Evolution of Contract Law. Oxford, Oxford University Press 2013, p 2.
7 Karton. The Culture of International Arbitration and the Evolution of Contract Law, *supra* nota 6, p 2.
8 Merrills, J. G. International Dispute Settlement (Third Edition). Cambridge, Cambridge University Press 1998, p 1.
9 Fojo, R. 12 Reasons Businesses Should Use Arbitration Agreements, 2015. www.lawgives.com/guide/551c5a687777773fa5160200/12-Reasons-Businesses-Should-Use-Arbitration-Agreements (3.2.2017)
10 Fojo. 12 Reasons Businesses Should Use Arbitration Agreements, *supra* nota 9
11 *Ibid*
12 Michell, P. Interim Measures in Canadian Commercial Arbitration. Advocates' Quarterly 2007, 32 (4), pp 413-436, p 413.

1.1. Litigation vs Arbitration

Normal court proceedings are known to take time, in most cases years. This makes it very stressful and tiring for the parties, and drags the solution of the case to the unforeseeable future. In general, arbitration process is much more efficient than traditional litigation, not to mention shorter and more streamlined.[13] This is because of several different reasons. For example, motions for summary judgement and motions to dismiss are not normally included in applicable arbitration rules.[14] Also, the selected arbitrator has the power to prohibit these kind of motions altogether when holding a preliminary conference.[15] This basically means that the parties save valuable time and money because they don't have to use them on these motions, neither in preparing nor in defending them.[16] The absence of these dispositive motions usually means that in the preliminary conference the arbitrator will set deadlines that are much more compressed than in the traditional litigation.[17] Results can be seen examining resent statistics which show that generally it takes 475 days from arbitration process to proceed from filing to a decision, while the same process with traditional litigation takes from 18 months to three years.[18]

Another positive quality of arbitration process is its flexibility compared to the normal civil litigation. While traditional court proceedings must be organised and planned to suit the already full court schedule, arbitration proceedings depend on solely of the individuals involved.[19] Only the parties', their attorneys' and the arbitrators' limitations restrict the possibilities of the proceedings.[20]

While there exists a very little leeway with traditional litigation, arbitration proceedings provide the parties much more substantial control.[21] Procedural details that are out of the parties control in normal civil proceedings become controllable with arbitration, including elements such as the selection of arbitrators and their number, where the arbitration itself will take place, which

13 Fojo. 12 Reasons Businesses Should Use Arbitration Agreements, *supra* nota 9
14 *Ibid*
15 *Ibid*
16 *Ibid*
17 *Ibid*
18 *Ibid*
19 *Ibid*
20 *Ibid*
21 Collins, E. Pre-Tribunal Emergency Relief in International Commercial Arbitration Student Article. Loyola University Chicago International Law Review 2013, 10 (1), pp 105-124, p 106.

language is going to be used and whether the arbitration will be conducted *ad hoc* or through an arbitral institution.[22] This becomes very important with international commercial arbitration, as the control over the proceedings ensures that neither one of the parties has unfair advantage of their "home-court"; in arbitration, neutral forum can be created placing both of the parties on the same line.[23] However, the ability to select an arbitrator provides that it is possible for a party to some extent control its own destiny by getting an arbitrator that is known for example sympathizing with the plaintiff, which means that the plaintiff has greater chance to walk away from the arbitration with the result that is most favourable for him/her.[24]

Solving a dispute in court with traditional litigation costs usually a lot of money. This is because of the several different components that belong to this particular process. When time used in the process grows longer because of these components, costs rise automatically also. Logically, as several of these so called components, including dispositive motions, discovery, jury selection etc., are stripped from the arbitration process, it means that the process takes less time and money from the parties.[25]

Above stated shows that arbitration, international commercial arbitration in particular, seems to have many advantages over the traditional litigation.[26] International commercial arbitration has been particularly designed to assure parties coming from different jurisdictions to trust that their disputes will be solved completely neutrally by impartial actors.[27] This is why it has always been the most popular way to resolve different disputes among international commercial companies. In some cases parties have decided to choose international commercial arbitration simply because they haven't been able to agree upon any other specific venue.[28] However, despite its many positive elements, arbitration process through different arbitral institutions did not recognise the concept of emergency relief at all until resent years. Obtaining emergency relief means getting an injunction or other similar remedy in case of an emergency to preserve assets or

22 Collins, E. Pre-Tribunal Emergency Relief in International Commercial Arbitration Student Article, *supra* nota 21, p 106.
23 *Ibid*, p 106.
24 Fojo. 12 Reasons Businesses Should Use Arbitration Agreements, *supra* nota 9
25 *Ibid*
26 Collins, E. Pre-Tribunal Emergency Relief in International Commercial Arbitration Student Article, *supra* nota 21, p 105.
27 Born, G. B. International Commercial Arbitration: Commentary and Materials. Hague, Kluwer Law International 2001, p 2.
28 Toope, A. J. Mixed International Arbitration. Cambridge, Grotius Publications Ltd 1990, p 12.

otherwise maintain the status quo in the situation.[29] Parties that needed this specific relief within their dispute resolution were forced to turn to traditional litigation, which meant losing all the other benefits that came with arbitration.

Before emergency relief was introduced couple of years ago to the arbitral institutions, the only way for granting any relief was first to constitute an arbitral tribunal.[30] This process can take up to couple of months, not to mention that it grows instantly longer if there appears any problems, for example in cases where there are challenges to an arbitrator or the other party refuses to pay its share of the advance costs that are required to constitute an arbitral tribunal.[31] During this time, it has grown more and more usual that the parties are in need of urgent interim relief. For several different reasons, the parties may be reluctant to seek interim relief from court, for example because the matter will be handled in public and especially if the appropriate court to handle the case is the one in the home jurisdiction of the other party.[32]

This lead to conversation about offering early interim relief within arbitration, as it clearly is a vital part of the international commercial disputes. Arbitral institutions responded to this need by drafting their own emergency rules which allow parties to seek emergency relief before the formation of the arbitral tribunal from special emergency arbitrators. These rules can be seen as supplement to the existing system of interim measures.[33] Their main task is to protect the parties in the particularly vulnerable time before the constitution of an arbitral tribunal and through that guarantee legal certainty.[34]

The first major international arbitral tribunal to introduce emergency rules was the International Centre for Dispute Resolution (ICDR). ICDR included emergency arbitrator provisions to their amended rules in 2006.[35] After this, many other high profile arbitral institutions followed, for example International Chamber of Commerce (ICC), Singapore International Arbitration Centre

29 Collins, E. Pre-Tribunal Emergency Relief in International Commercial Arbitration Student Article, *supra* nota 21, p 105.
30 Shaughnessy, P. Pre-Arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules. Journal of International Arbitration 2010, 27 (4), pp 337-360, p 337.
31 Shaughessy. Pre-Arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules, *supra* nota 30, p 337.
32 *Ibid*, p 337.
33 Roth, Reith. Emergency Rules, *supra* nota 3, p 66.
34 *Ibid*, p 66.
35 Born, G., Caher, C., Scekic, M. The Rise of Emergency Arbitration Provisions in Arbitral Institutional Rules, 2014. www.expertguides.com/articles/the-rise-of-emergency-arbitrator-provisions-in-arbitral-institutional-rules/the0ri14 (6.2.2017).

(SIAC) and Hong Kong International Arbitration Centre (HKIAC).[36] The fact that these major international arbitral tribunals reacted to the need rising from the absence of proper emergency rules within international commercial arbitration clearly shows that emergency arbitrator fixes significant inadequacy within the arbitration process.

Even though these institutions are spread all over the world, each set of these of emergency arbitrator rules are broadly quite similar.[37] Basically they offer the possibility for appointment of an emergency arbitrator by the arbitral institution within one or two business days within receiving an application from one of the parties to the dispute.[38] Usually the emergency arbitrator has quite broad discretion in determining the conduct of any proceeding.[39] These proceedings include, for example, determining is there a need for some kind of hearing in that particular case. Also, another common characteristics with different arbitral institutions around the world is that as soon as the proper, full arbitration tribunal is constituted, the emergency arbitrator automatically ceases to play any part in the future arbitral proceedings.[40]

1.2. Legal Factors Supporting the Introduction of Emergency Relief

The process of granting interim relief for the parties before the existence of emergency arbitrators was time-consuming and unpractical to say the least. As obtaining interim relief as quickly as possible is often crucially important to the party whose interests are threatened by the other party, this presented a real problem.[41] Usually, if parties wanted to explore the possibility to use interim relief within their dispute, there was no other option than to turn to the state court if the arbitral tribunal was not yet constituted.[42] As stated before, this was not an ideal option for the parties that had agreed on arbitration for the purpose of avoiding public court process, not to mention impossible for those parties who had validly excluded any state court jurisdiction, including the power to grant interim relief, which is in some jurisdictions perfectly admissible.[43]

36 Born, Caher, Scekic. The Rise of Emergency Arbitration Provisions in Arbitral Institutional Rules, *supra* nota 35
37 *Ibid*
38 *Ibid*
39 *Ibid*
40 *Ibid*
41 Voser, N. Interim Relief in International Arbitration: The Tendency Towards a More Business-Oriented Approach. Dispute Resolution International 2007, 1 (2), pp 171-186, p 171.
42 Boog, C. Swiss Rules of International Arbitration - Time to Introduce an Emergency Arbitrator Procedure. ASA Bulletin 2010, 28 (3), pp 462-477, p 463.
43 Boog. Swiss Rules of International Arbitration - Time to Introduce an Emergency Arbitrator Procedure, *supra*

Other kinds of obstacles have been recognised also; in some cases parties have been denied from taking state court action for certain religious reasons, and in the United States there still exists unresolved situations where state courts have in some instances refused to grant interim relief solely because the parties have entered into an arbitration contract.[44]

The first and most important factor to support the introduction of emergency relief for all arbitral institutions around the world is the mere essence of arbitration: applying to a state court is against the very reason why arbitration is chosen over traditional litigation.[45] The main intention with arbitration is to exclude courts from parties' disputes. This is extremely important point especially in cases where the arbitration contract was entered for the sole reason of confidentiality, which is quite unlikely to be achieved within state court proceedings.[46] Privacy and confidentiality are traits that are valued highly within the commercial community, as they guarantee for the parties that their dispute will not harm their reputation or compromise their trade secrets for the public. They also allow companies with long-standing relationships to resolve their issue away from public scrutiny and offer the best chance to save the underlying business relationship.[47] Introducing an emergency relief to every arbitration rules throughout the world's arbitral institutions would solve this problem and guarantee that no matter which arbitral institution was chosen by the parties, their dispute resolution would follow the suit of arbitration, even in cases of emergency interim relief.

Another problem with not having emergency rules included in every arbitral institution's rules is that even though the parties decided to turn to the competent state court in hope for an emergency interim relief, it is possible that it may not be available as the court is usually bound by its own *lex fori* when specifying the possible content of these interim measures.[48] In these cases emergency arbitrator would solve the problem, as it can not be bound by any other rules than those of its own.

Thirdly, usually any emergency interim measures that are granted through state courts are open

nota 42, p 463.
44 *Ibid*, p 463.
45 *Ibid*, p 464.
46 *Ibid*, p 464.
47 Wang, W. International Arbitration: The Need for Uniform Interim Measures of Relief. Brooklyn Journal of International Law 2002, 28 (3), pp 1059-1099, p 1060.
48 Boog. Swiss Rules of International Arbitration - Time to Introduce an Emergency Arbitrator Procedure, *supra* nota 42, p 464.

to appeal.[49] This means that it is possible for the other party to unduly protract the procedure for getting the emergency interim measures granted.[50] This undermines the very point of emergency interim relief, as if these measures are not granted soon enough, the object that was supposed to be protected could be long gone by the time that state court could finally give its decision on the matter. However, interim measures ordered by an arbitral tribunal are usually not challengeable in many jurisdictions.[51] This means that through emergency interim relief parties are normally guaranteed to get quick emergency relief that is not threatened by the possibility for the other party to challenge.

Also, it is understandable that the party looking for an interim relief is not willing to turn to the state court for it as it usually happens to be the state court in the territory of its adversary that has the jurisdiction to grant these measures.[52] If the party seeking an emergency interim relief would choose to proceed with state court of its adversary, this would also expose it to the procedural and in some cases substantial laws of that particular state.[53] It is the very situation that the parties usually want to avoid; the sole purpose of arbitration agreement is to escape situations where laws of their opposite side would govern the dispute.[54] Instead of this kind of biased initial setting, arbitration agreement provides the possibility to handle disputes that arise under an international contract in a neutral forum that is located outside the home countries of the parties.[55]

It can be seen that the factors supporting the introduction of emergency arbitration proceedings in international commercial arbitration rules through all over the world are heavily leaning on the same facts that are presented in favour of arbitration in general when compared to traditional litigation. All of the situations described above where turning to state court is not an option for it is disadvantageous or impossible for the parties have the nature to seriously cripple the protection created specially through an arbitration process for the parties' rights.[56] It is the main

49 *Ibid*, p 464.
50 *Ibid*, p 464.
51 *Ibid*, p 464.
52 *Ibid*, p 464.
53 *Ibid*, p 464.
54 *Ibid*, p 464.
55 Sheppard, B. H., Townsend, J. M. Holding the Fort Until the Arbitrators Are Appointed: The New ICDR International Emergency Rule. Dispute Resolution Journal 2006, 61 (2), pp 74-81, p 76.
56 Boog. Swiss Rules of International Arbitration - Time to Introduce an Emergency Arbitrator Procedure, *supra* nota 42, p 464.

purpose of an arbitration process to get the parties agree to waive some rights, especially rights connected to procedural aspects of dispute resolution, so that the process could be more neutral and proficient.[57]

For these reasons it is crucial for the parties to an international commercial arbitration agreement to have the option to solve all aspects of their dispute within arbitration process. It is not sufficient procedure to have the granting of interim measures tied up with the constitution of an arbitral tribunal. Situations might occur where interim relief is needed prior to the constitution of this kind of tribunal, especially in circumstances where there is evidence that is crucial for the final outcome of an arbitral proceeding, and it could be destroyed if not protected.[58] The constitution of an arbitral tribunal is known to take time which the party seeking emergency relief usually does not have.

The need to obtain interim relief prior to the formation of an arbitral tribunal has been increasingly recognised by arbitral institutions all around the world. However, all of these institutions haven't adopted emergency rules that permit special emergency arbitrators to order conservatory measures or interim relief before the arbitral tribunal is constituted.[59] This poses a problem for those parties who have made an arbitration agreement under the arbitration rules of one of these institutions lacking emergency arbitrator provisions.

57 *Ibid*, p 464.
58 Roth, Reith. Emergency Rules, *supra* nota 3, p 66.
59 *Ibid*, p 66.

2. Status and Enforceability

2.1. Status of an Emergency Arbitrator

The authority of an arbitral tribunal to grant any kind of interim relief for the parties originates from their inherent powers to conduct arbitral proceedings and from any additional authority that may be given to them through a contract between the parties.[60] If a set of administrative rules is chosen for the arbitration by the parties, these rules are usually deemed incorporated into the agreement and the provisions of such rules will be determinative in an arbitration proceeding when talking about the arbitrators' power to grant interim relief.[61] Arbitrators' authority is governed normally by the contract provisions; the administrative rules incorporated by reference into the contract to be exact.[62] Rather than modifying their contracts so that they would provide more specific grants of power to arbitrators, large majority of the parties include broad arbitration clauses within their contracts to cover events that cannot be foreseen beforehand.[63]

Emergency arbitration is a rather new concept within the arbitration scene but definitely here to stay. However, there has been concerns about the status of an emergency arbitrator as well as the legal effect of its decisions, especially about their enforceability.[64] Even though voluntary compliance in many cases obviates the need for formal enforcement mechanisms, it is of special importance that emergency arbitrator proceedings will be eventually properly introduced into a legal framework in order to ensure that the effectiveness of these proceedings match the growing popularity.[65]

60 Hoellering, M. F. Interim Relief in Aid of International Commercial Arbitration. Wisconsin International Law Journal 1984, 1984 (1), pp 1-14, p 2.
61 Hoellering. Interim Relief in Aid of International Commercial Arbitration, *supra* nota 60, p 2.
62 *Ibid*, p 2.
63 *Ibid*, p 2.
64 Fry, J. The Emergency Arbitrator - Flawed Fashion or Sensible Solution. Dispute Resolution International 2013, 7 (2), pp 179-198, p 181.
65 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 181.

2.1.1. Pre-Arbitral Referee

Most of the arbitral institutions that have adopted emergency relief into their rules often refer to them as "emergency arbitrator proceedings". The question still remains whether this emergency arbitrator is indeed an arbitrator in the same sense as a normal arbitrator.[66] Before the emergency arbitrator was presented, ICC rules introduced new procedure with the name Pre-Arbitral Referee in 1990.[67] Pre-Arbitral Referee is a non-judicial procedural mechanism that permits the parties to seek emergency relief before actual arbitral tribunal is constituted.[68] This happens through a person known as the referee, who has the power to make certain orders relating to the case presented to it before the constitution of an arbitral tribunal.[69]

The name of this procedure gave rise to a discussion concerning the real status of it. Pre-Arbitral Referee has, according to the ICC rules, certain powers that were given to it by Article 2 of the pre-arbitral rules.[70] These powers are comparable to the ones bestowed upon an arbitral tribunal.[71] Despite this fact, there were questions that rose because of the unclarity of definitions; these rules do not define Pre-Arbitral Referee as an arbitrator, neither do they specify that the form of the decision made by this actor is actually an order.[72] Also, decisions made by it are not enforceable pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[73] Despite these unanswered questions, the ICC Pre-Arbitral Referee procedure offered a functional system for delivering interim measures at the time.[74] Currently the rules for Pre-Arbitral Referee are under review with the meaning of amending them with regard to pre-arbitral interim relief.[75]

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66 *Ibid*, p 186.
67 *Ibid*, p 185.
68 Falconer, C., Bouchenaki, A. Protective Measures in International Arbitration. Business Law International 2010, 11 (3), pp 183-194, p 188.
69 Sun, C. L., Weiyi, T. Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief. Contemporary Asia Arbitration Journal 2013, 6 (2), pp 349-372, p 360.
70 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 186.
71 *Ibid*, p 186.
72 *Ibid*, p 186.
73 Werdnik, R. Emergency Arbitrator and the new Ljubljana Arbitration Rules. Slovenian Arbitration Review 2013, 2 (3), pp 15-18, p 16.
74 Beraudo, J. Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals - A Comparison with the Republic of Congo Pre-Arbitral Referee Case Notes and Current Developments. Journal of International Arbitration 2005, 22 (3), pp 245-254, p 254.
75 Boog. Swiss Rules of International Arbitration - Time to Introduce an Emergency Arbitrator Procedure, *supra* nota 42, p 468.

Unclarity with definitions continues to be the issue with emergency arbitrator also. First of all, the term "arbitrator" is not defined in many national arbitration laws, let alone the term "emergency arbitrator".[76] In cases where there can be found a definition for "arbitral tribunal", it leads most of the time nowhere as the term refers back to the description of an arbitrator, which can be non-existent.[77] Examples of this kind of circular investigation can be found from Swiss Statute on International Private Law which states that the parties to a dispute should turn to state courts to enforce decisions in provisional and contemporary measures executed by the arbitral tribunal; however, there cannot be found any precise definition of an arbitral tribunal.[78] This solution of granting the arbitral tribunal the authority to order interim measures without defining what "arbitral tribunal" really is appears to be quite confusing.[79]

It seems that according to the most applicable arbitration rules, emergency arbitrator is not purely an arbitral tribunal.[80] This presumption is supported by the fact that when arbitration laws were drafted, there did not exist an actor that is now the emergency arbitrator, so it is safe to assume that this new actor is not meant to be considered under the statutory definition of an arbitrator either.[81]

2.1.2. Judicial Nature of Emergency Arbitrator

Those who are nevertheless still arguing that an emergency arbitrator is actually an arbitral tribunal support their claim by stating that the whole intention of the parties involved is to seek emergency relief from an arbitrator, namely emergency arbitrator, in contrast to pre-arbitral reference.[82] Even though this claim nods to the direction of principle of party autonomy within arbitration, it clearly limps because of the nature of an emergency arbitrator's role; reference only to intentions of the parties cannot be properly considered to answer the question whether an emergency arbitrator can be described as judicial.[83] Another argument in favour of emergency

76 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 186.
77 *Ibid*, p 186.
78 *Ibid*, p 186.
79 Voser. Interim Relief in International Arbitration: The Tendency Towards a More Business-Oriented Approach, *supra* nota 41, p 174.
80 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 186.
81 *Ibid*, p 186.
82 *Ibid*, p 187.
83 *Ibid*, p 187.

arbitrator being an arbitral tribunal is that they have many similarities between their duties.[84] In most arbitration rules the duties of an emergency arbitrator are linked with impartiality and independence, as do the duties of an arbitral tribunal also; they are seen related to impartiality, independence and fairness.[85] This is, according to those supporting the introduction of an emergency arbitrator as an arbitral tribunal, a proof to support their cause without the need for further definition.[86]

Due to the nature and purpose of arbitration, an arbitrator can be described being like a private judge for the parties to resolve their dispute.[87] Therefore there exists the judicial element within the process. Despite this fact, most of the national arbitration laws do not contain specific provisions about an arbitral tribunal's role as a judicial actor.[88] This is why most of the scholars are content to just draw a parallel line between the missions of actual judges and arbitral tribunals.[89] Also, it would be only logical to adopt such purposive approach that recognises emergency arbitrator as arbitral tribunal by necessary and logical implication in cases where the national arbitration law does not yet do so.[90]

According to some French authors, there exists two different criterion to determine whether an arbitral tribunal has a judicial role. The first criterion is that the arbitrator must resolve the dispute at hand according to known legal principles.[91] The second one states that the arbitral tribunal's decision must be legally binding.[92] With this specific criteria, it can be examined whether an emergency arbitrator could have a judicial mission in the same way that it is determined with an arbitral tribunals.

Examining the first criterion stating that the arbitrator must resolve the dispute according to legal principles, a question arises. This question is about the fact that does an emergency arbitrator actually resolve a dispute. When the main task of an emergency arbitrator is considered, it is not

84 *Ibid*, p 187.
85 *Ibid*, p 187.
86 *Ibid*, p 187.
87 *Ibid*, p 187.
88 *Ibid*, p 187.
89 *Ibid*, p 187.
90 Ghaffari, A., Walters, E. The Emergency Arbitrator: The Dawn of a New Age? Arbitration International 2014, 30 (1), pp 153-168, p 159.
91 Savage, J., Gaillard, E. (ed.) Fouchard Gaillard Goldman on International Commercial Arbitration. Hague, Kluwer Law International 1999, p 12.
92 Fouchard Gaillard Goldman on International Commercial Arbitration, *supra* nota 91, p 12.

to find a solution or make a decision about the whole dispute but just about those provisions related to interim relief. It is said according to some that there cannot be exercise of judicial power if there is no resolving of a dispute on the merits.[93] This follows the reasoning that is consistent with some authorities in relation to the question of what type of decision constitutes as an award for the purposes of the New York Convention.[94]

However, there exists also differing opinions on this matter. Others point out that a dispute regarding interim measures is a dispute just as much as any other.[95] When looking at the problem from this point of view, it has to be kept in mind that in this case, common sense meaning of the term "dispute" concerns all disputes; it should be understood to relate every single dispute no matter if it relates to the merits of the case or interim measures.[96]

The second criterion, in relation to the New York Convention, of the possibility of enforcing the decision of an emergency arbitrator as an award remains to be a different legal question. In simplest terms, a decision is enforceable in particular state if emergency arbitrator is recognised as an arbitral tribunal in national law. A decision is enforceable outside that particular state under the New York Convention if its recognised as arbitral award under the meaning of the New York Convention.[97] However, in situations where the decision made is dispositive of an issue, there exists authority for the proposition that certain types of interim relief can be recognised and enforced under the New York Convention.[98] This does not mean that the issue has to be dispositive of an issue on the merits.[99]

93 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 188.
94 Born, G. B. International Arbitration: Law and Practice. Hague, Kluwer Law International 2012, p 278.
95 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 188.
96 *Ibid*, p 188.
97 Lye, K.C., Yeo, C. T., Miller, W. Legal Status of the Emergency Arbitrator under the SIAC 2010 Rules. Singapore Academy of Law Journal 2011, 23 (1), pp 93-124, p 100.
98 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 189.
99 *Ibid*, p 189.

2.1.3. Form of the Decision of Emergency Arbitrator

Another interesting aspect of the status of an emergency arbitrator is the form of the decision of it and does it help to figure out the essential function of an emergency arbitrator.[100] There cannot be found any uniform rules in this matter and most of these rules are flexible to the form of the decision, while others state that decisions given by an emergency arbitrator can be only rendered in the form of order.[101] For example, while the ICC rules expressly state that the decision made by an emergency arbitrator shall take the form of an order, ICDR rules give it the power to either order or award interim relief.[102] Either way, it is important to emphasise that the choice of the form of an emergency arbitrator's decision has to be made while keeping in mind the duty to make every reasonable effort to make sure that the enforceability of the decision is actualising.[103]

The difference between forms that the decision of an emergency arbitrator can take, an award and an order, must be identified. The greatest divergence between the two is that normally an award is recognisable and enforceable through international frameworks in a way that an order simply is not, except when it is expressly stated in legislation.[104] Some emergency arbitrators are even granted the power to call their decisions as awards, which would seem like guaranteeing the enforceability of their decisions.[105] However, this is not so, as the fact still remains that there exists uncertainty because this kind of labels are not dispositive of the issues.[106]

This matter stays within the power of national courts, as it is ultimately their decision to make whether the decisions of an emergency arbitrator are qualified as awards for the purposes of their setting aside procedures or in respect of an action for recognition and enforcement of a foreign decision.[107]

There does not exist an independent definition of an award in the New York Convention, but it is traditionally believed by most authors that only final awards can be considered to be awards

100 *Ibid*, p 189.
101 *Ibid*, p 189.
102 Ghaffari, Walters. The Emergency Arbitrator: The Dawn of a New Age?, *supra* nota 90, p 159.
103 Giaretta, B. Duties of Arbitrators and Emergency Arbitrators under the SIAC Rules. Asian International Arbitration Journal 2012, 8 (2), pp 196-221, p 219.
104 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 190.
105 *Ibid*, p 190.
106 *Ibid*, p 190.

under the meaning of the Convention.[108] However, certain national arbitration laws state that a interim decision made by an emergency arbitrator is an award.[109] This means that according to these laws, for example under Spanish law, all of the interim measures originating from an emergency arbitrator can be enforced or set aside just like any other awards.[110]

This leads to the question whether it is possible that the decision of an emergency arbitrator could be regarded as an arbitral decision under this kind of law, and the status of this decision could be comparable to awards rendered by arbitral tribunals.[111] If so, it would be only natural that same proceedings could be taken against these decisions as those that can be taken against "normal" awards. This means that it would be possible for example to file for annulment.[112] It would be extremely strange to follow this suit in a situation where a party seeks enforcement of an award on provisional relief; whether it would be admissible to challenge the validity of an arbitration agreement, and if so, to what extent.[113] This would lead to a conclusion that because such an examination would most probably complicate the enforcement process, it would be easier and more straight forward for the parties themselves just to accept that an emergency arbitrator is not a real arbitrator in the sense that this name is usually used, and that the decisions made by an emergency arbitrator are not awards.[114]

When thinking about the main purpose of interim measures, it can be said that an award is not necessarily the most effective form of a interim decision to take, as it has been proven that a decision may be enforceable under the New York Convention when categorised as an order.[115] Whether issued by an emergency arbitrator within its own procedure or arbitral tribunal during its arbitration process, the sole purpose of interim measures is to provide effective and quick relief for the parties.[116] Examining emergency arbitrators' decision, it can be seen that usually they are rendered as orders, not awards. This is also shown by the statistics provided by SIAC, where it can be seen that almost half of the decisions made by emergency arbitrators are actually

107 *Ibid*, p 190.
108 *Ibid*, p 190.
109 *Ibid*, p 190.
110 *Ibid*, p 190.
111 *Ibid*, p 190.
112 *Ibid*, p 190.
113 Kojovic, T. Court Enforcement of Arbitral Decisions on Provisional Relief. Journal of International Arbitration 2001, 18 (5), pp 511-532, p 527.
114 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 191.
115 Kojovic. Court Enforcement of Arbitral Decisions on Provisional Relief, *supra* nota 113, p 527.
116 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 191.

in the form of an order instead of an award.[117]

There does exist problems with orders also. The greatest issue concerns enforceability, as it is again matter of the enforcing court and the laws of the country in which these proceedings are sought to decide whether a decision can be recognised and enforced as an order.[118] Another thing that determines the recognition and enforceability of the decision in the form of an order is the jurisdiction; whether the enforcement is sought in respect of an order in the jurisdiction where the order was originally made, or in the another jurisdiction where the decision was made.[119] This clearly shows that one should not have over-reliance on form and nomenclature, as it turns out that there exists no guarantee that a decision made by an emergency arbitrator categorised as an award would be enforced as one, or that a decision labelled as an order wouldn't be enforced as an award.[120]

The amendments of 2006 made by the United Nations Commission on International Trade Law (UNCITRAL) to its Model Law for International Commercial Arbitration (UNCITRAL Model Law) clear some issues relating to enforceability, as they state that any interim decisions made by an arbitral tribunals shall be recognised as binding and can be enforced by the state courts.[121] This means that also orders can be enforced on the same basis as awards.[122] These new rules make no distinction between the two, solving the problem by using only the term "interim measures", and talking about the enforceability and recognition of these measures.[123] Nevertheless, there still remains the problem with the definition; can an emergency arbitrator be categorised as an arbitral tribunal or not.[124]

Recently legislative amendments have been successfully intertwining with the new emergency arbitrator provisions introduced in some of the institutional arbitration rules. In 2012 the Singapore International Arbitral Act was modified so that some of its emergency interim relief provisions could complement the SIAC emergency arbitrator provisions that had already

117 *Ibid*, p 191.
118 *Ibid*, p 191.
119 *Ibid*, p 191.
120 *Ibid*, p 192.
121 UNCITRAL Model Law on International Commercial Arbitration (modified 7 July 2006), Article 17 H paragraph 1
122 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 192.
123 *Ibid*, p 193.
124 *Ibid*, p 193.

managed to solve the problem with definitions. This act states in its current rules that an arbitral tribunal means a sole arbitrator or a panel of arbitrators, or a permanent arbitral institution, and includes an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties.[125] The Singapore International Arbitral Act also follows the solution of SIAC to the question of enforceability of the decision by noting that all orders or directions given by an arbitral tribunal (which in this case means also an emergency arbitrator as stated above) shall be enforceable in the same way as any decision made by a court.[126]

All in all, there exists many different views regarding the status of an emergency arbitrator. It can be said that there lies major legal obstacles with the lack of proper definitions, regarding both the arbitrator itself as well as its decisions. There still remains the questions of whether a decision of an emergency arbitrator can really be considered as a decision, and in what form it should be handled, as an award or as an order. Nevertheless, many of the major arbitral institutions have been recently successful in introducing new amendments to their old rules with the meaning of resolving the question of the status of an emergency arbitrator. Some have even had legislative support, as SIAC in Singapore. It seems that despite the several problems regarding the status of an emergency arbitrator and the uncertainty of actually equating an emergency arbitrator with an arbitral tribunal, there can still be found strong arguments in favour of the opinion that it actually is more of an arbitral tribunal than a just mere expert or referee.[127] This view is supported by the fact that most of the duties of an emergency arbitrator are quite similar with the duties of an arbitral tribunal, and also by the fact that most the decisions of emergency arbitrators are binding in a way that can be compared to awards.[128]

2.2. Enforceability of an Interim Decision

As already studied above, there exists quite a few problems with the enforceability of an interim decision. These two main problems with an emergency arbitrator, meaning the status of it and enforceability of its interim decisions, go hand in hand as the form that the decision of an emergency arbitrator takes can help to determine the status and essential function of it.

125 *Ibid*, p 194.
126 Singapore International Arbitration Act (modified 15 May 2012), Article 12 para 6.
127 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 194.
128 *Ibid*, p 194.

2.2.1. Attitude of Courts

The most important test regarding the enforceability of an interim decision made by an emergency arbitrator is the attitude of the courts.[129] However, as the whole concept of an emergency arbitrator is rather new one, there exists a shortage of legal authority on these specific issues.[130] There can be found two cases that are related to these issues, and can be examined more closely in order to enlighten the attitude of the courts towards the enforceability of interim decisions made by an emergency arbitrator.

First one of these cases, *Socigti Nationale des Pitroles du Congo and Ripublique du Congo v TotalFinaElf E&P Congo*[131], occurred a little while back in 2003, when the concept of an emergency arbitrator was yet to make its bigger breakthrough. In this case, the question brought before the French courts was about the ICC's pre-arbitral referee's capacity and the nature of its decision. In 2003, the Republic of Congo initiated annulment proceedings against a decision made by a pre-arbitral referee before the Paris Court of Appeal.[132] The claimant contended that the decision of the referee was an award because the procedure did not amount to rules of arbitration.[133] This was however not the conclusion that the court reached. Arguing this conclusion the court pointed out that the wording of the pre-arbitral rules themselves very carefully avoided specifying the process as "arbitration" at any point.[134] This lead to the conclusion that this particular decision made by a pre-arbitral referee was not one of judicial nature, and therefore it was not possible to enforce it as an award.[135] Instead, the decisions made by the referee had the same binding effect as a contractual provision.[136] This basically meant that the court held the pre-arbitral referee's role to be more of an expert than an arbitral tribunal.[137] Denying the claim that the pre-arbitral referee could be regarded as an arbitral tribunal and through that denying also the claim that the decision made by this referee could be regarded as an award, the French court emphasised that the decision made by it would be only binding

129 *Ibid*, p 194.
130 *Ibid*, p 195.
131 Cour d'appel [CA], Regional court of appeal, Paris 1e ch, 29 April 2003.
132 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 195.
133 Gaillard, E., Pinsolle, P. The ICC Pre-Arbitral Referee: First Practical Experiences. Arbitration International 2004, 20 (1), pp 13-38, p 36.
134 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 195.
135 *Ibid*, p 195.
136 *Ibid*, p 195.
137 *Ibid*, p 195.

between the parties.[138] Any failure to comply with the decision had to be interpreted as a breach comparable to one of a contractual breach.[139] In short, the court stated that the pre-arbitral referee procedure couldn't be regarded as arbitration but a purely private contractual agreement.[140]

According to the French courts, it is not possible for a party seeking for an emergency relief through a pre-arbitral referee to have the decision of it enforced under the New York Convention.[141] This decision of the court is criticized by some authors, even though it is quite revealing.[142] However, it has to be kept in mind that in this case the question was about a pre-arbitral referee, and not specifically about an emergency arbitrator.[143]

Another more resent case concerning the enforcement of an interim decision was in *Chinmax Medical Systems Inc v Alere San Diego Inc.*[144] In this case, the Southern District of California considered the nature of an emergency arbitrator's decision which was issued in accordance with Article 37 of the ICDR rules.[145] There was a petition to vacate an emergency arbitrator's issuing arbitration award, but the court found that it was not possible for it to review the decision as it was not final and binding in a way that an award is.[146] However, the court stated that this decision was expressly subject to review by the full arbitral tribunal.[147] According to it, it was possible for the court to step in and vacate a decision by an emergency arbitrator only in extreme situations, without specifying what kind of situation an “extreme” situation is.[148]

As it can be seen from these two example cases, there still exists many uncertainties within the process of emergency arbitrator.[149] One of the biggest one of these seems to relate to the essential function of the emergency arbitrator.[150] Despite this, it has to be kept in mind that different courts can reach different kind of conclusions in the future, so it is possible that the attitude of courts

138 *Ibid*, p 195.
139 *Ibid*, p 195.
140 Falconer, Bouchenaki. Protective Measures in International Arbitration, *supra* nota 68, p 188.
141 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 195.
142 *Ibid*, p 195.
143 *Ibid*, p 195.
144 U.S. District Court for the Southern District of California, 3:10-cv-02467, 27 May 2011, Chinmax Medical Systems Inc. v Alere San Diego, Inc.
145 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 195.
146 *Ibid*, p 196.
147 *Ibid*, p 196.
148 *Ibid*, p 196.
149 *Ibid*, p 196.
150 *Ibid*, p 196.

may vary and change.[151] This could have been the matter with the *Socigti Nationale des Pitroles du Congo and Ripublique du Congo v TotalFinaElf E&P Congo* case also if it would have come in front of the court in present time; in that situation the French court would have been obliged to resolve the case based on the new emergency arbitrator rules by the ICC, and not the old ones concerning the pre-arbitral referee.[152]

As stated before, the matter of enforceability of an interim decision made by an emergency arbitrator cannot be dealt with without speaking also about the status of it. The greatest question lies in the legal status of an emergency arbitrator, which to this day still continues to be without any proper definition. However, in a practical sense, much will depend on the wording of the institutional rules and the wording of the particular arbitration law in question.[153] These issues matter when examining the enforceability of an interim decision; voluntary compliance with the emergency arbitrator procedures may be quite high, but this does not change the fact that there still exists considerable percentage of those who refuse to comply with emergency measures directed at them.[154] If a party has to have the interim decision made by an emergency arbitrator either enforced or set aside by the court, the question of the enforceability arises.[155]

2.2.2. Compliance

As enforceability is related to the fact of how effortlessly the parties will comply with the decisions of an emergency arbitrator, it is interesting to notice that there actually can be expected quite high incidence of voluntary compliance.[156] Even though arbitral institutions seem to take up for granted that parties to a dispute will voluntarily comply with interim measures ordered for them by an arbitral tribunal, this seems to be the prevailing trend at the time being.[157] From this high rate of voluntary compliance an assumption can be made that this would be the case with decisions made by emergency arbitrators also, and this assumption would probably be correct

151 *Ibid*, p 196.
152 *Ibid*, p 196.
153 *Ibid*, p 196.
154 Sherwin, P. J. W., Rennie, D. C. Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis. The American Review of International Arbitration 2009, 20 (3), pp 317-366, p 324.
155 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, supra nota 64, p 196.
156 *Ibid*, p 196.
157 *Ibid*, p 196.

one.[158] This is mainly because of the pattern that is starting to develop; the easier parties to a dispute comply with these decisions, the more likely it is for them to reach settlement.[159] Even though it is too early to make any definitive conclusions yet because of the insufficient evidence, it seems very likely that with the evidence collected to this date this is likely to be the case.[160] According to this prediction, a process that is concluded between the parties with voluntary compliance serves actually a practical purpose as it more often leads the parties to a settlement, despite of all uncertainties that are linked with the status of an emergency arbitrator and enforceability of its decisions.[161]

There does exist differing views from this assumption, as with every aspect of an emergency arbitrator as it has been shown before. Some consider this kind of thinking to be naïve because of the fact that the parties do not want or need anything else than a credible framework for enforcing decisions against importunate parties with the intention to support a broader culture of voluntary compliance.[162] According to them, even though it is an important part of a consensual judicial process to rely on voluntary compliance, because of the fact that arbitration increasingly resembles litigation this kind of trust in voluntary compliance isn't really justified.[163] However, although it is good to have these kind of procedures to support the other instruments with which parties may seek to resolve a dispute through an international commercial arbitration and they do provide a neat and practical solution to temporary problem, offering the possibility to turn to an emergency arbitrator does not take anything away from anyone, quite the opposite.[164] Parties who still want to turn to courts with their problem continue to be able to do so.[165] Also, under certain rules the provisions for expediting the formation of an arbitral tribunal still continue to be available.[166]

These old means still continue to exist, but they cannot be the solution to every situation. There will become instances where it is not possible to reach the court for some reason, or instances where it may not be the best choice to seek interim relief from rapidly convened arbitral tribunal

158 *Ibid*, p 196.
159 *Ibid*, p 196.
160 *Ibid*, p 196.
161 *Ibid*, p 196.
162 *Ibid*, p 197.
163 Kojovic. Court Enforcement of Arbitral Decisions on Provisional Relief, *supra* nota 113, p 512.
164 Fry. The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *supra* nota 64, p 197.
165 *Ibid*, p 197.
166 *Ibid*, p 197.

which will then continue to determine the merits of the dispute.[167] In these situations it is good to have that another option to turn to.

2.2.3. Legislative Support

The most important and effective thing when speaking about the enforceability of an interim decision made by an emergency arbitrator is to give emergency arbitrator that same legislative teeth that arbitral tribunals have. This has been already executed quite successfully by Singapore with their amended International Arbitration Act and Hong Kong by amending the Hong Kong Arbitration Ordinance in 2013 to match with the HKIAC rules that have showed the right approach to every other legislator throughout the world.[168] Without proper safeguards to ensure that decisions of an emergency arbitrator will actually have other weight than the mere persuasive power of an emergency arbitrator and the fact that it is not the best scenario for a party to a dispute to fail to comply with the order of an emergency arbitrator and start arbitral proceedings on the merits of your case in front of an arbitral tribunal, the uncertainty within the decisions made by an emergency arbitrator will remain.[169]

The new Singapore International Arbitration Act was briefly addressed when talking about the status of an emergency arbitrator; their 2012 amended rules gave the emergency arbitrator an equal status to an arbitral tribunal. They also ensured that an interim decision made by an emergency arbitrator would have the same weight as the decision of an arbitral tribunal by stating that all of decisions made by it shall be enforceable in the same way as any decision made by the court.[170] This choice was made because the importance of enforceability is reinforced by the view that the party to whom the interim decision is directed does not have the incentive of avoiding upsetting the arbitral tribunal which will ultimately decide the merits of the case, which leads to a conclusion that this party is much less likely to comply with the measure addressed to it voluntarily.[171]

167 *Ibid*, p 197.
168 *Ibid*, p 197.
169 *Ibid*, p 197.
170 Singapore International Arbitration Act (modified 15 May 2012), Chapter 143A
171 Lye, Yeo, Miller. Legal Status of the Emergency Arbitrator under the SIAC 2010 Rules, *supra* nota 97, p 100.

Without these new modifications to Singapore International Arbitration Act, inspired by the SIAC, that define the emergency arbitrator as an arbitral tribunal, it would be impossible to enforce any of its orders in Singapore.[172] Also, if orders made by the emergency arbitrator wouldn't be given the same weight as orders of arbitral tribunal, they would not be considered as arbitral awards under the New York Convention, and couldn't therefore be enforcer internationally either.[173] This is so because of the wording of the New York convention, which provides in its very first sentence that the Convention shall apply only to the recognition and enforcement of arbitral awards.[174] These arbitral awards are to be understood including not only awards made by arbitrators appointed for each case but also those that are made by permanent arbitral bodies to which the parties have submitted.[175] These words found from the New York Convention do not assist with determining the definition of an arbitral award; however, as stated before, the prevailing opinion amongst most of the commentators is that only the final award may be considered as an arbitral award and may therefore be enforced.[176] Even though these decisions may be enforceable in the jurisdiction where they have been rendered, their incompatibility with the New York Convention means that they cannot be enforced internationally.[177]

Despite that it has been demonstrated for example by the new SIAC rules that all the problems that have arisen with the introduction of an emergency arbitrator can be resolved sensibly with modifying the arbitration rules so that they will grant the status of an arbitral tribunal to an emergency arbitrator and recognise all the decisions made by it as arbitral awards guaranteeing also their international enforcement, there still exists major arbitral institutions who have not updated their rules to respond to these issues. This poses a real problem for the recognition of the status of an emergency arbitrator and also for the enforcement of interim decision made by it. Also, it is of great importance to get more legislators to follow the suit of Hong Kong and Singapore by updating their legislation to complement rules of arbitral institutions that have already recognised the status of an emergency arbitrator and taken care of the enforcement of its decisions.

172 *Ibid*, p 98.
173 *Ibid*, p 98.
174 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), Article 1 paragraph 1
175 Lye, Yeo, Miller. Legal Status of the Emergency Arbitrator under the SIAC 2010 Rules, *supra* nota 97, p 119.
176 *Ibid*, p 120.
177 *Ibid*, p 120.

The solution to this situation regarding especially the enforcement of the decisions made by an emergency arbitrator would be to ensure the application of a mechanism for the recognition and enforcement of arbitration decisions on the application of interim measures which would correspond with current international principles for the development of arbitration legislation.[178]

178 Prytyka, Y. Interim Measures in International Commercial Arbitration Topic of the Issue: International Commercial Arbitration: Modern Trends and Challenges (from Arbitration Clause to Arbitration Award Enforcement): Section III: Economic Courts and International Arbitration. Law of Ukraine: Legal Journal 2011, 2011 (2), pp 148-157, p 157.

3. Proposal for Emergency Arbitrator Rules

Interim relief has an important role in dispute resolution, as it ensures that the parties have the possibility to seek these measures, such as attachments and preliminary injunctions, when their opposition threatens to take action that cannot be undone.[179] Introduction of emergency arbitrator provisions to every arbitral institution's arbitration rules throughout the world is a goal that should be pursued. This would make different arbitration rules more equal, give those who want to use them more options from which to choose and offer better protection to the parties. These rules would not have to be identical; there exists much variety within those emergency arbitrator rules that have already been introduced by some arbitral institutions.

Features of emergency arbitrator proceedings vary depending on the chosen institution.[180] Each set of emergency arbitrator rules provides different pre-conditions to emergency relief, time limits, specific procedures and so on.[181] Despite this variety among these rules, all of them stem from a common procedural framework for emergency arbitration procedures.[182]

In the first section of this chapter the author focuses on demonstrating a proposal for emergency arbitrator rules that have been constructed by exploiting the already existing emergency arbitrator provisions of HKIAC, SIAC, ICC and ICDR arbitration rules and combining the most sensible features of them as a new general set of emergency arbitrator rules. The meaning is to present a simple set of rules that could be adopted as a base for emergency arbitrator rules to any remaining arbitration rules that are yet lacking the emergency arbitrator provisions.

In the second section of this chapter the author goes through the problems with combining emergency relief with *ad hoc* arbitration.

179 Sherwin, Rennie. Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis, *supra* nota 154, p 317.
180 Santacroce, F. G. The emergency arbitrator: a full-fledged arbitrator rendering an enforceable decision? Arbitration International 2015, 31 (2), pp 283-312, p 285.
181 Santacroce. The emergency arbitrator: a full-fledged arbitrator rendering an enforceable decision?, *supra* nota 180, p 285.
182 *Ibid*, p 285.

3.1. Institutional Emergency Arbitrator Rules

Because the following rules are not created for any specific arbitral institution, whenever an arbitral institution has to be referred, it will be done so by speaking of the Administrator of these rules (the “Administrator”).

3.1.1. Definitions

As was examined more closely in the previous chapter in relation to the status and enforceability of an emergency arbitrator, the greatest problems with these proceedings exist because of the lack of proper definitions. Without clearly defining the emergency arbitrator as an arbitrator in the same sense as an arbitral tribunal is one, there cannot exist any guarantees of the enforcement of decisions made by it. Defining emergency arbitrator as an actual arbitrator and all of its decisions as arbitral awards that can be enforced through the New York Convention minimizes most of the problems often associated with emergency arbitrator. As also mentioned before, there exists two arbitral institutions, SIAC and HKIAC, that have followed this plan and even better, they have also received legislative support from their states. This is why in the beginning of these example emergency arbitrator rules their model is followed. The first thing to do is to lay down the proper definitions for these rather new concepts of an emergency arbitrator and its decision.

The example below is originally taken from Article 1.3 of the SIAC rules and modified to suit into any arbitral institution's rules. The most important part of these definitions is to mention that an award includes the decision made by an emergency arbitrator, and specify that this emergency arbitrator means actually an arbitrator, or arbitral tribunal to be exact.

Provision proposed by the author:

“In these rules:
'Award' includes, inter alia, an interim, partial or final award or an award of an Emergency Arbitrator;

'Emergency Arbitrator' means an arbitrator appointed in accordance of these rules."

3.1.2. Application for Emergency Relief

The filing of an application for emergency relief is invariably the first step towards emergency arbitrator proceedings.[183] This particular application must contain description of the interim measure that is sought and all the information that is held necessary when trying to assess whether the emergency arbitrator has jurisdiction over the matter at hand.[184] It must also emphasize the urgency of the application as emergency arbitration is usually granted only in situations where there is reason to believe that the party requesting for the interim relief cannot wait for the constitution of the arbitral tribunal.[185]

Example article 1 is a mixture of Schedule 1 paragraph 1 from the SIAC rules and Appendix V Article 1 paragraph 3 from the ICC emergency arbitrator rules. The first thing to emphasise is that emergency proceedings must be applied before the construction of an arbitral tribunal, otherwise there would be no point for it. All parties must keep their personal data accurate and up to date to avoid slowing down the process. Three most essential parts of Article 1 are c, d and e. Before emergency arbitrator is constituted, there has to exists valid reason for it. A party seeking for interim relief must present his case; what has happened, what he wants from the emergency arbitrator and why he thinks he's entitled to this relief. It is also important to keep all parties to a dispute informed at all times and it is crucial that the party seeking emergency relief sends a copy of this application with all the information requested for the opposite party so that it is possible for this party to react if necessary. Example Article 2 is also taken from Appendix V Article 1 paragraph 3 of the ICC rules. In author's opinion it is important to include this article to these general rules as it gives the applicant the possibility to include other documents to his application, as long as he deems them important and relating to the cause.

Provisions proposed by the author:

183 Santacroce. The emergency arbitrator: a full-fledged arbitrator rendering an enforceable decision?, *supra* nota 180, p 285.
184 *Ibid*, p 285.
185 *Ibid*, p 285.

“1. A party seeking emergency interim relief may, concurrent with or following the filing of Notice of Arbitration but prior to the constitution of an arbitral tribunal, file an application for emergency interim relief (the “Application”) with the Administrator. The party shall, at the same time as it files the Application, supply this Application in a number of copies sufficient to provide one copy for each party, one for the Emergency Arbitrator and one for the Administrator. The application for emergency interim relief shall include the following:

a. the full name, description, address and other contact details of each of the parties;
b. the full name, address and other contact details of any person(s) representing the applicant;
c. description of the circumstances giving rise to the Application and of the underlying dispute referred or to be referred to arbitration;
d. the nature of the relief sought;
e. the reasons why the party sees that it is entitled to such a relief;
f. any relevant agreements and, in particular, the arbitration agreement;
g. any agreement as to the place of the arbitration, the applicable rules of law or the language of the arbitration;
h. proof of payment of the required sum;
i. any Request for Arbitration and other submissions in connection with the underlying dispute, which have been filed with the Administrator by any of the parties to the emergency arbitrator proceedings prior to the making of the Application; and
j. a statement certifying that all other parties have been provided with a copy of the application or, if not, an explanation of the steps taken in good faith to provide a copy or notification to all other parties involved.”

“2. The Application may also contain such other documents or information as the applicant considers appropriate or as may contribute to the efficient examination of the Application.”

3.1.3. Appointment of the Emergency Arbitrator

After these definitions and rules for filing an application for emergency relief, the next logical step is to lay down the rules for the appointment of an emergency arbitrator. This appointment has to be executed quickly, as the main purpose of an emergency arbitrator is to grant interim relief as swiftly as possible. The appointment also includes rules about transmission of files and the correct conduct of an emergency arbitrator.

Example Article 3 derives from Article 6 paragraph 2 of the ICDR rules and executes one of the most essential and valuable features of the emergency arbitrator which is the quick constitution of it. Article 4 originates from Schedule 1 paragraph 4 of the SIAC rules emphasising the principle of party autonomy within arbitration; if there exists an agreement on the seat of the proceedings, that seat shall also be the seat of emergency arbitrator. However, if the seat is not agreed or other obstacles occur, it is important to have rules that cover these situations also. In this case, the author considers that the execution in the SIAC rules is a sensible one. In situation where the seat is not determined, the decision making power over it transfers to the Administration with respect to the Tribunal.

Provisions proposed by the author:

"3. Within one business day of receipt of the Application as provided in Article 1, the Administrator shall appoint a single Emergency Arbitrator."

"4. If the parties have agreed on the seat of the arbitration, such seat shall be seat of the proceedings for emergency interim relief. Failing such an agreement, the seat of the proceedings for emergency interim relief shall be under the consideration of the Administrator, without prejudice to the Tribunal's determination of the seat of the arbitration having regard to all the circumstances of the case."

Example Article 5 is Article 6 paragraph 2 of the ICDR rules and Appendix V Article 2 paragraph 4 and 5 of the ICC rules combined. The meaning of it is to underline the principle of impartiality. There cannot exist any conflicts of interest with the emergency arbitrator. Meaning

behind the short deadline of one day to challenge the appointment of the emergency arbitrator continues to ensure the quick process which is an essential part of these proceedings. Schedule 4 paragraph 7 of the HKIAC rules is the basis of example Article 6. This is the article that finally constitutes the emergency arbitrator. The Administrator has to inform this appointment to the parties and transmit the file to the emergency arbitrator. The article also states that for this point onwards, all communications from the parties are dealt by the emergency arbitrator, not the Administrator. All parties, meaning the two parties to a dispute, the emergency arbitrator and the Administrator have to have all communications disclosed to them at all times to maintain the openness and trust within the process.

Provisions proposed by the author:

"5. Every Emergency Arbitrator shall be and remain impartial and independent of the parties involved in the dispute. Prior to accepting appointment, a prospective Emergency Arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The Administrator shall provide a copy of such statement to the parties involved. Any challenge to the appointment of the Emergency Arbitrator must be made within one business day of the communication by the Administrator to the parties of the appointment of the emergency arbitrator and circumstances disclosed."

"6. Once the Emergency Arbitrator has been appointed, the Administrator shall notify the parties to the Application and shall transmit the file to the emergency arbitrator. Thereafter, all written communications from the parties shall be submitted directly to the Emergency Arbitrator with a copy to the other party to the Application and the Administrator. A copy of any written communications from the emergency arbitrator to the parties shall also be copied to the Administrator."

Example Article 7 is important to include in these example rules as it brings out the provisional nature of the emergency arbitrator. The sole meaning of these proceedings is to grant emergency interim relief. After this, the dispute transfers to an arbitral tribunal which can decide on the merits of the case as it pleases; it is not tied up with the decisions made by the emergency arbitrator and is completely free to either support them or undo them. This example is taken from

Schedule 1 paragraph 6 of the SIAC emergency arbitrator rules.

Provision proposed by the author:

"7. An Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless otherwise agreed by the parties."

3.1.4. Costs of the Emergency Arbitrator

Emergency arbitrator proceedings are not free of charge, but require different kinds of payments, for example of the non-refundable administration fee. This is so that emergency arbitrator could operate, and it also ensures that the parties take these proceedings more seriously. Example Article 8 concentrates to these payments and it derives from Schedule 1 paragraph 2 of the SIAC rules.

Provision proposed by the author:

"8. Any application for emergency interim relief shall be accompanied by payment of the non-refundable administration fee and the requisite deposits under these rules towards the Emergency Arbitrator's fees and expenses for proceedings pursuant to these rules. In appropriate cases, the Administrator may increase the amount of the deposits requested from the party making the application. If the additional deposits are not paid within the time limit set by the Administrator, the application shall be considered withdrawn."

3.1.5. Proceedings

After these steps, emergency arbitration provisions in arbitration rules should also include detailed rules about proceedings covering all aspects from the beginning of these proceedings until the very end of them.

Example Article 9 originates from Article 6 paragraph 3 of the ICDR rules, Article 10 from

Schedule 4 paragraph 12 of the HKIAC rules and Article 11 from Schedule 4 paragraph 13 of the HKIAC rules. Each of these Articles ensure that the emergency arbitrator follows its purpose to act fast. In Article 9 this is taken care of by stating that the emergency arbitrator must take action to resolve the situation as soon as possible. As these proceedings usually move with such a great speed, it is understandable if all parties are unable to attend physically, which is why the Article states also that other ways to that party to be heard must be made possible. This Article also gives the emergency arbitrator the authority of the arbitral tribunal. Article 10 sets the time limit for the decision of the emergency arbitrator. Article 11 emphasises that the transmission of file to the arbitral tribunal in the meantime does not stop the emergency arbitrator for giving its decision.

Provisions proposed by the author:

“9. The Emergency Arbitrator shall as soon as possible, and in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard and may provide for proceedings by telephone, video, written submissions, or other suitable means, as alternatives to an in-person hearing. The Emergency Arbitrator shall have the powers vested in the Tribunal pursuant to these Rules, including the authority to rule on his own jurisdiction, without prejudice to the Tribunal’s determination.”

“10. Any decision, order or award of the Emergency Arbitrator on the Application (the "Emergency Decision") shall be made within fifteen days from the date on which the file was transmitted to the Emergency Arbitrator. This period of time may be extended by agreement of the parties or, in appropriate circumstances, by the Administrator.”

“11. The Emergency Decision may be made even if in the meantime the file has been transmitted to the arbitral tribunal.”

Example Article 12 is a mixture of Schedule 1 paragraph 8 of the SIAC rules and Schedule 4 paragraph 14 of the HKIAC rules. This Article gives the emergency arbitrator the power to basically decide on any kind of interim relief it considers necessary and states the form of this

emergency decision. Example Article 13 defines the situations where this emergency decision ceases to be binding. Here it is important to notice the point a, which gives the emergency arbitrator also the power to withdraw its decision. When constituted, the arbitral tribunal has also the power to withdraw it. This example is taken from Schedule 4 paragraph 19 of the HKIAC rules.

Provisions proposed by the author:

"12. The Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary, including preliminary orders that may be made pending any hearing, telephone or video conference or written submissions by the parties.
Any Emergency Decision shall:
a. be made in writing;
b. state the date when it was made and summary reasons upon which the Emergency Decision is based (including a determination on whether the Emergency Arbitrator has jurisdiction to grant the Emergency Relief); and
c. be signed by the Emergency Arbitrator."

"13. Any Emergency Decision ceases to be binding:
a. if the Emergency Arbitrator or the arbitral tribunal so decides;
b. upon the arbitral tribunal rendering a final award, unless the arbitral tribunal expressly decides otherwise;
c. upon the withdrawal of all claims or the termination of the arbitration before the rendering of a final award; or
d. if the arbitral tribunal is not constituted within 90 days from the date of the Emergency Decision. This period of time may be extended by agreement of the parties or, in appropriate circumstances, by the Administrator."

Example Article 14 originates from Schedule 1 paragraph 10 of the SIAC rules. It is important to stress that the emergency arbitrator operates for one purpose only, namely granting emergency interim relief before the arbitral tribunal is constituted. After this constitution, the arbitral tribunal is in charge and may do whatever it feels like is the best option to proceed, whether it is

in accordance with the emergency decision made by the emergency arbitrator or not. The following example, Article 15 deriving from Article 6 paragraph 6 of the ICDR rules, provides that the emergency arbitrator can make the emergency decision subject to such condition as requiring the provision of appropriate security.

Provisions proposed by the author:

“14. Subject to Article 11 of these rules, the Emergency Arbitrator shall have no power to act after the Tribunal is constituted. The Tribunal may reconsider, modify or vacate any interim order or Award issued by the Emergency Arbitrator, including a ruling on his own jurisdiction. The Tribunal is not bound by the reasons given by the Emergency Arbitrator.”

“15. Any interim award or order of emergency relief may be conditioned on provision of appropriate security by the party seeking such relief.”

Example Article 16, originally from Schedule 4 paragraph 22 of the HKIAC rules, stresses that at any given time, if the need should arise, the parties are free to turn to the courts. This ensures that the emergency arbitrator does not limit any possibilities of the parties and supports the principle of party autonomy. Article 17, from Schedule 4 paragraph 24 of the HKIAC rules, states that it is on the emergency arbitrator's responsibility to pursue emergency decision that will be valid so that these rules could respect the principle of legal certainty.

Provisions proposed by the author:

“16. The Emergency Arbitrator Procedures are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time.”

“17. The Emergency Arbitrator shall make every reasonable effort to ensure that an Emergency Decision is valid.”

3.2. Emergency Relief in *Ad Hoc* Arbitration

There exists two different forms of arbitration; institutional arbitration and *ad hoc* arbitration. Both of these forms have different mechanisms for appointing the arbitrators.[186] In institutional arbitration an arbitral institution like HKIAC or ICC administers the arbitration process following its own institutional rules.[187] In *ad hoc* arbitration, it is up for the parties themselves to make arrangements for the selection of arbitrators and for the applicable law, designation of rules, administrative support and procedures.[188]

With institutional arbitration parties don't have to think so much about emergency interim relief as they just have to make sure that the arbitral institution of their choice includes emergency arbitration provisions in their arbitration rules. However, when engaging themselves in *ad hoc* arbitration, parties have to concentrate also in emergency interim relief as all aspects of their arbitration agreement are up to themselves. For the purpose of making *ad hoc* arbitration equal to institutional arbitration, it would be important to include emergency arbitration provisions in these rules. Basically, law should ensure that *ad hoc* arbitration would obtain the same safeguard mechanisms as institutional arbitration does.[189] However, this is not so simple with emergency relief as *ad hoc* arbitrations have no institutional oversight.

Parties choosing to add *ad hoc* arbitration clause in the underlying contract between them have few different options on how to come up with a complete set of rules which will meet all of their personal needs. First of these is to use arbitration rules of bodies that have designed such set of rules especially for *ad hoc* proceedings.[190] The most well known example of this kind of body is the UNCITRAL Model Law. The current UNCITRAL rules include provision about interim relief but not about emergency interim relief.

186 Bu, R. Emergency Arbitrator Procedure and Open-List Arbitrator Appointment Under the New China (Shanghai) Pilot Free Trade Zone Arbitration Rules: Dawn of a New Era? East Asia Law Review 2014, 10 (1), pp 66-100, p 88.
187 Bu. Emergency Arbitrator Procedure and Open-List Arbitrator Appointment Under the New China (Shanghai) Pilot Free Trade Zone Arbitration Rules: Dawn of a New Era?, *supra* nota 186, p 88.
188 *Ibid*, p 88.
189 Zhang, T. Enforceability of Ad Hoc Arbitration Agreements in China: China's Incomplete Ad Hoc Arbitration System. Cornell International Law Journal 2013, 46 (2), pp 361-400, p 398.
190 Pinsent Masons LLP. Institutional vs. 'ad hoc' arbitration, 2011. www.out-law.com/en/topics/projects--construction/international-arbitration/institutional-vs-ad-hoc-arbitration/ (13.4.2017).

Second option is to use or adapt a set of institutional rules, such as the SIAC or ICDR arbitration rules. If this method is applied, attentiveness is required as these institutional rules incorporated into *ad hoc* proceeding must be stripped down from any administration by the provider.[191] Otherwise there exists a risk of the parties creating unintentionally an institutional arbitration process, or creating ambiguities.[192] Final options are to either adopt an *ad hoc* provision from another contract or incorporate statutory procedures, for example English Arbitration Act of 1996.

The most popular methods are the first, using UNCITRAL rules, and the second, adapting existing institutional rules. However, when it comes to the Emergency Arbitrator, none of these options will do. There exists a reason why UNCITRAL rules do not contain emergency arbitrator provisions; this is because of the fact that *ad hoc* arbitration happens without institutional oversight and without it, there does not exist any institutional mechanism to appoint an emergency arbitrator before the constitution of an arbitral tribunal.[193] For the same reason it is impossible to adapt any existing institutional emergency arbitrator provisions to fit *ad hoc* arbitration.

This leaves only two possible routes to obtain emergency relief before an arbitral tribunal is constituted. The first of these is the court. It is crucial for the parties to think the importance of emergency relief before deciding on institutional or *ad hoc* arbitration; if it seems that the need for emergency interim relief may arise during the dispute, it is safer and more sensible to choose institutional arbitration. However, if for some reason this is not possible, it would be good to include standard contractual clause in the arbitration rules between the parties stating that any arising need for emergency relief in the case of a dispute should be handled by the court.

The second option is to adopt *ad hoc* section that states that in case of urgent need for interim relief, some organisation or an individual is competent to order certain binding emergency measures.[194] This organisation or person has only the powers granted to it in the contract between the parties. Both of these routes are rarely used and when so, usually as an exception.

191 Institutional vs. 'ad hoc' arbitration, *supra* nota 190

192 *Ibid*

193 Robertson, A. R., Carson, D., Harrell, D.E. "Rules for Appointing an Emergency Arbitrator – Drafting the International Arbitration Clause, Part 3 of 4", Corporate Counsel, 16.7.2015.

194 Boog. Swiss Rules of International Arbitration - Time to Introduce an Emergency Arbitrator Procedure, *supra* nota 42, p 465.

Conclusion

Arbitration has for a long time been a very popular choice among businesses that engage themselves in international trade. It has many traits that make it more favourable option than court in many ways. Arbitration process is quicker, more flexible, cheaper and provides the parties with more substantial control than traditional litigation. Not to mention privacy that arbitration proceedings offer for the parties, which is one of the most important aspects in commercial environment as it means that the companies are able to protect their trade secrets and avoid negative publicity. However, within the arbitration rules of different arbitral tribunals around the world, there has been a major flaw that has only just been started to get recognised in recent years.

This flaw is the lack of emergency procedures in arbitration rules. With growing number, situations that require an emergency relief have become more common, but not all of the many arbitration rules of different arbitral institutions have responded to this issue. Because of the lack of proper emergency procedures, the parties have been forced to turn to national courts to seek emergency relief. This has basically meant that they have lost all of the benefits that made them choose arbitration over traditional litigation in the first place.

In recent times there has been a rise of emergency arbitrators. Some of the most famous arbitral institutions have adopted rules that make constituting an emergency arbitrator possible. Before this possibility, parties wanting to seek urgent interim relief had two options; to turn to national courts and give up of all the benefits of arbitration, or seek this relief from an arbitral tribunal that had to be formed first. Constituting an arbitral tribunal can take time, and in a situation where a party is seeking an emergency relief, this time can be crucial as the other party may have the time to hide the assets or get rid of the property in question of these procedures. An emergency arbitrator however provides the parties with a third option, which is to get decision on interim measures from an emergency arbitrator which is formed before the constitution of an arbitral tribunal. This makes it possible for the parties to seek emergency relief without turning to traditional litigation or having to wait the formation of an arbitral tribunal.

Legal factors supporting the introduction of an emergency arbitrator into the rules of all arbitral institutions around the world start with the very essence of arbitration: intention to avoid going to

the state courts. Other factors include the *lex fori* rule that most national courts have to follow, guaranteed quick and unchallengeable interim decision compared to traditional litigation and handling disputes under neutral laws instead of turning to a state court and having to apply the laws of one particular state. These factors alone show that it is vital to get all arbitral institutions to include emergency arbitrator provisions into their arbitration rules as it ensures that no matter which institution will the parties choose, they will have the same options to handle situations where seeking emergency relief becomes inevitable.

However, as the concept of emergency arbitrator is rather new, it does not come without its problems. When it comes to an emergency arbitrator, there can be recognised two major complexities; the first concerns the status of it, and the second enforceability of its interim decisions. These two problems are intertwined as there cannot exist one without the other. Whether an emergency arbitrator can be regarded as an arbitral tribunal or rather an expert or a referee is a question that can be answered in many ways. The biggest legal obstacles can be found from lack of definitions, of the concept on an emergency arbitrator as well as its decisions. However, the most popular opinion seems to be that an emergency arbitrator is more of an arbitral tribunal than one of the two previously mentioned.

Even though arbitration process has been the answer to most problems arising from solving international commercial disputes with litigation in national courts, there has existed a gap in the arbitration rules of most arbitral institutions. With growing number of situations, emergency relief is needed in international commercial environment. This means situations where evidence that is essential for the final outcome of the arbitral proceedings is in danger to be destroyed, or the other party has assets that it might want to place out of reach if no preservation measures are taken against it.[195] Before the introduction of an emergency arbitrator there existed only two previously mentioned ways to proceed in this kind of situation and both of them had their problems.

These facts show that an emergency arbitrator is in many ways the right answer to the problem that has been around for a quite some time now. The sole purpose of arbitration is to give the parties another option next to traditional litigation. The latter does not serve the parties in a way

195 Roth, Reith. Emergency Rules, *supra* nota 3, p 66.

that would be beneficial for both in international commercial environment as it does not guarantee privacy, is time-consuming and costs a lot of money. Parties engaged in a dispute within this environment usually want their dispute to be solved in private without having to expose their commercial secrets, as quickly as possible so it does not harm the business and preferably as cheap as possible.

Emergency arbitrator fills the gap by introducing a measure that is comparable to an arbitral tribunal's proceedings as most of the duties of the former are the same as the latter's. This means that emergency arbitrator preserves the nature of an arbitral tribunal as most of the decisions that it makes are comparable to awards made in “real” arbitral proceedings. Making an emergency arbitrator equivalent to an arbitral tribunal ensures the parties the best terms of solving a possible dispute between them. It is the sole meaning of international commercial arbitration to offer these parties the most advantageous rules that are equal to both of them and by that way place them in neutral ground. Litigation in state courts always moves one or the other into an unfavourable position as state courts usually decide in favour of domestic companies. The laws of one country are also quite often notably favourable for national businesses.

Even though the benefit that emergency arbitrator provides for the parties themselves by offering the possibility to seek interim relief prior to the constitution of an arbitral tribunal and without having to turn to traditional litigation, as well as for the arbitral institutions by ensuring that they will not get overlooked because of the lack of proper measures to deal with emergency relief, there still exists arbitral institutions that haven't adopted the concept. For example, the Court of Arbitration at the Polish Chamber of Commerce adopted new arbitration rules on 1st of January 2015 without including any emergency arbitrator provisions in them despite their rising popularity.

Furthermore, despite the fact that several notable arbitral institutions have recently changed their arbitration rules and included emergency arbitrator provisions in them, it hasn't stopped previously mentioned problems with status of an emergency arbitrator as well as enforcement of its decisions from arising; does emergency arbitrator have judicial nature, what form should a decision made by an emergency arbitrator take, how do the courts react to these decisions, how high is voluntary compliance of the parties to follow emergency arbitrator's decisions or does

emergency arbitrator require legislative support. Arbitral institutions and states struggling with these problems should take notice of Singapore and Hong Kong that have given legislative support to interim measures made by emergency arbitrator, solving these problems once and for all. Without this kind of support, parties dealing with emergency arbitrator have to continue trusting the persuasive power of emergency arbitrators.

There are legal obstacles to the recognition and enforceability of pre-arbitral interim relief in international commercial arbitration. However, above stated proves that these two major problems that are normally linked with emergency arbitrator and those legal obstacles that are usually attached to it are not problems or obstacles that couldn't be resolved. They should not stand in the way of introduction of emergency arbitrator proceedings into arbitral institutions' arbitration rules all around the world. Bigger problem than the status and enforceability lies within differing opinions of them; as long as unanimity is not reached within scholars, emergency arbitrator will have to continue as an uncertain actor without any proper legal guarantees, excluding arbitration within SIAC and HKIAC rules, of the legal status of it and the possibility of enforcement of its decisions in international commercial arbitration.

All remaining arbitral institutions that have yet not adopted any kind of emergency arbitrator provisions in their existing arbitration rules are highly recommended to do so. It will not only expand their customer base by responding the growing need of the clients but also ensure their survival in this changing world. The author has put together an example institutional emergency arbitration rules that should offer the very basic outline of emergency arbitrator provisions and help possible clients as well as arbitral institutions considering to adopt emergency arbitrator proceedings in their own arbitration rules. Parties considering to choose institutional arbitration with rules that include emergency arbitrator provisions can see in general level how this process is regulated and what it includes. Arbitral institutions can have some kind of contact surface to how these proceedings should be regulated.

These proposed emergency arbitrator rules are the result of combining best parts, in authors' opinion, of four different arbitral institutions' emergency rules including SIAC, HKIAC, ICC and ICDR. Each of these four institutions have adopted their own procedural rules for emergency relief quite successfully despite the fact that even though there can be found many similarities

within them, there does exist differences also. This proves that although emergency arbitration rules usually share a common procedural framework, there is room for variety amongst them as well.

All in all, the emergency arbitrator is here to stay. Despite the problems linked to it it offers parties an easy and growingly reliable option to seek interim relief before constitution of an arbitral tribunal. It also helps them to remain within arbitration process, with no need to turn to litigation at any point as it has been shown that it usually is the last result that parties involved in an international commercial dispute would want. It can be said that the emergency arbitrator is the future of international commercial arbitration and should be treated as such.

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