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INTERIM MEASURES GRANTED BY THE EMERGENCY ARBITRATOR

IN INTERNATIONAL COMMERCIAL ARBITRATION

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CHAPTER 1: INTRODUCTION

1.1 Background

Arbitration is a dispute resolution method by which parties can resolve a controversy through an impartial authority for a final decision (an award).¹ Neutrality, a centralized dispute resolution, the enforceability of awards, commercial competence and expertise, the finality of decisions, party autonomy, flexibility, cost, speed, and confidentiality are some of the incentives for choosing international arbitration.² An independent survey indicated that 97% of participants remarked international commercial arbitration as their preferred method of dispute resolution, either on a sole basis (48%) or together with alternative dispute resolution (ADR) (49%).³

Interim measures, which can protect the rights of the parties from any possible damage with an order or an award in the arbitration process, have an outstanding place in international arbitration.⁴ However, the problem arises with regard to the enforceability of arbitral interim measures. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),⁵ dating back to 1958, is one of the most significant treaties on international arbitration. It provides the recognition and enforcement of foreign arbitral awards of the other Signatory States.⁶ However, the Convention does not deal with arbitral interim measures or their enforcement.

By comparison, with its 2006 amendments, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law) has accepted the power of arbitral tribunals to grant interim measures by confirming the growing importance of provisional measures in area of international arbitration.⁷ Similarly, over time, most states have started to accept the authority of arbitrators to grant interim measures in regulations, case law, and the legal literature.⁸ There are two basic models in the legal literature regarding the connection between judicial courts and arbitral tribunals with regard to interim measures: the court-subsidiarity model and the

¹ Neil Andrews, *The Three Paths of Justice*, Springer, 2nd ed. (Springer International Publication, 2018), 217.

² Gary B. Born, *International Arbitration: Law and Practice*, Wolters Kluwer (Kluwer Law International, 2012), 38.

³ Queen Mary University of London, "2018 International Arbitration Survey: The Evolution of International Arbitration," 2018, 5.

⁴ Born, *International Arbitration: Law and Practice*, 261.

⁵ United Nations, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1958).

⁶ As of June 2020; the Convention has 164 contracting states.

https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 accessed 31 July 2020.

⁷ United Nations Commission on International Trade Law, "UNCITRAL Model Law on International Commercial Arbitration," United Nations Publication, 1985, 24. The Model Law aims to help the signatory states to adapt their national regulations according to the new perspectives and tools in the international commercial arbitration by constituting the standards. With 2006 revisions, some articles of the original 1985 text were amended including the new Chapter IV A which involves detailed provisions about the arbitral provisional measures including the recognition and enforcement issues.

As of June 2020, 83 States in a total of 116 jurisdictions has been adopted regulation based on the Model Law. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status accessed 31 July 2020.

⁸ Mika Savola, "Interim Measures and Emergency Arbitrator Proceedings," *Croatian Arbitration Yearbook* 23 (2016): 73–97, 74.

free-choice model.⁹ England has adopted the first model. It accepts the priority of arbitrator power on interim measures and restricts the intervention of judicial courts except under specific conditions.¹⁰ The free-choice model, which has been adopted by Germany and Hong Kong, gives parties the option to apply both to the courts and to arbitral tribunals, according to their preferences.¹¹

International commercial arbitration has become more popular with the increase of global commerce. Therefore, this dispute resolution method required reforms in order to become more efficient. To achieve this, the arbitral community welcomed some mechanisms, including an emergency arbitrator, expedited arbitration, and summary/early determination procedures, to make arbitration proceedings swifter and more effective for the parties concerned. The rationale for an emergency arbitrator is to deal with the urgent needs of interim measures before the formulation of the arbitral tribunal.¹² It aims to preserve the rights of the requesting party from the other party's actions, like the dissipation of assets or evidence before the constitution of the arbitral tribunal.

A survey conducted by the Queen Mary University of London indicated that 46% of participants would prefer national courts when requiring urgent relief before the constitution of a tribunal, against 29% who would choose an emergency arbitrator.¹³ Also, 79% of respondents had doubts about the enforceability of emergency decisions, 93% supported the involvement of emergency arbitrator provisions in institutional rules, and 78% believed that their enforcement should be like arbitral awards.¹⁴ This survey indicated that if the enforceability of the emergency decisions can be guaranteed as the proper arbitral awards under the arbitral rules, the mechanism is preferable for the parties.

1.2 Literature Review

Emergency arbitrator procedures have been debated for years. Scholars have opposing views concerning the power of emergency arbitrators, the quality and enforcement of their decisions, and whether their decisions should be regarded as “orders” or “awards.”

On the one hand, some scholars claim that an emergency arbitrator is a regular arbitrator, and his decisions are enforceable. Santacrose has stated that the emergency arbitrator's validity relies on two issues: if the emergency arbitrator is an arbitrator and if his decisions are enforceable, which should both be answered in the affirmative.¹⁵ Yeşilirmak believes that an emergency arbitrator is an arbitrator, and the decisions granted by him are binding, for the reason that they have the adjudicatory feature.¹⁶ Similarly, Boog and Stoffel share the same opinion, stating that the title contains the term “arbitrator” – which is

⁹ Jan K. Schaefer, “New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared,” *Electronic Journal of Comparative Law* 2.2 (1998): 1–39, 1.

¹⁰ Schaefer, 11.

¹¹ Schaefer, 19 and 24.

¹² Chang Leng Sun and Tan Weiyi, “Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief,” *Contemporary Asia Arbitration Journal* 6, no. 2 (2013): 349–372, 360.

¹³ Queen Mary University of London, “2015 International Arbitration Survey: Improvements and Innovations in International Arbitration,” 2015, 27.

¹⁴ Queen Mary University of London, 28-29.

¹⁵ Fabio G. Santacrose, “The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?,” *Arbitration International* 31 (2015): 283–312, 311.

¹⁶ Ali Yeşilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005), 133.

adequate evidence for confirming the person's status – and the minimum requirements they have to possess as a proper arbitrator.¹⁷

On the other hand, some scholars claim that emergency arbitrators do not have the identical power as proper arbitrators. For instance, Baigel has proposed that, although the emergency arbitrator was accepted as a proper arbitrator by the 2012 International Chamber of Commerce (ICC) Rules,¹⁸ this is not determinative, because he is of the opinion that these provisions have a contractual character, not judicatory, and the parties to the arbitral process do not wish to create an award which possesses finality and bindingness.¹⁹ Moreover, for Azelius, Bergqvist, and Olsson, an emergency arbitrator can be regarded as an agreed, neutral authority with the power to grant unenforceable interim measures as a supplementary mechanism, but not as an arbitrator under the scope of the New York Convention.²⁰

Regarding the debate concerning the enforceability of an emergency arbitrator's decisions, on the one hand, Yeşilirmak has argued that an emergency arbitrator's decisions have a legal basis and have the potential of enforceability under the New York Convention.²¹ On the other hand, Azelius, Bergqvist, and Olsson believe that interim measures are not binding, because they are changeable; hence the enforcement of these relief measures is impossible under the New York Convention.²²

Furthermore, some states have adopted a different approach to emergency measures. For example, Singapore and Hong Kong amended their national legislation. In these states, an emergency arbitrator has equal legal status to an arbitral tribunal, and emergency measures are enforceable through the national courts with certainty.

1.3 Purpose of the Study and Research Question

This study focuses on the interim measures granted by emergency arbitrators in international commercial arbitration. This paper contributes to finding an answer to the enforceability of an emergency arbitrator's decisions by analyzing the emergency arbitrator procedures in the United Kingdom and Turkey.

The research question is: To what extent are an emergency arbitrator's decisions within international commercial arbitration enforceable in the United Kingdom and Turkey? The following sub-questions will help to answer the research question:

- What is the legal nature of arbitral interim measures in international commercial arbitration?

¹⁷ Christopher Boog and Bertrand Stoffel, "Preliminary Orders and the Emergency Arbitrator: Urgent Interim Relief by an Arbitral Decision Maker in Exceptional Circumstances," *ASA Special Series -Ten Years of Swiss Rules of International Arbitration*, no. 44 (2014): 71–82, 78.

¹⁸ ICC is one of the significant institutions in the arbitral community for providing international commercial dispute resolution to parties under its detailed arbitral rules. 2012 ICC Rules of Arbitration had introduced Emergency Arbitrator Provisions. Currently, 2017 Arbitration Rules, which amended the 2012 Rules and includes emergency arbitration proceedings invariably, are in force.

¹⁹ Baruch Baigel, "The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis," *Journal of International Arbitration* 31, no. 1 (2014): 1–18, 18.

²⁰ Lina Bergqvist, Emma Olsson, and Krister Azelius, "Making Use of the New SCC Rules on Emergency Arbitration," *Skiljedomsratt*, 2009, 936–948, 941.

²¹ Yeşilirmak, *Provisional Measures in International Commercial Arbitration*, 2005, 133.

²² Bergqvist, Olsson, and Azelius, 940-941.

- What are the emergency arbitrator procedures and its key features in the United Kingdom and Turkey?
- To what extent are arbitral interim measures within international commercial arbitration enforceable in the UK?
- To what extent are arbitral interim measures within international commercial arbitration enforceable in Turkey?

1.4 Methodology

This paper provides a comparative analysis of emergency arbitrator procedures in the United Kingdom and Turkey, based upon the national regulations, case law, and the rules of the countries' major arbitral institutions (the London Court of International Arbitration or LCIA and the Istanbul Arbitration Center or ISTAC). The reason for choosing to compare these two countries is the LCIA's success in the world in terms of prestige, former practices, and management²³ and ISTAC's recent implementation of the emergency arbitrator provisions.

1.5 Significance of this Paper

Realizing the value of interim measures in the arbitral proceedings resulted in the inclusion of arbitral-ordered interim measures in the Model Law – regarding the changes and needs of international commercial relations – which can be regarded as an important step for the arbitral community. Hence, the implementation of emergency arbitrator provisions, aiming to get relief measures but only urgent ones, may be regarded as the next step. The reason is that emergency arbitrator procedures have been gaining prominence lately. However, the legal position of the mechanism has not been confirmed yet, since the main treaties on arbitration do not refer to it, and case law illustrations depend on the perspective of the courts. This situation has led to a lack of confidence in the mechanism and results in uncertainties. This paper is expected to contribute to determining the legal position of emergency arbitrators and the enforcement of emergency measures.

1.6 Overview

Chapter 2 analyzes arbitral interim measures, the authorities that can grant these relief measures, and their enforceability. Chapter 3 explains the emergency arbitrator procedures, including details such as the requirements of emergency measures, their types, and forms. The nature of the emergency arbitrator and the enforcement of the emergency relief measures are examined from a case law perspective. Chapter 4 evaluates and compares arbitral legislation and the leading arbitral institutions of the United Kingdom and Turkey. Chapter 5 provides the conclusion to the thesis.

²³ Queen Mary University of London, "2018 International Arbitration Survey: The Evolution of International Arbitration", 2.

CHAPTER 2: INTERIM MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION

2.1 Interim Measures in Arbitration Proceedings

Interim measures,²⁴ which aim to preserve the status quo of the parties during the proceedings and secure the enforcement of the final judgment, have an essential place in dispute resolution mechanisms.²⁵ As long as more parties prefer arbitration instead of national courts, arbitral measures will be in demand.²⁶

In former times, courts were the single authority in granting arbitral interim measures,²⁷ but nowadays several states internalized the concurrent jurisdiction of national courts and arbitrators under their legislation clearly.²⁸ In some circumstances, court-ordered interim measures can be displeasing for a variety of reasons, such as the following:

- The wish of the parties to solve a dispute in confidentiality by an impartial tribunal which has a specific proficiency.
- To avoid the probable slowness and inefficiency of the courts or any suspicion about the court's neutrality.
- To abstain from a foreign judicial process which increases the costs of the process, for example by using a foreign language or translation of the documents or hiring a foreign counselor.
- To prevent the possibility of conflicting judicial decisions of different jurisdictions, particularly in international disputes.²⁹

At present, empowering arbitral authorities with the power to grant arbitral interim measures like national courts seems to be the trend in most states.³⁰ Also, they have become an essential part of arbitration procedure, particularly with the help of the Model Law. The Model Law defines interim measures in Chapter IV as follows:

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

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

²⁴ It is also known as provisional reliefs or conservatory measures.

²⁵ United Nations Commission on International Trade Law Working Group on Arbitration, “International Commercial Arbitration,” 2000, 2.

²⁶ Stephen M. Ferguson, “Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results,” *International Trade Law Journal* 12, no. 2 (2003): 55–67, 55.

²⁷ As an example of this historical feature, we can give the example of 1961 European Convention on International Commercial Arbitration (1961). Art. VI, paragraph 4 of the Convention remarks that a request for interim measures to a judicial authority shall not be deemed incompatible with the arbitration agreement. Later, under the Art. 26 of the UNCITRAL Arbitration Rules (1976), it is stated that in case of a request of a party, the arbitral tribunal may take the necessary interim measure that offered the parties a choice between the courts and arbitral tribunals.

²⁸ The Chartered Institute of Arbitrators, “Applications for Interim Measures,” *International Arbitration Practice Guideline*, n.d. Contrary to this tendency, there are some jurisdictions clearly ban on interim measures given by the arbitrators/arbitral tribunals like China, Czech Republic and, Italy.

²⁹ Savola, “Interim Measures and Emergency Arbitrator Proceedings.”, 74.

³⁰ Savola, 74.

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

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.”³¹

To date, the Model Law has been adopted in 83 states in a total of 116 jurisdictions.³² However, there is no practice unity among them due to the difference in the countries’ approach. Nonetheless, the Model Law indicates four goals of interim measures: continuance of the status quo; preservation of the arbitral process itself; protection of assets; and conservation of evidence.³³ These provisions can lead to a steady perspective for the authorities which play a role in the arbitral proceedings.³⁴

Guiding the Signatory States, the Model Law details provisions for arbitral interim measures. As the standard, Article 17-A states the conditions for granting interim measures. According to this article, the party requesting temporary relief must convince the arbitral tribunal on two grounds: irreparable harm that is likely to occur and the possible harm that may place the requesting party in a more disadvantageous position if the measure is not granted. In addition, the requesting party needs a reasonable possibility to succeed on the grounds of its claim.

2.2 Authorities that may Grant Arbitral Interim Measures

Interim measures particularly have importance at the early stage of judicial procedures for providing the final decision with efficiency. Principally, in case parties need an interim measure in the international arbitration process, parties can apply to three authorities: judicial courts, arbitral tribunals – constituted of one or more arbitrator(s) to resolve disputes through arbitration – and, if accepted, emergency arbitrators.

2.2.1 Courts

Parties have to apply to national courts to get an interim measure before the formation of the arbitral tribunal if the applicable arbitral rules, which can be national regulations or international arbitral rules, do not involve provisions for emergency arbitrators. Depending on the national legislation, there should be a “concurrent” or a “parallel” jurisdiction between the courts and the arbitral tribunals about the interim reliefs.³⁵ Article 9 of the Model Law also accepts this approach, by stating that a court-ordered interim measure, given in the arbitral process, is not contrary to the arbitration agreement.

In any case, parties can opt to get interim measures from the courts due to reasons such as the enforceability power of the courts directly,³⁶ the nonbinding feature of interim measures on third parties, and the capability of using the coercive powers of the state when

³¹ UNCITRAL Model Law, Art. 17(2).

³² https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status accessed 31 July 2020.

³³ Marianne Roth, “Interim Measures,” *Journal of Dispute Resolution* 2012, no. 2 (2012): 425–436, 426.

³⁴ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*. (Cambridge University Press, 2012), 107.

³⁵ Diana-Loredana Hogaş, “Considerations for Interim Measures in the International Arbitration,” *Conferinta Internationala de Drept*, 2015, 290–297, 291.

³⁶ Nathalie Voser, “Interim Relief in International Arbitration: The Tendency Towards a More Business-Oriented Approach,” *Dispute Resolution International* 1, no. 2 (2007): 171–186, 173.

needed.³⁷

2.2.2 Arbitral Tribunals

Today, it is widely accepted by major arbitral institutions that arbitral tribunals have the competency to grant interim measures.³⁸ The power of arbitral tribunals with regard to interim measures may stem from the arbitration agreement, the applicable arbitration rules, or the law applicable at the seat of the arbitration. If the parties agree not to authorize the arbitrators, this must be clearly stated in the agreement; also, in institutional arbitration, the institution's rules must be evaluated.³⁹ Inherently, if the parties agree on arbitration, then it must be accepted that the granted arbitral interim measures bind them. According to Blackaby et al., disregarding the given arbitral interim relief can be regarded as "brave or even a foolish behavior" for the parties.⁴⁰

2.2.3 Emergency Arbitrators

The emergency arbitrator procedure answers the urgent need for interim measures in the arbitral process. The basis for the mechanism stems from two situations: not obliging the parties to apply courts contrary to their wishes and avoiding harm during the possible prolonged duration of the arbitral tribunal constitution.

This mechanism is shaped like one of the usual processes of arbitration under most arbitral rules, unless the parties clearly express to "opt out" of this procedure. As stated by the ICC, the preference to opt out can also be implicit, for example when deciding on another mechanism like the pre-arbitral referee procedure.⁴¹ Because of doubts about the enforcement of emergency arbitrator decisions under the New York Convention, the parties

³⁷ Yeşilirmak, *Provisional Measures in International Commercial Arbitration*, 2005, 21.

³⁸ UNCITRAL Arbitration Rules, Art. 26: "The arbitral tribunal may, at the request of a party, grant interim measures."

ICC Rules of Arbitration, Art. 28: "Unless the parties have otherwise agreed, ..., the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate."

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules, Art. 37(1): "The Arbitral Tribunal may, at the request of a party, grant any interim measures it deems appropriate."

LCIA Arbitration Rules, Art. 25(1): "The Arbitral Tribunal shall have the power upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances:

- i. to order any respondent party to a claim or cross-claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner;
- ii. to order the preservation, storage, sale or other disposal of any documents, goods, samples, property, site or thing under the control of any party and relating to the subject-matter of the arbitration; and
- iii. to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties."

Singapore International Arbitration Centre (SIAC) Rules, Art. 30(1): "The Tribunal may, at the request of a party, issue an order or an award granting an injunction or any other interim relief it deems appropriate..."

Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules, Art. 23(2): "At the request of either party, the arbitral tribunal may order any interim measures it deems necessary or appropriate."

³⁹ Voser, "Interim Relief in International Arbitration: The Tendency Towards a More Business-Oriented Approach.", 175.

⁴⁰ Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 6th ed. (Oxford University Press, 2015), 426.

⁴¹ Jason Fry, Simon Greenberg, and Francesca Mazza, "The Secretariat's Guide to ICC Arbitration," 2012, 309.

may be reluctant to breach the agreement provisions at the outset of the arbitration proceedings, to prevent a negative impression during the procedure.

2.3 Enforcement of Arbitral Interim Measures

As mentioned above, arbitral authorities have the power to grant interim measures. However, they cannot enforce these relief measures like the ones granted by the courts – depending on national regulations – which can be executed directly or through official authorities in the ordered state.⁴² Therefore, in case of in compliance, enforcement of a decision can be provided with the assistance of the judicial courts.⁴³

In principle, the enforcement of a foreign arbitral award depends on the national law or the New York Convention. National legislation may allow or forbid an arbitral authority to grant interim relief measures in arbitration. If interim relief measures are allowed, these can in principle be enforced by the national courts. However, the enforceability of arbitral interim measures under the Convention is still dominating debates. The Convention regulates the recognition and enforcement of “foreign arbitral awards,” which have to be binding and final, but there is a question as to interim measures and their enforceability. Arbitral interim measures have a binding effect on the parties to the arbitration agreement. However, the finality feature of interim measures – whether the arbitral relief measure resolves a main part of the dispute during the arbitral process or not⁴⁴ – is controversial, regardless of whether it is tribunal-ordered or court-ordered.⁴⁵ In any case, it should not be forgotten that enhancing the efficiency of arbitration is the purpose of the Convention.

By contrast, the Model Law involves a subsection about the recognition and enforcement of interim measures. According to Article 17-H, a tribunal-ordered interim measure shall be recognized as binding and, unless otherwise provided by the tribunal, it can be enforced upon application to the competent court, regardless of the country where it was issued. In conclusion, in the countries which adopted the Model Law with the 2006 revisions, arbitral interim measures are enforceable.⁴⁶ Thus, interim measures granted in a different state can be enforced in other countries which adopted the Model Law with Article 17, without depending on the Convention.⁴⁷

In short, governments have the option to resolve disputes through arbitration if the parties agree to it. Arbitral interim measures play a significant role, particularly during the early stages of the proceedings, to ensure the rights of the parties and the validity of the arbitration agreement. Any party to the arbitral agreement may need a relief measure, whether urgent or not, to avoid possible harm before or during the arbitral proceedings. Thus, doubts about the enforcement of arbitral-ordered relief measures have to be eliminated. This can be done by providing the same effects to these as to court-ordered ones, especially for the improvement of the arbitration mechanism.

⁴² Yeşilirmak, *Provisional Measures in International Commercial Arbitration*, 2005, 236.

⁴³ Gary B. Born, “Provisional Relief in International Arbitration,” in *International Commercial Arbitration*, 2nd ed. (Kluwer Law International, 2014), 2424–2563, 2511.

⁴⁴ The Chartered Institute of Arbitrators, “Applications for Interim Measures.”, 13.

⁴⁵ Born, *International Arbitration: Law and Practice*, 269.

⁴⁶ Voser, “Interim Relief in International Arbitration: The Tendency Towards a More Business-Oriented Approach.”, 184.

⁴⁷ Moses, *The Principles and Practice of International Commercial Arbitration*, 112.

CHAPTER 3: EMERGENCY ARBITRATOR PROCEDURES

3.1 The Development of the Mechanism

Arbitration offers parties fast and confidential dispute resolution with neutrality and expertise of the decision-makers, which concludes in preference over courts' litigation, especially in international commercial disputes. The parties' intention and the arbitration agreement are the primary grounds for arbitration; thus, the arbitral tribunal should be seen as a "creature of contract."⁴⁸

Firstly, the confidentiality advantage of arbitration makes it one step ahead of the national courts. It allows keeping information confidential about the parties and the dispute (including trade secrets)⁴⁹ according to the wishes of the parties⁵⁰. Confidentiality cannot be guaranteed under the courts' judgment because most of the judicial process occurs publicly.⁵¹

Secondly, the neutrality and easiness feature of arbitration is noteworthy. The parties may prefer to have urgent measures by only applying one impartial authority, which is the arbitral tribunal instead of appealing to different countries' multiple courts.⁵²

Lastly, the court's possible lack of expertise in the specialization-required commercial disputes and availability of granting requested urgent measures can be the other motives for applying the arbitral proceedings by the parties.⁵³ The power of arbitral authorities in deciding the appropriate measures rather than the bordered ones in the usual legal proceedings may cause the arbitration more preferable.⁵⁴

Despite the advantages of the arbitration, the slow constitution of the arbitral tribunal may lead to problems for the urgent needs of the parties. The delayed constitution of an arbitral tribunal causes a provisional difficulty because in that case the parties are obliged to get the interim reliefs from the courts.⁵⁵

3.2 The Origin of the Emergency Arbitrator

Over time, new types of arbitral proceedings have emerged according to the actual needs of arbitration. The ground of the emergency arbitrator mechanism stands upon the Pre-Arbitral Referee Procedure – affected by the French Référé Procedure⁵⁶ - which was introduced in 1990 by the ICC. The procedure intends the parties to get urgent measures from an appointed referee in case of a dispute arising from a contractual relationship that occurred before the arbitration proceedings. The referee is the person who is empowered to decide on temporary relief for overcoming the urgent problem between the parties. As an

⁴⁸ Blackaby et al., Redfern and Hunter on International Arbitration, 437.

⁴⁹ Yeşilirmak, Provisional Measures in International Commercial Arbitration, 2005, 51.

⁵⁰ Santacroce, "The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?" 284.

⁵¹ Yeşilirmak, Provisional Measures in International Commercial Arbitration, 2005, 52.

⁵² Jason Fry, "The Emergency Arbitrator - Flawed Fashion or Sensible Solution?," Dispute Resolution International 7, no. 2 (2013): 179–198, 180.

⁵³ Fry, 180.

⁵⁴ Yeşilirmak, Provisional Measures in International Commercial Arbitration, 2005, 53.

⁵⁵ Fry, "The Emergency Arbitrator - Flawed Fashion or Sensible Solution?," 180.

⁵⁶ For more information on the Référé Procedure, Wallace R. Baker and Patrick De Fontbressin, "The French Référé Procedure-A Legal Miracle?" University of Miami International and Comparative Law Review 2, no. 1 (1993): 1–68.

example, under the ICC Rules, the Referee can order “any conservatory measures that are urgently necessary to prevent either immediate damage or irreparable loss” or “any measures necessary to preserve or establish evidence.”⁵⁷ However, the procedure has not been so effective because practicing the mechanism necessitates an express statement in the written agreement between the parties.⁵⁸

The next initiative for expediting arbitration can be seen as the Summary Arbitral Proceedings of the Netherlands Arbitration Institution (NAI), dated 2001. The rules aim at solving urgent issues related to interim measures with an appointed arbitrator rather than granting the final decision of the dispute.⁵⁹

At last, the International Center for Dispute Resolution (ICDR) introduced the emergency arbitrator mechanism under Article 37 of the ICDR International Arbitration Rules in 2006.⁶⁰ As of 31 December 2018, ICDR had 92 applications for emergency measures of protection⁶¹ related to several industries, including financial services, manufacturing, real estate, and technology.⁶² After this development, most of the arbitral institutions started to include the emergency arbitrator to their rules.⁶³ Also, some jurisdictions accepted the phenomenon and amended their national legislation by giving the same status to emergency arbitrators like arbitral tribunals.

The mechanism provides parties to get urgent interim measures before the constitution of the arbitral tribunal without the obligation of applying to courts. It considers the wishes of parties on arbitration and provides the effectiveness of the whole arbitral process. The emergency arbitrator is a different matter of fact, especially based on the procedure and the given decisions than the traditional arbitration.⁶⁴ Although the standard practice is parallel, the provisions related to emergency arbitrator differ among the arbitral institutions in the areas such as duration, the application process, and particular features.⁶⁵

3.3 Initiating the Emergency Arbitrator Procedure

The appointment of an emergency arbitrator starts with the request of a party that needs an urgent relief according to the relevant arbitral institution rules. The process may

⁵⁷ ICC Pre-Arbitral Referee Rules, Art. 2.

⁵⁸ Fry, “The Emergency Arbitrator - Flawed Fashion or Sensible Solution?”, 182.

⁵⁹ NAI Rules, Art. 36.

⁶⁰ ICDR Rules 2006, Art. 37(5): “The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measure may take the form of an interim award or of an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order for good cause shown.”

⁶¹ American Arbitration Association – International Centre for Dispute Resolution. “2018 ICDR Case Data Infographic.” According to this data, of those 92 cases, 43 were granted partially or in full, 21 requests were denied, 15 were settled and 13 withdrawn.

https://www.icdr.org/sites/default/files/document_repository/2018_ICDR_Case_Data.pdf accessed 12 April 2020.

⁶² International Centre for Dispute Resolution, “The ICDR International Arbitration Reporter,” Fall 2016, Volume 5, 5.

⁶³ ICC Rules, Art. 29; ICDR Rules, Art. 6; LCIA Rules, Art. 9B; SIAC Rules, Rule 30 and Schedule 1, SCC Rules, Appendix II; HKIAC Rules, Art. 23 and Schedule 4.

⁶⁴ Eliane Fischer and Michael Walbert, “Efficient and Expedited Dispute Resolution in M&A Transactions,” Austrian Yearbook on International Arbitration 2017, 2017, 21–48, 28.

⁶⁵ Rania Alnaber, “Emergency Arbitration: Mere Innovation or Vast Improvement,” *Arbitration International* 35, no. 4 (2019): 441–472, 446.

differ in the submission of the arbitration notice. As an example, under the ICC⁶⁶ and The Arbitration Institute of the Stockholm Chamber of Commerce (SCC)⁶⁷ rules, the party can apply to this proceeding before the submission.⁶⁸ Commencing the process under other institutions like ICDR⁶⁹ and Singapore International Arbitration Centre (SIAC)⁷⁰ necessitates the party to apply along with or after the submission of the notice.

Generally, an application of the emergency arbitrator proceedings has to involve some general information, including the names and contact details of the parties, an outline of the dispute, and a statement regarding the sought interim measure, including the reasons for the request.⁷¹ Some institutions require a copy or description of the arbitration agreement on which the dispute is based and the proof of the payment of the application.⁷² Also, it may be required to explain the reasons for the urgency which cannot await the formulation of the arbitral tribunal.⁷³ After the documentative works, the application can be filed to the relevant body of the institution that has the power to appoint the emergency arbitrator and send the request under the time limits determined by the respective rules. The relevant body of the institutions has to inform both parties about the situation and process upon a proper request.

In case there is an urgency by nature, according to major arbitral institutions, the emergency arbitrator is a single/sole arbitrator who is appointed by the relevant body of the arbitral institution. As an exception, NAI Summary Arbitral Proceedings allows the parties to agree on a method for the appointment.⁷⁴

The appointment authority and time limit may vary. For example, the appointment of the emergency arbitrator will be fulfilled by the President of the ICC Court “within as short a time as possible, normally within two days”⁷⁵, by the SCC Board “within 24 hours”⁷⁶, by the President of the SIAC Court “within one day”⁷⁷ and by the ICDR Administrator “within one business day.”⁷⁸

There is always a possibility for an emergency arbitrator to be challenged, which means the appointed arbitrator cannot act as an arbitrator for some reason according to the existing conditions. The purpose of the challenge is to provide impartiality to the arbitration without raising any doubts related to the process similar to the usual court litigation. A challenge against an emergency arbitrator can be done by the request of the emergency arbitrator himself or the parties, in defined time limits. This challenging period varies under the rules of the arbitration institutes. For example, the challenge requests must be done

⁶⁶ ICC Rules, Art. 29(1).

⁶⁷ SCC Rules, Appendix II, Art. 1(1).

⁶⁸ The notice shall be submitted within 10 days (ICC Rules) or 30 days (SCC Rules).

⁶⁹ ICDR Rules, Art. 6(1).

⁷⁰ SIAC Rules, Schedule 1, Art. 1.

⁷¹ ICC Rules, Appendix V, Art. 1(3); SCC Rules, Appendix II, Art. 2; SIAC Rules, Schedule 1, Art. 1.

⁷² ICC Rules, Appendix V, Art. 1(3); SCC Rules, Appendix II, Art. 2; LCIA Rules, Art. 9(5).

⁷³ ICC Rules, Appendix V, Art. 1(3); SIAC Rules, Schedule 1, Art. 1.

⁷⁴ NAI Rules Art. 36(4).

⁷⁵ ICC Rules, Appendix V, Art. 2(1).

⁷⁶ SCC Rules, Appendix II, Art. 4(1).

⁷⁷ SIAC Rules, Schedule 1, Art. 3.

⁷⁸ ICDR Rules, Art. 6(2).

under the ICC Rules within three days,⁷⁹ under the SCC Rules within twenty-four hours,⁸⁰ under SIAC Rules within two days⁸¹ and under ICDR Rules within one business day⁸² from the circumstances which result in the challenge. In any case, if the reasons are found justifiable, then the related authority will replace the emergency arbitrator.

3.4 Requirements for Granting Emergency Measures

An arbitral authority has to view some requirements in granting an interim measure to protect the opposing party from groundless applications of the requesting party. Over time, some requirements have been accepted in the international arbitration rules about the requirements of granting interim measures, and these rules have also been updated according to the emergency arbitration.

3.4.1 Prima Facie Establishment of Jurisdiction

As similar to the state judgment, granting an arbitral relief depends on the jurisdiction of the arbitral authority. In case of an emergency measure request, the jurisdictional assay of the emergency arbitrator can be done at a minimum for protecting the rights of the requested party⁸³ when it is considered that granting an interim measure does not affect the final award of the arbitral tribunal⁸⁴. The prima facie jurisdiction of the arbitral authority is the first requirement in granting an interim measure and can be met with a valid written arbitration agreement.⁸⁵

Arbitral institutions' power on deciding the application of an emergency arbitrator is appropriate or not reduces the responsibility of emergency arbitrator to determine its jurisdiction in the time limit given to him.⁸⁶ As an example, an emergency arbitrator does not have jurisdiction to grant interim measures about third party entities under the ICC Rules because the practice of these provisions is limited only to parties or their successors who are the signatories of the arbitration agreement.⁸⁷

3.4.2 Prima Facie Establishment of Merits of the Case

This requirement can be defined as the probability of success on the claim.⁸⁸ The emergency arbitrator does not have the power to issue a final decision, but the claim must be convincing on the prima facie basis in any case.

According to Muñoz, an emergency arbitrator may find this requirement's standards sufficiently easy to comply with, in comparison to an arbitral tribunal for two reasons:

- An emergency arbitrator does not have the power to grant a final award, therefore, does not carry any risk about the impartiality of the arbitral process.

⁷⁹ ICC Rules, Appendix V, Art. (1).

⁸⁰ SCC Rules, Appendix II, Art. 4(3).

⁸¹ SIAC Rules, Schedule 1, Art. 5.

⁸² ICDR Rules, Art. 6(2).

⁸³ Gary B. Born, "Provisional Relief in International Arbitration," in *International Commercial Arbitration*, 2nd ed. (Kluwer Law International, 2014), 2424-2563, 2483.

⁸⁴ The Chartered Institute of Arbitrators, "Applications for Interim Measures.", 6.

⁸⁵ The Chartered Institute of Arbitrators, 6.

⁸⁶ Edgardo Muñoz, "How Urgent Shall an Emergency Be? - The Standards Required to Grant Urgent Relief by Emergency Arbitrators," *Yearbook on International Arbitration*, vol. IV, 2015, 59.

⁸⁷ Johan Lundstedt, "SCC Practice : Emergency Arbitrator Decisions," *Arbitration Institute of the Stockholm Chamber of Commerce* 1 (2013): 1-26, 4.

⁸⁸ Born, "Provisional Relief in International Arbitration.", 2478.

- An emergency arbitrator has a strict time limit that forbids to make a detailed analysis of the underlying merits of the jurisdictional issue as a regular arbitrator.⁸⁹

3.4.3 Urgency

The exercise of the “urgency” requirement can differ according to practical conditions, but the arbitral authority has to be convinced that an interim measure is necessary to avoid serious and irreparable damages.⁹⁰ In an SCC case (010/2012), in which the parties acceded to a purchase agreement, the emergency arbitrator accepted the urgency, stating that the Claimant had no chance to find an alternative settlement like making another agreement with the third parties due to the close deadlines for delivery of goods.⁹¹

Indeed, arbitral rules define the “urgency” term under different definitions, but, in any case, the emergency arbitrator shall deny the request of an urgent measure if the situation has no emergency basis. For instance, in a case of ICC, the request of an interim measure was denied by the arbitral tribunal with the reason that *“the Tribunal, after having examined all the facts of the case, is not convinced of the existence of urgency, the basic requirement for granting a provisional measure in the Claimant's favor.”*⁹²

3.4.4 Risk of Irreparable Harm if the Measure is not Granted

The risk of irreparable damage is sufficient to grant an interim measure, and there is no need to be satisfied with the certainty of definite harm.⁹³ If the possible harm can be compensated with an award of monetary damages, then it cannot be defined as irreparable harm.⁹⁴ Similarly, Article 17(1) of the Model Law describes irreparable harm with two components: “cannot be repaired by an award” and “is likely to arise”. The assessment of granting an interim measure must include some features like the possibility occurrence of harm, the extent and the feature of damage, and the equilibrium of challenges between the parties.⁹⁵ This requirement also has not an absolute definition, so it must be evaluated according to circumstances in every case.

In an SCC case, the emergency arbitrator denied the request because the Claimant could not demonstrate any threat of the Respondent, which could conclude in a disadvantageous position for the Claimant.⁹⁶ In another case, the emergency arbitrator denied the request by finding that the possible substantial harm is reparable (can fully be compensable in damages, interest, and costs in the arbitral proceeding).⁹⁷

3.4.5 Proportionality

The proportionality requirement ensures providing the balance of the parties’ situations according to the arbitration agreement. Hence, the emergency arbitrator should

⁸⁹ Muñoz, “How Urgent Shall an Emergency Be? - The Standards Required to Grant Urgent Relief by Emergency Arbitrators.”, 60.

⁹⁰ Born, “Provisional Relief in International Arbitration.”, 2475.

⁹¹ Lundstedt, “SCC Practice: Emergency Arbitrator Decisions.”, 16.

⁹² ICC Second Partial Award 8113 of 1995, extracts published in ICC International Court of Arbitration Bulletin Vol.11 No.1, 65-69 (2000), quoted in Yeşilirmak, Provisional Measures in International Commercial Arbitration, 2005, 195.

⁹³ The Chartered Institute of Arbitrators, “Applications for Interim Measures.”, 7.

⁹⁴ Yeşilirmak, Provisional Measures in International Commercial Arbitration, 2005, 179.

⁹⁵ Born, “Provisional Relief in International Arbitration.”, 2473.

⁹⁶ Lundstedt, “SCC Practice: Emergency Arbitrator Decisions.”, 5.

⁹⁷ Lundstedt, 18.

evaluate the consequences of granting an interim measure, which may cause any harm disproportional to the opposing party.

According to Muñoz, heavy necessities of demonstrating the urgency requirement may cause easiness for this requirement and should be seen as an aid for the emergency arbitrator to decide on an emergency measure.⁹⁸ The urgent situation of the claimant can be more critical than the opposing party, since the arbitral tribunal has the authority to adapt or annul the given measure according to the changes of the conditions in the arbitral process.⁹⁹

In any case, the emergency arbitrator has the power to deny the requested emergency measure if the proportionality requirement is not met. For instance, in an SCC case (010/2012), the emergency arbitrator denied the request of the claimant by stating that the risk, which could cause serious sanctions for the respondent, did not comply with the proportionality requirement.¹⁰⁰

3.5 Possible Forms of Emergency Arbitrator Decisions

According to the major arbitral institutions, the decisions awarded by the emergency arbitrator can emerge as an order or an award. This difference depends on the perspective of the relevant arbitral institution. While an order is generally related to the procedural issues, an award concerns the key issues of the dispute.¹⁰¹

The arbitration rules may choose to follow three paths about the form of the emergency arbitrator decision. Firstly, the arbitral institution can prefer not to state the structure of the emergency arbitrator decisions in any way. For instance, under the SCC Rules, they are defined only as “emergency decisions” and have not been classified under any other specific naming.

Secondly, the relevant rules may define the emergency arbitrator decisions under one of the classifications. For example, Article 29(2) of the ICC Rules indicates that the emergency arbitrator’s decision shall only be in the form of an order.

Lastly, other arbitral institutions – such as SIAC¹⁰², ICDR¹⁰³, and the LCIA¹⁰⁴ - held the view that the emergency arbitrator has the authority to order or award any interim measure needed. According to these rules, the emergency arbitrator has the power to decide the form of the decision, which is necessary under the case. Thus, it is obvious that the emergency

⁹⁸ Muñoz, “How Urgent Shall an Emergency Be? - The Standards Required to Grant Urgent Relief by Emergency Arbitrators.”, 62.

⁹⁹ Muñoz, 63.

¹⁰⁰ Lundstedt, “SCC Practice: Emergency Arbitrator Decisions.”, 19.

¹⁰¹ Richard Chernick, Daniel M. Kolkey, and Barbara Reeves Neal, “Practitioner's Handbook on International Arbitration and Mediation.”, (Juris Net, 2012), 223.

¹⁰² SIAC Rules, Schedule I, Art. 8: “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.”

¹⁰³ ICDR Rules, Art. 6(4): “The emergency arbitrator shall have the power to order or award any interim or conservancy measures that the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measures may take the form of an interim award or of an order.”

¹⁰⁴ LCIA Rules, Art. 9(8): “The Emergency Arbitrator may make any order or award which the Arbitral Tribunal could make under the Arbitration Agreement (excepting Arbitration and Legal Costs under Articles 28.2 and 28.3); and, in addition, make any order adjourning the consideration of all or any part of the claim for emergency relief to the proceedings conducted by the Arbitral Tribunal (when formed).”

arbitrator's decision, which is limited only to interim measures, has identical features with the ones given by the arbitral tribunal.¹⁰⁵

Moreover, it must be added that whether the form of an emergency decision being "order" or "award" does not have that much importance on enforceability issues because the jurisdictions take into consideration "the principle of substance over form" which prioritizes the feature of the given decision, not the naming.¹⁰⁶

In accordance with this principle, particularly the US courts adopted the flexibility of interpreting the content of the decision whether it has the finality character or not.¹⁰⁷ There are some noteworthy US decisions in regard to emergency arbitrator decisions.

- In the *Draeger Safety Diagnostics, Inc. v. New Horizons Interlock, Inc.* case,¹⁰⁸ the US Court granted the emergency arbitrator relief. According to the agreement between the parties, New Horizons was authorized as the provider of Safety Diagnostics' products in Michigan. Despite the termination of contract, the authorized provider did not return the customer records, data and equipment as pursuant to the contract. After a request under the American Arbitration Association (AAA) Rules, the emergency arbitrator decided in favor of the manufacturer. However, due to the non-compliance of the provider, the manufacturer applied to a district court. The Court enforced the emergency decision by stating that "interim awards that finally and definitively disposes of a separate independent claim may be confirmed notwithstanding the absence of an award." The Court recognized that the interim award was not a final award but prefer to evaluate the content of the decision according to the likelihood of harm, hardship to the parties and sufficient factual record.

- In the *Chinmax Medical Systems v. Alere San Diego* case,¹⁰⁹ the US Court denied vacating the emergency arbitrator decision by stating that the decision was lack of finality. Chinmax, which was the distributor of medical services for Alere, was informed about the termination of the distribution agreement. After a proper request under Article 37 of the ICDR Rules, the emergency arbitrator ordered Chinmax to put the necessary documents and registrations related to the distribution agreement into an escrow, not to have contact with the Chinese authorities for the official registrations and renewals, and to disclose to the opposing party all information, including the list of bank names, contact information and details of bank accounts. A California federal court denied the decision. The Court stated that the interim order was temporary and not final, because the emergency arbitrator issued the order "*in order to facilitate any consideration by the full panel of conservancy ...*" and it would "*remain in effect pending review of the full arbitration tribunal, once appointed, and thereafter as the tribunal may order.*" Also, the arbitral tribunal's full authority to "*reconsider, modify or vacate*" the granted order was seen as lacking finality.

However, as Born argues, the arbitral tribunal's authority to assess the emergency arbitrator's decision cannot be interpreted as the court does not have the authority to enforce the given decision.¹¹⁰

¹⁰⁵ Muñoz, "How Urgent Shall an Emergency Be? - The Standards Required to Grant Urgent Relief by Emergency Arbitrators.", 51.

¹⁰⁶ Dominik Horodyski and Maria Kierska, "Enforcement of Emergency Arbitrator's Decisions - Legal Problems and Global Trends." *Kwartalnik ADR* 33, no. 1 (2016): 27-38, 31.

¹⁰⁷ Born, "Provisional Relief in International Arbitration.", 2513.

¹⁰⁸ *Draeger Safety Diagnostics, Inc. v. New Horizon Interlock, Inc.*, 2011 W.L. 653651 (2011).

¹⁰⁹ *Chinmax Medical Systems, Inc. v. Alere San Diego, Inc.*, 10CV2467 WQH NLS, 2011 W.L. 2135350 (2011).

¹¹⁰ Born, "Provisional Relief in International Arbitration.", note 521.

- On the contrary, in the *Yahoo! Inc. v. Microsoft Corporation* case,¹¹¹ the US Court consider the emergency arbitrator decision as an award. Yahoo and Microsoft agreed to associate their search engine services to compete better with Google. As an agreement provision, the parties divided the whole market into 16 geographical markets, and Yahoo completed the transitions in 14 markets, excluding Hong Kong and Taiwan. Microsoft then applied for emergency arbitrator proceedings under the AAA Rules. The emergency arbitrator decided that Yahoo was in breach of the agreement. The decision stated that the “urgency of the transition establishes the emergency required by the Emergency Rules” and that Yahoo’s breach of the agreement “established irreparable harm to Microsoft.” In addition, the arbitrator ordered Yahoo to fulfill the transitions of the two markets within the limited time frame stated in the decision. In other words, the emergency arbitrator found that the discrepancy involved urgency and the risk of irreparable harm to Microsoft, which could be thwarted by the complement of these Asian markets’ immediate transitions by Yahoo. Following this decision, Yahoo applied to the federal court of New York and claimed that the arbitrator had exceeded his authority, since there was no urgent situation; the arbitrator disregarded the law because the granted award was a “final permanent relief” instead of an interim measure, which should be “temporary in nature.” The Court denied the application. The Court stated that the emergency arbitrator had found realistic evidence in favor of Microsoft, related to both urgency and the risk of irreparable harm. The Court decided that the parties had authorized the emergency arbitrator to restore the status quo when required to implement non-monetary measures, so if a need occurred to realize this requirement, then “the Arbitrator had a colorable basis for concluding that an injunction require[ed] Yahoo to continue to perform contractual obligations.” Consequently, the Court found that the emergency arbitrator’s award was final and confirmed the decision.

Consequently, the content of the emergency arbitrator decisions is more important than the form, regardless of the name. This approach – that seems to be adopted by the US case law – will also increase the practice area of the emergency arbitrator proceedings.

3.6 Common Types of Emergency Measures

In general, arbitration rules – with a few exceptions¹¹² – do not specify the types of arbitral interim measures.¹¹³ Under the rules, the arbitral tribunal and also an emergency arbitrator are empowered to grant “any” interim measure, which is “appropriate” or “necessary” related to the dispute. This approach gives arbitrators more flexibility to choose the best measure regarding the dispute than a regular judge in a national court, which is restricted by the laws.¹¹⁴

The power to grant interim measures certainly cannot be limitless for arbitral authorities. Arbitral interim measures should be comprehensive, unless they prevent one of the parties’ rights with regard to the subject matter of the dispute under the jurisdiction of the arbitral authority.¹¹⁵ Inherently, the arbitrator has limitations based on the powers in international arbitration practice, the arbitral agreement, and the requesting party’s application. The limits may be based on the law of the seat, which should restrict some types

¹¹¹ *Yahoo! Inc. v. Microsoft Corp.*, 983 F. Supp. 2d 310 (S.D.N.Y. 2013).

¹¹² UNCITRAL Model Law, Art. 17(2); LCIA Rules, Art. 25(1); English Arbitration Act 1996, Section 38.

¹¹³ Yeşilirmak, *Provisional Measures in International Commercial Arbitration*, 2005, 203.

¹¹⁴ Yeşilirmak, 204.

¹¹⁵ Born, “Provisional Relief in International Arbitration.”, 2484.

of interim measures to the national courts of the country,¹¹⁶ or the possible reluctance of the arbitrators to contravene the rules of the seat.¹¹⁷ An example of this situation occurred under the SCC Emergency Arbitration Case (057/2013), which Lundstedt explained as follows:

*“The Emergency Arbitrator reviewed the specific relief requested by the Claimant to order the various interim measures “under forfeiture of a penalty”. In this regard the Emergency Arbitrator found that according to Swedish arbitration law (the lex arbitri), arbitrators (including the emergency arbitrator) do not have the power to impose any fine or penalty in the context of an interim decision, and, as a consequence, declared that the Claimant’s request for the ordering of penalties must be rejected for lack of jurisdiction.”*¹¹⁸

As mentioned above as an exception, Article 17(2) of the Model Law and Article 26(2) of the UNCITRAL Arbitration Rules list arbitral interim measures types:

*“(a) Maintain or restore the status quo pending determination of the dispute;
(b) Take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
(d) Preserve evidence that may be relevant and material to the resolution of the dispute.”*¹¹⁹

In the first 80 emergency arbitrator applications under the ICC Rules, the applicant party requested preserving the status quo in 51 cases, specific performance in 23 cases, declaratory relief in 10 cases, interim payments in 8 cases, transfer of money into an escrow account in 7 cases and anti-suit injunctions in 6 cases.¹²⁰ In some circumstances, the requests for interim measures can be within the scope of more than one classification, as in a case under ICC Rules, the requested party asked both for a declaration about the payment and the maintenance of the status quo.¹²¹

3.6.1 Maintaining or Restoring the Status Quo

This interim measure aims to provide continuance of the situation - even it can be legal, contractual, or factual - between the parties.¹²² This measure purposes of ensuring the circumstances of the parties as if any dispute occurred between them during the arbitral proceedings. Orders like prohibiting the other party to dissolve the subject matter of the dispute; selling the perishable goods related to the dispute under the management of an authorized person; in a supply contract, providing the distributor to supply goods/services from the manufacturer or ensuring the distributor to carry on selling the manufacturer’s goods/services are some of the examples.¹²³ In a case under the SCC Rules, the requesting party demanded from the emergency arbitrator to grant an interim measure to prohibit the

¹¹⁶ Muñoz, “How Urgent Shall an Emergency Be? - The Standards Required to Grant Urgent Relief by Emergency Arbitrators.”, 52.

¹¹⁷ Yeşilirmak, Provisional Measures in International Commercial Arbitration, 2005, 211.

¹¹⁸ Lundstedt, “SCC Practice: Emergency Arbitrator Decisions.” 24.

¹¹⁹ UNCITRAL Model Law, Art. 17(2).

¹²⁰ International Chamber of Commerce, “ICC Commission Report: Emergency Arbitrator Proceedings,” 2019, 40-41.

¹²¹ International Chamber of Commerce, 41.

¹²² Born, “Provisional Relief in International Arbitration.”, 2484.

¹²³ Savola, “Interim Measures and Emergency Arbitrator Proceedings.”, 77.

claimant from disposing of equity interests and assets to other parties until the resolution of the dispute.¹²⁴

The meaning of status quo has been stated by the United States District Court of California in the *Susanville Indian Rancheria v. Leavitt* case as “(a court) must look to the last peaceable state between the parties which preceded the present controversy.”¹²⁵ However, the definition can lead to some discrepancies regarding the period, whether it depends on the time of granting interim measure, the time of requesting interim measure, the time of the opening of arbitration, or the time of the emergence of the dispute.¹²⁶

Apart from the other arbitral rules, the arbitral authorities -even it is an arbitral tribunal or an emergency arbitrator- clearly empowered to grant maintaining or restoring the status quo according to the Model Law and UNCITRAL Rules.¹²⁷

3.6.2 Preserving Assets and Evidence

An arbitral tribunal can order an interim measure to preserve assets for the satisfaction of the final award, which is also stated in Article 17(2)(c) of the Model Law. Interim measures related to preserving assets can be shaped as freezing the assets of any party, forbidding the movement of the property, or ordering to provide a bank guarantee.¹²⁸ This interim measure type was accepted as a final award in *Yonir Technologies, Inc. v. Duration Systems* case. The US Court stated that “Arbitrators have the authority to award interim relief in order to protect their final award from being meaningless, and equitable awards involving the preservation of assets related to the subject of arbitration are generally considered “final” arbitral awards subject to judicial review.”¹²⁹

Preserving evidence as an interim measure is also stated under Article 17(2)(d) of the Model Law. For instance, if needed, an arbitral authority can order an interim measure that prohibits the other party from the destruction of material documents related to the dispute.¹³⁰ Consequentially, evidence maintenance, which makes sense related to urgency situations and occurs before the formulation of the arbitral tribunal, is quite likely to stand on the emergency arbitrator proceedings.¹³¹

3.6.3 Anti-Suit Injunctions

An anti-suit injunction is a measure taken by a judicial authority to prohibit any party of an arbitral agreement from commencing or following up the legal procedure before another court or arbitral authority. The aim of this measure is resolving the arbitral dispute compatibly with the arbitral agreement in the determined arbitral authority.¹³² This injunction stands against the party that starts the proceeding in a foreign court, not for the related court.¹³³ Cole and Ortolani state an anti-suit injunction’s concept as below:

¹²⁴ Andrea Carlevaris and José Ricardo Feris, “Running in the ICC Emergency Arbitrator Rules: The First Ten Cases,” ICC International Court of Arbitration Bulletin 25, no. 1 (2014): 25-46, 16.

¹²⁵ *Susanville Indian Rancheria v. Leavitt*, 2008 W.L. 58951 (2008).

¹²⁶ Born, “Provisional Relief in International Arbitration.”, 2487-2488.

¹²⁷ UNCITRAL Model Law, Art. 17(2); UNCITRAL Arbitration Rules, Art. 26(2).

¹²⁸ Savola, “Interim Measures and Emergency Arbitrator Proceedings.”, 78.

¹²⁹ *Yonir Technologies, Inc. v. Duration Systems (1992) Ltd.*, 244 F. Supp. 2d 195 (S.D.N.Y. 2002).

¹³⁰ Fry, Greenberg, and Mazza, “The Secretariat’s Guide to ICC Arbitration.”, 289.

¹³¹ Blackaby et al., *Redfern and Hunter on International Arbitration*, 429.

¹³² Born, “Provisional Relief in International Arbitration.”, 2501.

¹³³ Born, 2501.

*“It does not, that is, say to the court “you cannot hear this case”, but says to the party “you must stop litigating in that other court”.”*¹³⁴

Emerging from the case *Allianz SpA, Generali Assicurazioni Generali SpA v. West Tankers Inc.*, the Court of Justice of the European Union (CJEU) stated that anti-suit injunctions given by an EC Member State Court to restrain a party from commencing proceedings before the court of another Member State that has jurisdiction under Regulation No 44/2001, is not compatible with that regulation.¹³⁵ However, with the *Gazprom* case, the CJEU conceded that Regulation No 44/2001 does not include arbitration under its scope because it is not a court of a Member State, and the regulation only deals with the conflicts of jurisdiction between the Member States courts'.¹³⁶ Therefore, anti-suit injunctions which are granted by any arbitral authority, are permitted under this Regulation.

3.6.4 Providing Security for Costs

This type of relief means guaranteeing the possible costs of the arbitral process in case the opposite party is proved right in the end of the arbitral proceedings and gain the right to compensate the costs related to this process.¹³⁷ In ordering this measure, the arbitral authority needs to be careful about the evaluation of the potential costs for not being insufficient after the final award.¹³⁸

After the decision of an arbitral authority about granting a security for costs measure, then it has to determine the form of the relief.¹³⁹ This measure can be formed as putting the securities in an escrow account, which can be controlled by the arbitral authorities or collectively by the parties or guaranteeing in a bank bond.¹⁴⁰ In a case under the Rules of ICC, the parties ordered to secure certain shares into a deposit account and forbidden to transact till another order given by the arbitral tribunal.¹⁴¹

3.7 Ex Parte Interim Measures in the Arbitral Proceedings

Another type of relief can be based on ex parte feature (have the power to grant an interim measure without hearing or notifying the other party) which is a usual proceeding in the judicial courts. This relief type is particularly appropriate where a party could suffer serious damages simply through a single, quickly completed action by its counterparties like transferring the assets to third parties or devastating evidence.¹⁴²

However, granting ex parte interim measures in the arbitral proceedings is a controversial issue. According to Born, the reason is that the order has to be enforced by the judicial authorities for its legal effect, and the possible harms can occur in this period.¹⁴³ On the other side, Yeşilirmak believes that, unless there are limits regarding the right to be heard and the rule of neutrality in arbitration, if the parties agreed to arbitrate and if the arbitral

¹³⁴ Tony Cole and Pietro Ortolani, *Understanding International Arbitration*, Routledge (Routledge, 2020), 87.

¹³⁵ C-185/07 *Allianz SpA [formerly Riunione Adriatica di Sicurtà SpA] and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009].

¹³⁶ C-536/13 *Gazprom OAO v Lietuvos Respublika* [2015].

¹³⁷ Born, “Provisional Relief in International Arbitration.”, 2495.

¹³⁸ Blackaby et al., *Redfern and Hunter on International Arbitration*, 316.

¹³⁹ Bernhard Berger, “Security for Costs: Trends and Developments in Swiss Arbitral Case Law.”, *ASA Bulletin*, March 2010, 7-81, 13.

¹⁴⁰ Fry, Greenberg, and Mazza, “The Secretariat’s Guide to ICC Arbitration.”, 289.

¹⁴¹ Fry, Greenberg, and Mazza, 289.

¹⁴² Born, “Provisional Relief in International Arbitration.” 2508-2509.

¹⁴³ Born, note 448.

tribunal has the power to order interim measures, then the tribunal should also have the right to grant ex parte interim measures inherently.¹⁴⁴ Similarly, Muñoz states that if the parties choose any arbitration rules which include ex parte interim measures, then these provisions have to be applicable, except the parties exclude this type of power.¹⁴⁵

Important arbitral rules have different perspectives related to this type of interim measures. Under the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules¹⁴⁶ and ICC Rules¹⁴⁷, the power of granting ex parte interim measures by arbitral tribunals is forbidden. According to the World Intellectual Property Organization (WIPO) Arbitration Rules, ex parte interim measures can be obtained from the arbitral tribunal, but not from the emergency arbitrator.¹⁴⁸ On the other hand, some rules, like Swiss Arbitration Rules¹⁴⁹ and the Model Law, clearly refers to granting ex parte interim measures. The Model Law allows ex parte measures with the subsection of “Preliminary orders” with the Articles 17-B and 17-C. Under these provisions, the party who needs an interim measure can apply to the arbitral tribunal for getting a preliminary order “to avoid the frustration of the purpose of an interim measure” with some requirements.

Consequently, the arbitration agreement provides the parties the option to resolve the possible dispute under the arbitration rules they choose. The parties should have the chance to be trialed as a court judgment. Therefore, the arbitral tribunal and the emergency arbitrator ought to have the power to grant interim measures ex parte when it is needed for the dispute resolution, if there is not a restriction specifically, for reaching the aim of the purpose of the interim measure.

3.8 Restrictions Related to Emergency Measures

The abusive use of emergency arbitration proceedings may be a threat to the parties. To avoid this risk, institutional arbitral rules set some requirements as threshold features.

Firstly, the applicant has to prove that the need for emergency measure must be urgent¹⁵⁰ or necessary¹⁵¹. However, this requirement does not have a general description, in some cases, it may depend on the specific features of the case.¹⁵²

Another restriction for avoiding the inappropriate use of emergency proceedings can be seen as the fee which the requested party has to pay for the proceedings to commence.

¹⁴⁴ Yeşilirmak, *Provisional Measures in International Commercial Arbitration*, 2005, 221.

¹⁴⁵ Muñoz, “How Urgent Shall an Emergency Be? - The Standards Required to Grant Urgent Relief by Emergency Arbitrators.”, 64.

¹⁴⁶ ICSID Rules, Art. 39(4): “The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.”

¹⁴⁷ Fry, Greenberg, and Mazza, “The Secretariat’s Guide to ICC Arbitration.”, 291. However, there is a statement in the same document which means that there can be some exceptions in the proceedings before the emergency arbitrators, 298. “Depending on the circumstances, granting the responding party an opportunity to comment after the initial order has been rendered might still be considered as reasonable within the meaning of Article 5(2) of Appendix V.”

¹⁴⁸ WIPO Arbitration Rules, Art. 49(g).

¹⁴⁹ Swiss Rules of International Arbitration, Art. 26(3): “In exceptional circumstances, the arbitral tribunal may rule on a request for interim measures by way of a preliminary order before the request has been communicated to any other party, provided that such communication is made at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard.”

¹⁵⁰ ICC Rules, Appendix V, Art. 1(3); SCC Rules, Appendix II, Art. 7.

¹⁵¹ ICDR Rules, Art. 6(4), SIAC Rules, Schedule 1, Art. 8.

¹⁵² Carlevaris and Feris, “Running in the ICC Emergency Arbitrator Rules: The First Ten Cases.”, 19.

With this payment obligation, the parties will abstain from “testing the merits of their case” and “creating an adverse effect on the other party”.¹⁵³

Additionally, a general rule for the emergency arbitrator proceedings is that the appointed arbitrator cannot act as an arbitrator in the arbitral tribunal, which has been constituted for the relevant dispute unless the parties agreed otherwise.¹⁵⁴ With this provision, the institutions try to ensure the neutrality of the arbitration process. Also, it can be seen as providing a different point of view by a different arbitrator or an arbitral tribunal.¹⁵⁵

3.9 Modification, Annulment and Validity of the Decision

According to the changing conditions that can occur during the arbitral proceedings, an emergency arbitrator has the power to change or annul the order or award given by himself.¹⁵⁶ Offering the chance to the parties to appeal the given decisions of the emergency arbitrator does not fit with the aim of the mechanism because the essence of it originates from the urgent needs of the parties.¹⁵⁷ However, the arbitral tribunal has the full authority to reassess, modify, terminate, or repeal the decision.¹⁵⁸

The decision of the emergency arbitrator can lose validity under some conditions generally:

- If the emergency arbitrator decides differently,
- If the arbitral tribunal decides on the final award related to the dispute,
- If the proper arbitral process does not commence under the determined time limits,
- If the claim is withdrawn¹⁵⁹.

3.10 The Debate in the Arbitration Community: The Nature of the Emergency Arbitrator

As seen above, most reputable arbitral institutions accept the emergency arbitrator procedure. However, the primary concern is whether the emergency arbitrator is a proper arbitrator or not. If this question can be answered in the affirmative, then it can be stated that interim measures granted by an emergency arbitrator will be treated the same as the arbitral tribunal’s interim relief measures. If the answer is negative, then there will be no option for the enforcement of the emergency arbitrator’s decisions without the voluntary compliance of the parties. In the world of arbitration, this debate has been ongoing and has not yet been resolved.

This debate is important for the enforceability of emergency arbitrator decisions under the New York Convention. The Convention, which is the fundamental source for the recognition and enforcement of foreign arbitral awards, only addresses the enforcement of awards in different signatory countries. However, the Convention does not indicate the scope of an “arbitral award” and has no provision regarding arbitral interim measures.

¹⁵³ International Chamber of Commerce, “ICC Commission Report: Emergency Arbitrator Proceedings.”, 9.

¹⁵⁴ Under the Art. 2(6) of the ICC Rules (Appendix V) the prohibition is so clear that parties’ consent also did not allowed.

¹⁵⁵ Fry, Greenberg, and Mazza, “The Secretariat’s Guide to ICC Arbitration.”, 306.

¹⁵⁶ SCC Rules, Appendix II, Art. 9(2); ICDR Rules, Art. 6(4); SIAC Rules, Schedule 1, Art. 8.

¹⁵⁷ Yeşilirmak, Provisional Measures in International Commercial Arbitration, 2005, 142.

¹⁵⁸ ICC Rules, Appendix V, Art. 29(3); SCC Rules, Appendix II, Art. 9(5); SIAC Rules, Schedule 1, Art. 10; ICDR Rules, Art. 6(5); LCIA Rules, Art. 9(11).

¹⁵⁹ SCC Rules, Appendix II, Art. 9(4); SIAC Rules, Schedule 1, Art. 10.

Enforcement of an arbitral award under the provisions of the Convention requires an award to be “binding” and “final.”¹⁶⁰ The binding feature of interim measure decisions derives, inherently, from the arbitration agreement between the parties, which demonstrates that the parties agree on the arbitral proceedings, at least on the contractual basis, and accept the binding nature of a possible award.¹⁶¹ The majority of arbitral institutions indicate in their own rules that decisions – regardless of the nomenclature of the decision as order, award, or any other term – handed down by an emergency arbitrator are binding upon the parties. The finality of an arbitral award can be defined as the settlement of the controversy, partially or totally. Some scholars believe that interim measures cannot be regarded as final because they are temporary, and they can be modified or even annulled by the arbitral tribunal if needed during the pending process of the dispute.¹⁶² However, others argue that interim measures have the character of finality, which differs according to the merits of the case.¹⁶³

3.10.1 The Nature of the Emergency Arbitrator

The controversial issue, as stated previously, originates from the nature of the emergency arbitrator. The argument centers on the areas of the appointment of the emergency arbitrator by the arbitral institution instead of the parties, the lack of power to decide on the merits of the case as a regular arbitrator and doubts about the decision’s binding nature, that is, whether it has a judicial or only contractual effect.¹⁶⁴

To start, it must be taken into consideration, as Fry has stated, that “*The emergency arbitrator was not a character contemplated when most arbitration laws were drafted.*”¹⁶⁵ Arbitral rules, which fundamentally indicate the arbitrator or the arbitral tribunal, started to include emergency arbitrator proceedings in recent years. This highlighted the lack of emergency arbitrator referrals in some arbitral rules, including the Convention of 1958.

First, it must be accepted that the grammatical interpretation of the provisions which are in force has substantial importance in law. When analyzing the arbitral rules, it is apparent that they all refer to this new proceeding under the term “emergency arbitrator.” The French case which is still being debated also demonstrates the importance of the nomenclature for the concept of arbitration.

Here one can refer to the case of the termination decision of the crude oil sales agreement by the Société Nationale des Pétroles du Congo and the Republic of Congo (claimants) against Total Fina Elf E & P Congo (defendant). Following the intention filed by the claimants, the defendant party commenced the ICC Pre-Arbitral Referee Procedure, and

¹⁶⁰ Yeşilirmak, *Provisional Measures in International Commercial Arbitration*, 2005, 239.

¹⁶¹ Yeşilirmak, 239.

¹⁶² Azelius, Bergqvist, and Olsson, “Making Use of the New SCC Rules on Emergency Arbitration” (Due to its interim nature, the Emergency Arbitrator’s decision, even if in the form of an award, is not final.), 941; Baigel, “The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis” (As shown supra, it is this author’s opinion that the clear intentions of the parties signing up to the 2012 ICC Rules is for the decisions of an EA not to be treated as the decision of an arbitrator and not to be treated as final.), 17.

¹⁶³ Yeşilirmak, *Provisional Measures in International Commercial Arbitration*, 2005, 243 (As to the finality, it should be accepted that an interim award on provisional measures is final in regard of the issues it deals with so long as the issues separable from the other issues in dispute.); Born, “Provisional Relief in International Arbitration.”, 2515 (Provisional measures are “final” in the sense that they dispose of a request for relief pending the conclusion of the arbitration.).

¹⁶⁴ Baigel, “The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis”, 18; Azelius, Bergqvist, and Olsson, “Making Use of the New SCC Rules on Emergency Arbitration.”, 941.

¹⁶⁵ Fry, “The Emergency Arbitrator - Flawed Fashion or Sensible Solution?”, 187.

the ICC referee granted that the claimants had to fulfill their liabilities according to the agreement, until the arbitral tribunal had decided on the merits of the dispute.¹⁶⁶ After the decision, the claimants queried whether the referee had judicial authority, and the determined award could be annulled by the French courts. In response to this, the defendant alleged that the referee's decision was an order and not a final arbitral award. The Paris Court of Appeal decided that the claim was inappropriate. The Court stated that the referee mechanism is not an arbitration procedure; therefore, the referee is not an arbitrator, and the granted order was not an arbitral award.¹⁶⁷ The Court remarked on two significant points in the decision:¹⁶⁸

- The lack of implications in the rules, including the foreword, indicates that the rule-maker deliberately refrained from expressions connected to "arbitration" so that the Pre-arbitral Referee Rules cannot be characterized as arbitration.
- The order only had a binding effect on the contractual basis which originated from the agreement.

Baigel found this ruling extremely formalistic and argued that in the Court decision, the naming/form of the provisions was considered more than the substance, and the referee should grant a judicial decision originating from the agreement.¹⁶⁹ Thierry stated that the parties, who preferred to opt in with regard to the Rules for the Pre-arbitral Referee Procedure, lacked the wish to go to arbitration and resolve the dispute through an arbitrator with jurisdictional features; this choice caused the referee mechanism to be of a contractual nature only.¹⁷⁰ Today, this decision reflects on arguments as to whether it can be applicable to emergency arbitrator proceedings or not. However, Shaughnessy has rightly pointed out that the nomenclature and the integration of the rules of these two mechanisms are explicitly distinct from each other.¹⁷¹

Similarly, Boog and Stoffel have stated: "The emergency arbitrator is not a mediator, adjudicator, conciliator or settlement facilitator." It can obviously be seen from the naming of the mechanism that the term "arbitrator" is intended to refer inherently to an arbitration procedure. For example, under Article 9B (4) of the LCIA, it is stated that the emergency arbitrator is a "temporary sole arbitrator" to deal with emergency proceedings. When taking into consideration all the data about the nomenclature, it makes sense to admit that an emergency arbitrator is a proper arbitrator.

At the same time, most reputable arbitral institutions explicitly accept emergency arbitrator proceedings as a complementary part of their rules. The emergency arbitrator provisions are not "opt-in" in nature, which indicates that they are intended by the rule-makers to be a natural part of the arbitration process.

¹⁶⁶ Kah Cheong Lye, Chuan Tat Yeo, and William Miller, "Legal Status of the Emergency Arbitrator Under the SIAC 2010 Rules," *Singapore Academy of Law Journal* 23 (2011): 93-124, 115.

¹⁶⁷ Lye, Yeo, and Miller, 115.

¹⁶⁸ "Société Nationale Des Pétroles Du Congo v. Republic of Congo, Total Fina Elf E P Congo (Congo), Cour d'appel [Court of Appeal], 29 April 2003," *Yearbook Commercial Arbitration* 29 (2004): 203-205.

¹⁶⁹ Baigel, "The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis," 5.

¹⁷⁰ C. Lecuyer-Thieffry, "First Court Ruling on the ICC Pre-Arbitral Referee Procedure," *Journal of International Arbitration* 20, no. 6 (2003): 599-607, 601.

¹⁷¹ Patricia Shaughnessy, "Pre-Arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules," *Journal of International Arbitration* 27, no. 4 (2010): 337-360, 346.

The general requirements of the arbitration proceedings also necessitate the same levels of quality as in the case of a proper arbitrator, such as the features of impartiality and independence. Considering the interim measures, the power of the emergency arbitrator is the same as that of proper arbitrators and judges.¹⁷² Also, the interim measures are integrated as part of a litigation or arbitration process, and there is no difference, in terms of the aim of the interim measures, whether a judge or an arbitrator has granted these.

The other concern related to the position of the emergency arbitrator rests on the question as to whether the decisions given by an emergency arbitrator are adjudicatory or not. The problem arises from the arbitral tribunal's power to modify the emergency arbitrator's decisions after the constitution of the arbitral tribunal. However, this question can also be answered in the positive with the help of the competence-competence principle,¹⁷³ which can be applied by the emergency arbitrator to his own decisions. For example, under the ICC Rules, the emergency arbitrator has the authority to decide if he has the jurisdiction to grant interim measures or not.¹⁷⁴ The same issue is also stated in Article 6(3) of the ICDR Rules, namely that the emergency arbitrator shall decide on her/his jurisdiction as the arbitral tribunal.¹⁷⁵ Similarly, Santacrocce and Alnaber have stated that these provisions are also valid for emergency arbitrators, and emergency arbitrator proceedings have the jurisdictional feature in addition to the contractual one.¹⁷⁶ If the emergency arbitrator has the power to evaluate his judgment as a proper arbitrator, then it is a noteworthy indicator for inherently accepting the emergency arbitrator as an arbitrator.

3.10.2 Enforcement of Emergency Arbitrator Decisions

The intentional character of international arbitration derives from the wishes of the parties.¹⁷⁷ An interim measure, in general, has a binding effect on the parties that depends on the intention of the parties to arbitrate – if the parties prefer arbitration, in a manner, they inherently admit to complying with the arbitrator's decisions – and has been guaranteed by the arbitral rules. The vast majority of arbitral relief measures are voluntarily obeyed by the parties,¹⁷⁸ but the problem arises when there is non-compliance. As mentioned above, this may not be the desired behavior for the non-compliant party, because this may put the arbitral tribunal's assessment in a negative light and lead to monetary damages because of the contractual breach.¹⁷⁹

Therefore, the recognition and enforcement issues of emergency arbitrator decisions derive from the main problem: Are the arbitral tribunal's interim measures enforceable or not?

¹⁷² Santacrocce, "The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?", 293.

¹⁷³ Born, *International Arbitration: Law and Practice*, 88.

¹⁷⁴ ICC Rules, Appendix V, Art. 6(2).

¹⁷⁵ ICDR Rules, Art. 6(3).

¹⁷⁶ Santacrocce, "The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?", 294; Alnaber, "Emergency Arbitration: Mere Innovation or Vast Improvement.", 460.

¹⁷⁷ Blackaby et al., *Redfern and Hunter on International Arbitration*, 71.

¹⁷⁸ Fry, Greenberg, and Mazza, "The Secretariat's Guide to ICC Arbitration.", 292.

¹⁷⁹ Lisa Beisteiner, "Provisional Measures Specific to Construction Arbitration: Focus on the Austrian Legal Framework and Jurisprudence," in *Construction Arbitration in Central and Eastern Europe: Contemporary Issues*, ed. Crina Baltag and Cosmin Vasile (Kluwer Law International, 2019), 63–114, 75.

The Convention, which is the primary document about the enforcement of arbitral awards, by no means defines the requirements of this term. However, it is admitted that an arbitral award must be binding and final, as stated in the case of *Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty. Ltd.*: “*an award which finally determined the legal rights of the parties on all the matters in dispute so referred, was an 'arbitral award' within the meaning of the Convention.*”¹⁸⁰ The Court decided that the decision for an arbitral interim measure was not vested in the term “award” because it had no finality character.

By contrast, some scholars believe that arbitral interim measures are enforceable under the Convention. Born has stated that interim relief measures which have the finality feature to ensure the effectiveness of final awards should be enforceable as arbitral awards.¹⁸¹ Similarly, Yeşilirmak believes that interim awards have a finality character because they resolve issues within the context of the dispute.¹⁸² Along the same lines, Fry has pointed out that, although an arbitral interim decision does not concern the merits of the conflict, some qualified relief measures have the aspects of an issue, such as the preservation of evidence, and may be recognized and enforced under the Convention.¹⁸³

Accordingly, there have been noteworthy cases that argued the enforceability of interim orders or awards under the Convention. An Australian Court decided that an arbitral interim measure ensures parties’ rights en route to the final decision and is meaningful when the arbitrator grants it in time.¹⁸⁴ In the *Sperry v. Israel* case, the US Court decided that, under the AAA Rules, arbitrators may award interim injunctive relief by using the “power to prevent” in the pending process on the merits of the claims.¹⁸⁵ Similarly, in the case of the *Island Creek Coal Sales Company v. City of Gainesville*, the Court held that “*the interim award disposes of one self-contained issue, namely, whether a party is required to perform the contract during the pendency of the arbitration proceedings. This issue is a separate, discrete, independent, severable issue.*”¹⁸⁶

Most recently, the enforceability of an emergency arbitrator decision originated from an investor-state arbitration. In the *JKX Oil&Gas PLC v. Ukraine* case, the dispute arose from the augmentation decision of the Ukraine government in the matter of rental fees for natural gas production. JKX Oil&Gas PLC, Poltava Gas BV and the JV Poltava Petroleum Company, which were operating together in Ukraine, sent notification to the president of Ukraine about

¹⁸⁰ “Australia No. 11, *Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty. Ltd.*, Supreme Court of Queensland, 389, 29 October 1993,” *Yearbook Commercial Arbitration* 20 (1995): 628–650.

¹⁸¹ Born, *International Arbitration: Law and Practice*.

¹⁸² Yeşilirmak, *Provisional Measures in International Commercial Arbitration*, 2005, 243.

¹⁸³ Fry, “The Emergency Arbitrator - Flawed Fashion or Sensible Solution?”, 189.

¹⁸⁴ *Southern Seas Navigation v. Petroleos Mexicanos*, 606 F. Supp. 692 (S.D.N.Y. 1985), “That the arbitrators labeled their decision an “interim” award cannot overcome the fact that if an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made. Such an award is not “interim” in the sense of being an “intermediate” step toward a further end. Rather, it is an end in itself, for its very purpose is to clarify the parties’ rights in the “interim” period pending a final decision on the merits. The only meaningful point at which such an award may be enforced is when it is made, rather than after the arbitrators have completely concluded consideration of all the parties’ claims.”

¹⁸⁵ *Sperry International Trade, Inc. v. Government of Israel*, 689 F.2d 301 (2d Cir. 1982).

¹⁸⁶ *Island Creek Coal Sales Company v. City of Gainesville, Florida*, 729 F.2d 1046 (6th Cir. 1984).

the fee increase from 28% to 55%; however, the Ukraine government decided to extend the period of this practice until the end of 2015.¹⁸⁷ JKX applied for emergency arbitration under the SCC Rules, and the arbitrator shaped the decision as an award. In September 2018, the Supreme Court of Ukraine denied the enforcement of the decision, stating the following reasons with respect to violating the provisions of Article V of the New York Convention:¹⁸⁸

- From the standpoint of the public policy argument, the emergency award is not compatible with the Tax Code of Ukraine, because that may mean authorizing the legal authorities to change the tax rates, contradicting the principles of the taxation mechanism.
- In terms of notification, JKX inaccurately notified to the president of Ukraine instead of the Ministry of Justice. This mistake prevented the start of the three-month cooling-off period, which was a compulsory provision for initiating the arbitral proceedings.

This case occupies a fundamental position in the matter of arbitration, both for Ukraine and globally. First, it was the first initiative about the recognition and enforcement of an emergency arbitrator award in Ukraine, even though it was not approved. Second, in the decision, the Supreme Court referred to the New York Convention provisions as the legal framework for the enforcement of the emergency arbitrator award, without stating any difference from a tribunal-ordered award and as if the award had the finality character which is a requisite for enforcement under the Convention.¹⁸⁹ This led to the possibility of enforcement of the emergency awards in Ukraine, at least in theory.¹⁹⁰

The positive trend of the enforceability of arbitral interim measures legitimizes some commentators' statements about emergency relief measures. Thieffry stressed: *"If the parties chose to give the emergency arbitrator the power to order interim measures, they want those measures to be effective, which – as with State courts – requires that they be enforceable."* Also, Feigerlová remarked that there is no fundamental tenet which can restrict the parties, on the same issue – interim reliefs – to authorize the emergency arbitrator while they can authorize the proper arbitrators.¹⁹¹ According to the given arguments and decisions, the emergency arbitrator is a proper arbitrator, and the interim measures decisions should be recognizable and enforceable under the Convention as standard arbitral awards.¹⁹² When parties prefer to arbitrate because of the advantages, they have to be given the same opportunities as in the case of a comprehensive arbitration mechanism and state court proceedings, including interim measures, which are an integrated part of the law. It must also be taken into consideration that, regardless of the arbitral authority – an arbitral

¹⁸⁷ "Ukraine-enforcement of emergency arbitration awards (JKX Oil & Gas PLC v Ukraine)," LexisNexis, 13/11/2018, <http://www.ewriter.eu/articles/JKXOilGasPublished.pdf> accessed 15 May 2020.

¹⁸⁸ "Ukraine-enforcement of emergency arbitration awards (JKX Oil & Gas PLC v Ukraine)," accessed 15 May 2020.

¹⁸⁹ Olexander Martinenko, Vitaliy Radchenko, Olga Shenk, Vladyslav Kurylko, "Ukraine's Supreme Court ruled on enforceability of the first-ever emergency arbitral award in Ukraine," CMS Law-Now, 23/11/2018, https://www.cms-lawnow.com/ealerts/2018/11/ukraine-supreme-court-pulls-the-plug-on-jkx-emergency-award-enforcement?cc_lang=en accessed 29 May 2020.

¹⁹⁰ "Ukraine-enforcement of emergency arbitration awards (JKX Oil & Gas PLC v Ukraine)," accessed 15 May 2020.

¹⁹¹ Monika Feigerlová, "Emergency Measures of Protection in International Arbitration," *International and Comparative Law Review* 18, no. 1 (2018): 155–177, 171.

¹⁹² Born, "Provisional Relief in International Arbitration.," 2521.

tribunal or an emergency arbitrator – the aim of interim measures is identical: a sound arbitration process that protects the parties from unrecoverable situations during the pending process.¹⁹³

In addition, as indicated above, the type of emergency arbitrator decision, whether it is an order or an award, has a limited impact on the enforceability, because of the “substance-over-form principle”. Any enforcement request of an emergency arbitrator decision has to be evaluated on a case-by-case basis. In any event, the legislation of the jurisdiction in which the parties sought the enforcement of arbitral awards is of major importance for the issue.¹⁹⁴

The lack of specific provisions in the national arbitration laws about arbitral interim measures means that the enforcement issues of interim measures have to be determined by the general provisions for arbitral awards.¹⁹⁵ However, this lacuna was removed with the 2006 amendments of the UNCITRAL Model Law by clearly expressing the recognition and enforcement of arbitral interim measures. Article 17-H states:

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

It is clear from this provision that there is no distinction about the form of the granted measure, whether it is an order or an award. The Model Law states that the arbitral tribunal, in a general way, is “*a sole arbitrator or a panel of arbitrators.*” However, there are some arguments as to whether an emergency arbitrator has the characteristics of an arbitral tribunal or not. In this respect, Fry has stated that the nomenclature does not directly make an emergency arbitrator an arbitrator, because in many national legislations there is even no description of the arbitrator.¹⁹⁶ Born has stated that there is no general definition of arbitration; however, arbitration can be defined as follows:

“In particular, arbitration requires (i) a consensual agreement (ii) to submit disputes to (iii) a non-governmental decision-maker, chosen by or for them, to (iv) render a binding resolution of that dispute, (v) in accordance with adjudicatory procedures affording the parties an opportunity to be heard.”¹⁹⁷

As can be seen from this definition, the purpose of an emergency arbitrator fits this explanation, as it provides the minimum requirements for defining a proper arbitrator. In addition, Article 17-H of the Model Law provides that parties may seek the enforcement of an arbitral interim measure outside the country of the arbitral seat. This aspect of the provision also ensures that arbitral interim measures are more valid and worthy.

Considering the gradual increase in the popularity of arbitration, some obligations have responded to the requirement of the mechanism. According to the growing importance of the enforcement of arbitral interim measures, the 2006 revisions of the Model Law can be

¹⁹³ Santacroce, “The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?”, 308.

¹⁹⁴ Philippe Cavalieros and Janet (Hyun Jeong) Kim, “Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations,” *Journal of International Arbitration* 35, no. 3 (2018): 275–306, 287.

¹⁹⁵ Born, “Provisional Relief in International Arbitration.”, 2511.

¹⁹⁶ Fry, “The Emergency Arbitrator - Flawed Fashion or Sensible Solution?”, 186.

¹⁹⁷ Gary B. Born, “Legal Framework for International Arbitration Agreements,” in *International Commercial Arbitration*, 2nd ed. (Kluwer Law International, 2014), 229–348, 250.

seen as an important step, although they have some deficiencies which have led to some negative arguments. In any case, the amendments mean that in countries which prefer to follow the concept of the Model Law, these revised provisions can inherently enforce arbitral interim measures.¹⁹⁸

Lastly, some states have resolved the uncertainties regarding emergency arbitrator issues, including enforcement, by amending their national arbitral legislation. This modernist approach of some countries has led to practical, swift, and reliable emergency arbitrator proceedings. The leading states in terms of this innovation are Singapore, Hong Kong, and New Zealand.¹⁹⁹ By amending their national legislation, today, in these states, an emergency arbitrator is an arbitrator, and the emergency relief measures are enforceable, just like regular court decisions, without any difficulty. Also, the Netherlands has adopted a different approach. According to Article 1043b of the Dutch Code of Civil Procedure, parties can agree on a separate arbitral tribunal for granting provisional relief, and these awards are enforceable.

To summarize, emergency arbitration is a recent innovation in arbitration proceedings. The mechanism ensures that parties can obtain provisional relief measures in urgent situations so that parties are not frustrated by possible damages during the arbitral process. The emergency arbitrator considers the intents of the parties according to the arbitration agreement and offers the parties the option to get urgent relief, without the need of resorting to national courts. Based on the above discussions, it is concluded that an emergency arbitrator is an arbitrator with limited power according to a regular arbitrator. The nomenclature of the process, the involvement of the mechanism under arbitral rules as an elementary procedure, and the power to grant “awards” are some of the strong features for making out this conclusion. Since an emergency arbitrator is an arbitrator for these reasons, emergency relief measures that have a finality feature should be enforceable under the New York Convention, as confirmed by the decisions of various state courts.

¹⁹⁸ Voser, “Interim Relief in International Arbitration : The Tendency Towards a More Business-Oriented Approach”, 184; “ICC Commission Report: Emergency Arbitrator Proceedings.”, 30.

¹⁹⁹ Singapore International Arbitration Act 2012; Hong Kong Arbitration Ordinance (Cap.609); New Zealand Arbitration Act 1996.

CHAPTER 4: ARBITRATION LEGISLATIONS IN THE UNITED KINGDOM AND TURKEY

4.1 An Overview of the Arbitration Rules in the UK: Key Features

4.1.1 The Arbitration Act of 1996

The Arbitration Act, 1996, which was enacted on 31 January 1997, is the primary arbitration law in the United Kingdom.²⁰⁰ It covers arbitral proceedings in England, Wales, and Northern Ireland for both domestic and international arbitration. The “one-size-fits-all” approach of the Act by ignoring the nationality of the arbitration makes the Act straightforward.²⁰¹ The Act does not make any reference to emergency arbitration and depends on the Model Law’s basic principles, but has some significant points of difference, including the following:

- The Act prefers nondifferentiation between domestic and international arbitral agreements, whereas the Model Law applies only to international agreements.
- Under the Act, the tribunal shall be formed by a single arbitrator, in principle (Section 15), whereas under the Model Law, the tribunal is formed by three arbitrators (Article 10).
- A compelling provision is that, in the case that a party fails/refuses to appoint an arbitrator to form the arbitral tribunal, the Act gives the other party the right to appoint its arbitrator as the sole arbitrator for the dispute (Section 17); the appointment will be made by the court or another specified authority under the Model Law (Article 11).
- Under the Act, a party may claim that the arbitral award has to be challenged on a question of law arising out of an award under the determined situations (Section 69), which presents a separate protection from challenging the award under the reasons of substantive jurisdiction or severe irregularity.
- The Act does not involve the 2006 amendments of the Model Law.

The United Kingdom has been a signatory to the New York Convention since 1975; therefore, Part III of the Act deals with the recognition and enforcement of foreign awards. The Act states that “the New York Convention awards” means any award derived from an arbitration agreement of a signatory party to the Convention other than the United Kingdom.

In general, the Act stipulates all the arbitration phases step by step. However, it excludes some arbitral issues such as the definition of arbitration, arbitrability, conflict of the rules, and confidentiality by assuming them to be improved under case law practice.²⁰²

According to Section 1 of the Act, the provisions depend on three principles: relying on the aim of arbitration which resolves disputes under fair treatment by impartial tribunals by avoiding unnecessary delays or expenses; excluding situations that are to the detriment of the public interest, and allowing parties to decide freely about dispute resolution and restricting the intervention of the courts to the arbitral proceedings. In Sections 2 and 3, the seat of the arbitration is defined by referring to Part I that applies where the seat of arbitration is England. In Section 6(2), it is stated that “*an arbitration agreement means an agreement to submit to arbitration present or future disputes.*” In the case of David Wilson

²⁰⁰ Arbitration Act 1996, <https://www.legislation.gov.uk/ukpga/1996/23/introduction>.

²⁰¹ Born, “Legal Framework for International Arbitration Agreements.”, 336.

²⁰² Karyl Nairn, “National Report for England and Wales (2019 through 2020),” 2020, 2.

Homes Ltd v. Survey Services Ltd & Another, in which the dispute resolution clause in the agreement referred to Queen’s Council without any indication related to an arbitral meaning, the Court of Appeal held that a valid agreement matching the intention of the parties to provide a final and binding decision is an arbitration agreement, without referencing the terms “arbitrator” or “arbitration.”²⁰³ Similarly, in the case of Walkinshaw v. Diniz, the Court decided that under the Arbitration Act, 1996, the resolution board had the characteristics of an arbitral tribunal.²⁰⁴ Born analyzed this decision in terms of five requirements: (a) the nomenclature in the clause, (b) the duty of the tribunal about applying the law, (c) the proceedings’ nature as arbitration implies impartiality and fair treatment to the parties, (d) the enforceability of the agreement, and (e) the binding effect of the decision.²⁰⁵

4.1.2 Interim Measures Under the Arbitration Act, 1996

Section 38 of the Act determines the power of the arbitral tribunal. Unless agreed otherwise, the tribunal may order: to provide security for the costs of the arbitration (Section 38(3)); to give directions about any property which is a subject of the proceedings or regarding which any question arises in the proceedings, such as inspection, photographing, preservation, custody or detention of the property (Section 38(4)); and to give directions about the preservation of any evidence (Section (6)). Section 39 states that the parties have the opportunity to agree on the power of the arbitral tribunal to grant interim measures for the final award, such as the disposition of property or making an interim payment.

Under the Act, if a party fails to comply with an order or direction of the arbitral tribunal without showing sufficient reason, the tribunal has the authority to make a peremptory order and giving the defaulting party a specific time to comply. This particular provision also involves emergency arbitrator decisions.²⁰⁶ If the noncompliance continues, first the arbitral tribunal, and then the judicial court, has the power to make the party comply with the order under Sections 41 and 42.

Section 44 provides that the Court has the same powers as the tribunal for the arbitral proceedings, unless agreed otherwise by the parties, but it is restricted to urgent situations and may only be exercised for the aim of preserving evidence and assets. In any case, the Court’s authority is limited, with the condition that the arbitral tribunal and any arbitral or other institution or person vested by the parties has to have no power or has to be unable, for the time being, to act effectively (Section 44(5)). So, the state courts do not act in the arbitral process as the main authority, unless exceptional conditions apply.

This condition precedent is mentioned in two English court decisions. In the case of Seele Middle East Fze v. Drake & Scull Int SA Co.,²⁰⁷ the claimant made an application for interim relief before the constitution of the arbitral tribunal under the ICC Rules. The Court stated that the demand was in accordance with Section 44(5) because, at the time of the application, no arbitral tribunal had been constituted to act effectively. The Court granted the injunction but also stated the following:

“Although this is a matter where there is arbitration under the ICC Rules, it is not subject to the recent change in those rules in the form of the introduction of an emergency

²⁰³ David Wilson Homes Ltd v. Survey Services Ltd 2001 EWCA Civ 34, 2001 BLR 267 (2001).

²⁰⁴ Walkinshaw v. Diniz, 2000 All E.R. (Comm) 2 237 (2000).

²⁰⁵ Born, “Legal Framework for International Arbitration Agreements.”, note 191.

²⁰⁶ International Chamber of Commerce, “ICC Commission Report: Emergency Arbitrator Proceedings.”, 85.

²⁰⁷ Seele Middle East FZE v. Drake & Scull International SA CO, 2013 EWHC 4350 (2013).

arbitrator to deal with applications. Therefore, there is no power for the time being for an ICC arbitral tribunal to act effectively. Whether an emergency arbitrator would be able to act effectively is not a matter which I therefore need to consider.”

The decision of the Court is argued on the basis that, if there was an option to appoint an emergency arbitrator, it would be seen as compatible with this provision or not. It is also noteworthy that the Court decision was given when emergency arbitration provisions were not yet available under the ICC Rules.

Another significant case which relates to Section 44(5) and an emergency arbitrator, is *Gerald Metals SA v. Timis & Ors.*²⁰⁸ The claimant applied under Articles 9A and 9B of the LCIA Rules for the appointment of an emergency arbitrator to get emergency relief for preventing the disposition of assets by the counterparty. However, the LCIA refused to appoint an emergency arbitrator, and the claimant appealed the decision to Court to seek the relief under Section 44 of the Arbitration Act, 1996. The Court also rejected the appeal with Judge Leggatt stating the following:

- Sections 44(3) and 44(5) state that the Court may make orders only in urgency and may act only if the arbitral authority, lacks the ability or is unable for the time being to act effectively.
- The urgency prerequisite under Section 44(3) is to be evaluated if the arbitral tribunal has the authority to award an efficient measure in a suitable period.
- The LCIA was not convinced by the application on the urgency.
- It would be irrational to consider the LCIA Rules as causing a lacuna. Articles 9A (Expedited Formation of Arbitral Tribunal) and 9B (Emergency Arbitrator) aims to decrease the dependence on the courts in emergency situations by ensuring the effectiveness of the arbitral tribunal. The objective of Article 9B is not to restrict the application to the court as it is compatible with Section 44.

This detailed decision clearly states that an emergency arbitrator is one of the arbitral authorities mentioned under Section 44(5). On the one hand, after the confusing Court decision of *Seele v. Drake*, which led to arguments, this case answered the debate about the nature of an emergency arbitrator. On the other hand, this decision led to some discussions about limiting the Court’s ability to grant interim measures. First, Section 44 of the Act is in force with the same wordings before the occurrence of the emergency arbitrator mechanism, and this kind of decision could be given by a sole arbitrator or an arbitral tribunal, in either case. Second, if there were doubt about the decision related to the definition of urgency, the Court would take the steps provided by the Act under suitable circumstances. Lastly, as the Judge stated in the order, even if he misinterpreted the Act, he would decide on the same grounds as an emergency arbitrator did, because he was also of the opinion that the undertakings given by the defendant were sufficient to deny the emergency measure. For these reasons, there is no ground, in reality, for limitations solely based on the emergency arbitrator mechanisms, as it is discussed.

Based on recent and noteworthy cases, it can be said that British Courts legitimize the arbitral institutions’ emergency arbitrator provisions; even the Arbitration Act of 1996 includes an emergency arbitrator provision. As Baigel has stated, unless stated otherwise in the legislation or case law, the broad assessment of the British Courts about the nature of

²⁰⁸ *Gerald Metals SA v. Timis & Ors*, 2013 EWHC 2327 (2016).

arbitration may lead to admitting that emergency arbitration proceedings constitute arbitration.²⁰⁹

4.1.3 The London Court of International Arbitration (LCIA)

With the revisions of 2014, emergency arbitrator provisions are in force under the LCIA Rules. Article 9B of the Rules provides for obtaining emergency relief from an emergency arbitrator before the formation of the arbitral tribunal. In principle, the Rules are automatically applied to agreements signed after 1 October 2014 if the parties have not agreed to an opt-out from emergency arbitration in writing. For agreements signed before this date, the parties have to agree in writing to opt-in the mechanism.

First, the appointment of an emergency arbitrator necessitates urgency for the applicant party. However, the Rules do not define the meaning of “emergency.” However, based on the obvious distinction of the two mechanisms under different provisions, the “exceptional urgency” term under 9A for an expedited emergency indicates that the term “emergency” under 9B indicates a higher threshold than expedited arbitration.²¹⁰

The second criterion that must be met by the parties is the procedure of the application. The application must be made in written form (preferably electronic) and must involve specific reasons that state the urgency of an emergency arbitrator and the specific claim for emergency relief with the fee requirement.

Upon completion of all the procedures by the parties, the authority of the LCIA (the Court) has the power to grant or deny the application according to the criteria as soon as possible, whether it is suitable in terms of the article or not. In this process, the Court may allow a comment to the respondent, which is not an obligation, and decide to grant or deny the application, without the burden of stating any reason.²¹¹ In the case of an affirmative decision, an emergency arbitrator will be appointed by the Court within three days of receipt of the application. The selection of an emergency arbitrator depends on the 5.9 of the Rules, same as the constitution of a regular arbitral tribunal: the transaction(s) at issue, the nature and circumstances of the dispute, its monetary amount or value, the location and languages of the parties, the number of parties, and all other factors which the Court may consider relevant in the circumstances. In addition, the experience and availability of the arbitrator have to be taken into consideration, due to the purpose of the mechanism. As a proper arbitrator, the emergency arbitrator has to obey the principles of impartiality and independence, submit his or her qualifications and professional positions, and has to comply with the nationality requirements. Even if these requirements are met, the Court has to select the emergency arbitrator on the grounds of experience of the issue and availability for the proceedings. Also, the parties have the option to choose the emergency arbitrator if it is stated in the written agreement, inherently limited to one arbitrator, to get a fast conclusion. The agreement on the arbitrator may not be applicable if the Court decides that the nominee does not comply with the Rules, or if the parties do not nominate in time. The appointed emergency arbitrator can also be revoked or challenged according to the conditions stated in the Rules.

²⁰⁹ Baigel, “The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis.”, 8.

²¹⁰ Maxi Scherer, Lisa Richman, and Rémy Gerbay, “Expedited Formation of the Arbitral Tribunal, Emergency Arbitrators and Expedited Replacement of Arbitrators,” in *Arbitrating under the 2014 LCIA Rules: A User’s Guide* (Kluwer Law International, 2015), 133–166, 149.

²¹¹ The London Court of International Arbitration. “LCIA Notes on Emergency Procedures,” n. 38.

The emergency arbitrator has no limitations with regard to the proceedings, except that they have to be appropriate to the conditions of the case, the nature of the proceedings, the parties, and the claim. There is no obligation to hold a hearing with the parties, so that the emergency arbitrator may grant an *ex parte* relief. The emergency arbitrator has to decide on the claim as soon as possible, but in principle a maximum of 14 days after appointment. The emergency relief measure has to be written, with reasons, and can be in the form of an order or an award.

As usual, according to the emergency arbitration rules, the arbitral tribunal has the power to confirm, vary, discharge, or revoke the emergency relief, partially or totally. This relates to the temporary nature of the decision. The confirmation of the decision by the arbitral tribunal converts the decision into a final and binding situation, similar to any award given according to the LCIA Rules.²¹²

Lastly, as to the Rules, commencing the emergency arbitrator proceedings does not mean excluding any legal rights of the parties. The Rules ensure that parties have the right to apply to a state court or other legal authority for any interim measure in emergency arbitrator proceedings.

However, the practice of the proceedings under the LCIA Rules have fallen too short. Since Article 9B came into force in 2014, the LCIA has received only six applications for the appointment of emergency arbitrators.²¹³ There was only one application for each of the years 2016, 2017 and 2019, and three applications for 2018. Two of these applications were rejected, one was withdrawn, and three were granted. It seems that this mechanism is rarely used. According to the survey mentioned above, the five most preferred arbitral institutions are the ICC, the LCIA, the SIAC, the HKIAC, and the SCC.²¹⁴ When considering applications for emergency arbitrators, it can be seen that the ICC, the SIAC, the HKIAC, and the SCC filed 117,²¹⁵ 94,²¹⁶ 13²¹⁷ and 42²¹⁸ applications, respectively. There is a vast distinction between these arbitral institutions and the LCIA in terms of the number of applications received. The trend of English Courts' reluctance to intervene in arbitral proceedings is apparent, as stated above in the 2016 case of *Gerald Metals v. Timis & Ors*. The LCIA could close the gap with other arbitral institutions by making the arbitral process more effective.

In conclusion, the United Kingdom's national arbitral regulation, the Arbitration Act of 1996, adopted the court subsidiarity model for the arbitral interim measures. This manner of approaching priorities the power of granting arbitral interim measures by the arbitral authorities thus promotes the independence of the arbitration processes. It restricts the intervention of the national courts to the arbitral proceedings, with a few exceptions. Though the Act does not refer to emergency arbitrators, case law accepts that an emergency arbitrator is an arbitral authority who can act effectively, if this is ensured in the arbitration

²¹² Scherer, Richman, and Gerbay, "Expedited Formation of the Arbitral Tribunal, Emergency Arbitrators and Expedited Replacement of Arbitrators." note 141.

²¹³ The London Court of International Arbitration, "2019 Annual Casework Report," 2019, 22.

²¹⁴ Queen Mary University of London, "2018 International Arbitration Survey: The Evolution of International Arbitration.", 9.

²¹⁵ <https://iccwbo.org/media-wall/news-speeches/icc-celebrates-25000th-case-milestone-and-announces-record-figures-for-2019/> accessed 25 July 2020.

²¹⁶ Singapore International Arbitration Center, "Annual Report 2019," 2019, 19.

²¹⁷ <https://www.hkiac.org/about-us/statistics> accessed 25 July 2020.

²¹⁸ <https://sccinstitute.com/about-the-scc/news/2020/emergency-arbitration-at-the-scc-a-decade-in-review/> accessed 25 July 2020.

agreement. However, Section 44 of the Arbitration Act, 1996, which prohibits the courts' interference in arbitral proceedings, may lead parties to opt-out of the emergency arbitration mechanism, due to the restriction of applying to national courts for interim measures, except under extraordinary circumstances. This legislation approach may be seen as the reason for the lower number of applications for emergency arbitrators under the LCIA Rules.

4.2 An Overview of the Arbitration Rules in Turkey: Key Features

4.2.1 International Arbitration Law

Turkey's arbitral regulations mainly depend on three acts. The Civil Procedure Law (CPL), numbered 6100,²¹⁹ regulates domestic arbitrations, the International Arbitration Law (IAL), numbered 4686,²²⁰ deals with international arbitral issues, and the International Private and Procedural Law (IPPL), numbered 5718,²²¹ provides the recognition and enforcement of foreign awards.

The difference in the practice of the CPL and the IAL depends on the foreign element. According to Article 2 of the IAL, the indicators of foreign elements are the following:

- The parties' usual residence, domicile, or places of business are in different countries.
- The place of arbitration, the place where the majority of obligations occur, or the dispute's subject has a close connection to the parties' usual residence, domicile, or places of business.
- A shareholder of a company, who has signed an agreement, including an arbitration clause, has brought foreign capital to Turkey, under the foreign investment rules, or providing foreign capital from outside the country necessitates completing an agreement.
- An agreement with an arbitration clause leads to the movement of goods or capital from one country to another.

The IAL was fundamentally prepared based on the principles of arbitration originating from the 1985 Model Law. Also, Turkey signed the New York Convention in 1991. However, under the Turkish legislation, the recognition and enforcement of foreign arbitral awards are subject to the IPPL, not to the IAL. Thus, if a foreign arbitral award is rendered in a signatory state, it will be subject to the Convention, if not, to the IPPL.

A basic rule highlighted in Article 1 of IAL is that the rights related to immovable property in Turkey and disputes related to public policy, inherently as family or criminal law, cannot be the subject of an arbitration process. According to Article 4, an arbitration agreement is an agreement in which the parties agree to resolve a present or possible dispute arising from an existing legal relationship between them through arbitration, whether the origins are from a contract or not. Under the Act, the basic requirements for arbitration have to be ensured by providing equal treatment to the parties, impartiality, and independence of the arbitrators. Under Article 7(H), an arbitrator or arbitral tribunal has the

²¹⁹ The Civil Procedure Law No. 6100, published in the Official Gazette No. 27836 of 4 February 2011, <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6100.pdf>.

²²⁰ The International Arbitration Law No. 4686, published in the Official Gazette No. 24453 of 5 July 2001, <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4686.pdf>.

²²¹ The International Private and Procedural Law No. 5718, published in the Official Gazette No. 26728 of 12 December 2007, <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5718.pdf>.

power to decide on its jurisdiction, including the existence and validity of the arbitration agreement, compatible with the competence-competence principle.

In addition, under the IAL, the court's intervention is limited, in accordance with Article 5. If one of the parties applies to the court for a dispute arising from a valid arbitration agreement instead of an arbitral tribunal, the opposing party has the right to object as a preliminary objection. If the court decides the agreement is valid and the claim is appropriate, then it will dismiss the case and send it to the tribunal.

4.2.2 Interim Measures under the International Arbitration Law

According to Article 6 of the IAL, in case of a request, the arbitral tribunal may grant an interim injunction or attachment during the arbitral proceedings which is binding for the parties in principle. It is also ensured that requesting an interim injunction or attachment from a court before or during the arbitral proceedings is not in conflict with the arbitration agreement. The arbitral tribunal may demand an appropriate guarantee or security for the relief measures if the need arises. In addition, the tribunal cannot decide on any measure which requires enforcement by official authorities and binds third parties.

According to the Act, any default in the compliance of an arbitral decision can lead the parties to apply state courts for obtaining an interim injunction or attachment. This supportive approach, which aims to perform the outcome of the proceeding, has also been recognized by a decision given in 2014 by the Court of Cassation.²²² In this case, the applicant claimed that in the recognition period of a Moscow arbitral tribunal decision, the defendant kept on dissolving the assets, especially to third parties, to the detriment of the other party. The Court decided that in the recognition and enforcement period, the arbitration process cannot be regarded as terminated, and the courts can still grant interim measures. The Court interpreted Article 6 broadly, to the advantage of the requesting party, especially considering the possible prolonged period of the recognition and enforcement issues of the foreign arbitral awards in Turkey.

The types of interim measures and the conditions for granting them are not elaborated under the IAL as the Model Law.²²³ Also, the Act does not indicate the form of provisional measures. According to Yeşilirmak, Coşar, and Gültutar, even if it is not stated in the Act, the measures may be shaped as an order, but they have finality and a binding effect, as the issues they concern can be thought of as an award in terms of enforceability.²²⁴

Lastly, according to the IPPL, which regulates the recognition and enforcement of foreign awards, the request for the enforcement of a foreign arbitral award has to be made to the state court, as stated in the agreement. If the court is not stated in the agreement, then the court will be determined by the residence or domicile of the party or the place of the assets' subject to enforcement. After the procedural issues and the assessment of the court have been completed, the national court can grant the award, partially or totally, or deny the award.

In a recent case, the Court of Cassation gave a noteworthy decision on the enforceability of emergency relief measures.²²⁵ The Court stated that partial awards, if they

²²² Court of Cassation, 6th Civil Chamber, File No. 2014/3906, Decision No. 2014/4941 of 14/04/2014.

²²³ Ali Yesilirmak, Utku Cosar, and Dogan Gultutar, "National Report for Turkey (2019 through 2020)," ICCA International Handbook on Commercial Arbitration, 2020, 1–53, 32.

²²⁴ Yesilirmak, Cosar, and Gultutar, 35.

²²⁵ Court of Cassation, 11th Civil Chamber, File No. 2017/3469, Decision No. 2019/4259 of 11/06/2019.

deal with a separate and independent issue for the final award and form it as an award, it should be enforceable in urgent situations under Turkish law. The Court stated that arbitral interim measures have the character of finality related to the dispute, even for a specific time, and for the enforcement of an arbitral award under the New York Convention finality is not necessary, but it has to be binding on the parties. This decision indicates that emergency measures can be enforceable under Turkish law.

4.2.3 The Istanbul Arbitration Center (ISTAC)

The ISTAC is an arbitration institute founded in Istanbul in 2015.²²⁶ According to a commentator, it is a “very encouraging development” for arbitration in the country.²²⁷ This comment derives from Turkey’s need for a modern institutional arbitral institution, which can support the role of the country in the arbitral community. With the aim of supporting the institution, the government issued a circular that advises all public authorities to consider including ISTAC Arbitration Rules as a dispute resolution institution in their domestic and international agreements.²²⁸ However, this government support may lead to doubts, especially for foreign investors.

The institution approved the Emergency Arbitration Rules in 2015, under Appendix I of the Arbitration Rules. The Rules have the opt-out feature: in case the parties do not want to apply the Rules, they have to agree on this in writing. According to Article 1, the existence of this proceeding in an agreement does not prevent the parties from submitting their disputes to the courts. The application has to include some requirements, such as the parties’ information, the arbitration agreement, the interim measures sought, the reasons for the request, and the proof of payment. In the case of an appropriate request, the president of the board (the autonomous body of the ISTAC) may appoint a suitable emergency arbitrator within two days of the receipt of the application. As usual, the basic principles of arbitration are ensured with the provisions such as the impartiality and independence of the arbitrators, the possibility of challenging the arbitrator if there is sufficient doubt, and the arbitrator’s power in terms of his or her jurisdiction. As the LCIA Rules, the ISTAC arbitrator also has the opportunity to grant ex parte interim measures, as stated in Article 6(4), unless he or she decides that it is necessary for the case.

The Rules prefer to use the general term “interim measure decision,” without distinguishing the form of emergency relief. The appointed arbitrator has to render a decision within seven days and has the broad power to grant any appropriate measure and, if necessary, grant it with security. The decisions must be in written form, with reasons, and have a binding effect on the parties. Upon the request of a party, the arbitrator also has the power to modify or terminate the given decision before the transmission of the file to the tribunal. According to the Rules, the emergency arbitrator’s decisions will be ineffective in case of the termination of duty, the acceptance of a challenge, a different decision by the tribunal for the final award, or the termination of arbitral proceedings.

²²⁶ Istanbul Arbitration Center Law No. 6570, published in the Official Gazette No. 29190 of 29 November 2014, <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6570.pdf>.

²²⁷ Yasemin Çetinel, “Enforceability Issues of Dispute Boards: Considerations for an Efficient Practice in Turkey,” in *Construction Arbitration in Central and Eastern Europe: Contemporary Issues* (Kluwer Law International, 2019), 231–242, 239.

²²⁸ The Circular of Turkish Prime Ministry on ISTAC (2016/25), <https://www.resmigazete.gov.tr/eskiler/2016/11/20161119-5.pdf>.

The number of applications made to the ISTAC were 27 for 2018 and 45 for 2019, but there was no application requesting the appointment of an emergency arbitrator as such. These numbers may make sense as the arbitral institution is newly established. However, to be a reliable arbitration center in the region, which is also the aim of the government to make the country attractive for foreign investors, a fast arbitration system must be ensured by providing rapid recognition and enforcement processes.

To summarize, Turkey's national legislation clearly states that arbitral tribunals have the power to grant interim measures but does not indicate the emergency arbitrator mechanism. However, there has been a significant improvement in the country's arbitration practices, as seen from the ICC statistics. In 2018, Turkey became one of the top 10 countries that favored the ICC Rules with 62 cases,²²⁹ and this preference continued with 47 cases in 2019.²³⁰ In case this trend proceeds with the help of the ISTAC, there can be a stable but significant improvement in the country related to arbitration, including the emergency arbitrator mechanism.

4.3 Final Assessment

The arbitral seat, which determines the national legislation applicable to the arbitral proceedings and mostly agreed with an arbitration clause in the arbitral agreement, has significant importance for the parties in an international commercial arbitration. It affects the whole arbitration procedure, such as the arbitrating parties' rights, the power of the national courts – the scope of their involvement – on the arbitration and the enforceability of the arbitral award.²³¹

On the one hand, being one of the major international commercial centers due to its history, has led to the United Kingdom having a reputation for its effective, reliable, impartial and independent judicial system. Furthermore, together with the LCIA, which is one of the reputable arbitral institutions, both have secured their significant positions for arbitral proceedings. According to the annual report of the LCIA, English law was the most preferred law in LCIA cases in 2018.

On the other hand, Turkey, which has complicated national arbitral legislation, has recently decided to be a significant player in arbitration practices. Also, the government aims to support arbitral proceedings, for example by establishing a new arbitral institution in the country, namely the ISTAC.

Both the UK and Turkey adopted the Model Law without the 2006 revisions and are signatories to the New York Convention. The main provisions of both legislations include the fundamental values and principles of arbitration, such as party autonomy, the impartiality and independence of the arbitrators, fair treatment of the parties, and the competence-competence principle in deciding the jurisdiction of arbitrators.

Except for these basic principles, the regulations have some differences, especially with regard to interim relief measures and emergency arbitrator proceedings:

- English arbitration legislation makes no discretion between domestic and international arbitration and regulates both under a single law. However, Turkish

²²⁹ International Chamber of Commerce, "ICC Dispute Resolution 2018 Statistics," 2019, 9.

²³⁰ International Chamber of Commerce, "ICC Dispute Resolution 2019 Statistics," 2020, 10.

²³¹ David Hesse, "The Seat of Arbitration Is Important. It's That Simple.," Kluwer Arbitration Blog, 2018, <http://arbitrationblog.kluwerarbitration.com/2018/06/10/seat-arbitration-important-simple/> accessed 25 July 2020.

arbitral legislation involves a sharp contrast under three different acts according to the nationality and enforcement of the arbitral awards.

- According to English law, parties can decide the power of arbitral authorities in terms of the types of measures they prefer, otherwise the arbitral authority can have the ability to grant some relief measures which are listed in the Act: taking evidence from witnesses, preserving evidence, the sale of goods, and interim injunctions. By comparison, Turkish law restricts the extent of the arbitral interim measures to preliminary injunctions and attachments.
- Under English law, the courts can intervene in the arbitral proceedings under specified conditions: granting a peremptory order in case of non-compliance with the arbitral decision, determining a question of law arising from the arbitral course, and granting interim measures in case the arbitral authorities cannot act effectively in urgent situations. However, in Turkish law, parties can apply to courts for any interim measure related to arbitral proceedings but also have the right of an arbitration objection.
- According to the LCIA, the emergency relief can be in the form of an order or an award but maximum in 14 days after appointment. Under the ISTAC Rules, emergency measures defined as interim measure decisions and have to be rendered in seven days.
- The emergency arbitrator has to decide on the claim as soon as possible, but in principle a maximum of 14 days after appointment.
- The LCIA has a significant caseload, since it is one of the leading arbitral institutions, but exhibits a low practice of the emergency arbitration mechanism. There is no facility to apply for an emergency arbitrator under the ISTAC Rules yet.

According to English case law, an emergency arbitrator is an arbitral authority under the provisions of the Act of 1996. Under Turkish case law, arbitral interim measures are found sufficient for enforcement under the Convention. In conclusion, emergency interim measures are likely to be enforceable both in the United Kingdom and Turkey.

CHAPTER 5: CONCLUSION

Arbitration is an outstanding mechanism in international commercial relations, especially considering the advantages it offers, such as neutrality, specialization, and flexibility. Based on party autonomy and the freedom of contract principle, it ensures the fast resolution of disputes by providing confidentiality with impartial and independent judgments. Particularly in international disputes, the mechanism has value in case a foreign arbitral award becomes enforceable in a different state to the issuing state. Principally, enforcement of a foreign arbitral award depends on the national legislation of the countries or the New York Convention, which is accepted by and between the signatory states. However, the common practice area of the Convention globally limits the exercise of national arbitral regulations only to the states that are not signatories.

In this respect, the New York Convention, which is a fundamental treaty in recognition and enforcement matters, provides for foreign arbitral awards to be recognized and enforced in other signatory states. Under the Convention, an arbitral award has to be binding and final. However, the Convention does not include a provision about arbitral interim measures which may be concluded due to the enforcement date of the Convention, 1958.

Arbitration is a dynamic process that necessitates reforms according to developing trade practices and the needs of the parties. According to its aim, which is to provide an effective and swift dispute resolution, it has to be updated. One of the revisions in the arbitration rules occurred on the subject of arbitral interim measures. In general, interim measures, one of the main parts of the litigation proceedings, protect the parties from damages during the pending process of a resolution but before the final decision. As interim measures gain importance also in arbitral proceedings, the UNCITRAL Model Law revised its rules in 2006 and accepted arbitral tribunals' power to grant interim measures. However, being a guide, the Model Law provisions have no effect on countries unless a country implements the Model Law with the revisions.

In practice, arbitral interim measures have a significant effect, especially during the early stage of arbitration proceedings, and play an essential role in the effectiveness of the final award. Due to their importance, at present most arbitral institutions and national legislations accept the power of arbitral authorities to grant interim measures. However, the enforcement of an arbitral interim measure is a controversial issue under the Convention, because it does not include any provision about interim measures. Even so, in case an arbitral interim measure has a binding effect (an agreement inherently binds parties) and a finality feature (in some cases, an arbitral interim measure shall dissolve a significant part of the dispute), then it should be enforceable under the terms of the "arbitral award." States which implement their national arbitration laws according to the revised Model Law will be more inclined to enforce arbitral interim measures, as stated in the Model Law.

Arbitral interim measures can intrinsically be thought of as relief measures which may be obtained from a proper arbitral tribunal. However, in some cases, the formulation of an arbitral tribunal may take a long time, and that may lead to irrevocable harm for the parties. Therefore, in recent years, by virtue of reputable arbitral institutions, a new practice has developed, under the name of the emergency arbitrator procedure. The mechanism aims to provide urgent interim measures, as soon as possible, from a sole arbitrator without waiting for the constitution of an arbitral tribunal. The mechanism has been accepted by most arbitral institutions and also by some states.

The debate about the mechanism is whether an emergency arbitrator is a regular arbitrator or not. However, this discussion can be answered in a positive way regarding the features of the procedure. Firstly, the terminology which includes the “arbitrator” expression and the per se opt-in feature of the mechanism indicates the complementary function of the proceeding in the arbitral rules. Additionally, serving – absolutely – the same purpose as a regular arbitrator in the context of arbitral interim measures, including the power to decide the form of the decision, has an essential place in this view. Last but not least, the acknowledgment of the mechanism under the arbitral rules – both by the major arbitral institutions and national laws – and among some scholars indicates the emergency arbitrator’s equal status with the proper arbitrator. Therefore, if tribunal-ordered interim measures are enforceable, as accepted with the 2006 amendments of the Model Law, emergency arbitrator-ordered ones should also be enforceable.

The United Kingdom has a supportive approach to arbitral proceedings. The fundamental legislative regulation of the country, namely the Arbitration Act of 1996, prohibits the courts from intervening in arbitral proceedings, except under some extraordinary circumstances. In addition, there is a noticeable approach – seen in recent case law practices – that English courts prefer to interpret the arbitration proceedings primarily according to the parties’ intents. This may be thought of as a sign of being more likely to enforce arbitral interim measures. Regarding the emergency arbitrator proceedings, the Act does not stipulate any provisions. The mechanism has a place under the LCIA Rules, but it is more rare in practice than other leading arbitral institutions. The less demand for emergency arbitrators seems hard to overcome since the inclusion of the mechanism is one of the obstacles for the parties to apply to national courts due to the country’s court-subsidiarity approach.

Similarly, Turkey offers the right of preliminary objection to parties in case of an application to a court instead of an arbitral tribunal but does not have a provision about the emergency arbitrator. The practice has been adopted by the ISTAC, which is a recently established arbitral institution in the country but has not practiced until now. However, in a recent case, the Court of Cassation stated that the bindingness, not the finality, is a requisite for the enforcement of a foreign arbitral award under the New York Convention. In the decision, it was also pointed out that, even for a certain period of time, arbitral interim measures are final in terms of the dispute. Therefore, in accordance with this decision, upon request, the emergency arbitrator decisions can be enforceable under Turkish law. The country aims to be a major player in the region, but the three-component legislation model – different and specific acts for each arbitral subject: domestic arbitration, international arbitration, recognition and enforcement of foreign awards – and the long process of the enforcement of arbitral awards may lead to problems for foreign parties.

The truth is that each law amendment necessitates a defined time to be adapted both by the states and the parties. The emergency arbitrator has also been going through this harmonization period at the present time. If the importance of arbitral interim measures and therefore the practice of emergency arbitrator mechanism keeps on rising, the perspectives of the states to the mechanism will be adapted more easily, as the US case law. Recently, the US Courts have been adopted the trend which prioritize the importance of the emergency decisions’ content rather than the form. This approach leads to the enforceability of emergency decisions and enhances the value of the mechanism in the arbitral proceedings.

In any event, making appropriate revisions for the inclusion of emergency arbitrator proceedings to the New York Convention and the Model Law should be the primary step for improving the mechanism's practice.

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