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# Emergency arbitration: A practical guide for young arbitration practitioners



## IBA Arb40 Subcommittee of the IBA Arbitration Committee

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# Preface

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Since its establishment in 2014, a key goal of the **IBA Arb40 Subcommittee** ('**Arb40**') has been to support the professional growth of young arbitration practitioners. Through practical toolkits, guides, and comparative studies, Arb40 has worked to create resources that are not only informative but also practically useful for young practitioners as they start dealing with specific topics.

**Emergency arbitration: A practical guide for young arbitration practitioners** (the '**Guide**') was devised in furtherance of that mission, building upon the success of previous Arb40 initiatives. It aims to offer practical insights and sometimes comparative perspectives into one of the most dynamic procedural tools in international arbitration.

Emergency arbitration ('**EA**'), while still a relatively recent development, has become an essential procedural feature for parties seeking urgent interim relief before the constitution of an arbitral tribunal. Its origins trace back to 1999, when the American Arbitration Association (AAA) introduced its Optional Rules for Emergency Measures of Protection as part of its Commercial Arbitration Rules. Slightly more than a quarter of a century later, this mechanism has been gradually adopted and refined by all the major arbitral institutions, becoming a standard feature of the modern arbitral framework.

Recognising the growing significance of EA and the need for practical guidance, Arb40 initiated this project – under the leadership of Arb40's former Co-Chairs, **Anina Liebkind**, **Hamid Abdulkareem**, **Juan Felipe Merizalde** and **Agnès Bizard** – to study how EA functions under different institutional rules and in diverse regions. The result is this Guide: a user-focused resource designed to help young practitioners as they start encountering EA in their practice.

The preparation of the Guide was led by a dedicated Working Group composed of **Nora Fredstie**, **Séréna Salem**, **Alipak Banerjee**, and **Francisco Amallo**, to whom the primary credit for this project is owed. We also thank **Ritika Bansal**, **Manal Sanai**, **Pablo Pereira Brause**, and **Suriya Idris** for their valuable support throughout the preparation of the Guide.

A key component of the project was the design and circulation of a detailed questionnaire to arbitral institutions, aimed at gathering empirical data on EA. We are especially grateful to the institutions that generously responded to this questionnaire and shared their expertise: **ARBITAC** (Câmara de Mediação e Arbitragem da Associação Comercial do Paraná), **CAMARB** (Chamber of Business Mediation and Arbitration – Brazil), **CCL** (Centro de Arbitraje de la Cámara de Comercio de Lima), **CEMARC** (Centro de Mediación y Arbitraje Comercial de la Cámara Argentina de Comercio), **DIAC** (Dubai International Arbitration Centre), **HKIAC** (Hong Kong International Arbitration Centre), **ICDR** (International Centre for Dispute Resolution), **LCIA** (London Court of International Arbitration), **SIAC** (Singapore International Arbitration Centre), and the **Swiss Arbitration Centre**.

This Guide is the product of collective effort and reflects the spirit of collaboration that lies at the heart of Arb40. We hope it proves to be a useful and enduring resource.

# I. Introduction

1. *It is not unusual that an arbitrator's first experience in the role comes from acting as an emergency arbitrator. This can be a particularly daunting experience, given the particularities of EA, coupled with the rapid pace at which the EA proceedings take place. This Guide therefore aims to assist practitioners – and particularly first-time emergency arbitrators – to come to grips with the peculiarities of EA. As such, while it does not intend to be a comprehensive treatise of every aspect of EA, the Guide provides an overview of the key issues from the perspective of both an emergency arbitrator and counsel and in that way serves as an initial point of reference and as a launchpad for further research, where necessary.*

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2. There are many reasons why parties may choose arbitration over national courts including efficiency, confidentiality, the perceived partiality of national courts, finality, the ability to choose specialised decision makers, and flexibility, to name just a few. Some of these advantages, such as neutrality and confidentiality, may be compromised if a party is forced to seek emergency relief in national courts either before or during the arbitral proceedings.
3. Whilst national courts retain residual authority to support international arbitration, which includes the authority to grant emergency relief even where the parties have decided to resolve their disputes by arbitration, this arrangement can be fraught with difficulties. For one, pursuing emergency relief through national courts may, depending on the precise circumstances, effectively negate the parties' choice of arbitration. If the national courts deny such a request, the applicant might decide not to pursue the arbitration thereafter, either due to an early negative assessment of their case or because the subject of the dispute may have been destroyed or compromised during the interim measures proceedings. Alternatively, if the national courts grant the request and comment favourably on the likelihood of success, the respondent may seek to settle the matter. In either case, the national courts may have ultimately decided the case.<sup>1</sup>
4. EA is a procedure that allows a party to an arbitration agreement to seek urgent relief from an arbitrator prior to the establishment of the arbitral tribunal, avoiding the need to resort to national courts.
5. EA was first introduced in 1999 in the rules of some arbitral institutions in an attempt to extend their reach where the parties had agreed to resolve their disputes by arbitration. Over the last decade, EA has grown in popularity, and almost all major arbitral institutions now have specific rules on EA.<sup>2</sup> Over time, trends have developed and common issues have emerged. The key issues and trends that young practitioners should be aware of are highlighted in the following chapters.
6. **Chapter II** of the Guide covers the commencement of EA proceedings, and, more specifically, the availability and applicability of EA rules, the jurisdiction of emergency arbitrators, as well as the

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1 G. Hanessian and E. Alexandra Dosman, 'Songs of Innocence and Experience: Ten Years of Emergency Arbitration' in *The American Review of International Arbitration*, October 2016.

2 Including: the ICC, LCIA, AAA-ICDR, HKIAC, SIAC, SCC, Swiss Arbitration Centre, CIETAC, CIAM-CIAR, FAI, and NOMA.

admissibility of claims and reliefs. It addresses the appointment timeline and procedure, and the prospect of a challenge brought against the emergency arbitrator.

7. After covering these key initial aspects, **Chapter III** discusses the conduct of EA proceedings. This substantive chapter addresses common procedural matters, the applicable standards for granting emergency relief and the types of relief available.
8. **Chapter IV** then addresses post-EA matters. It considers the legal effect of emergency orders/awards and their enforceability, financial consequences of non-performance, settlements after EA proceedings, and the correlation with the main arbitral proceedings.
9. **Chapter V** shifts focus to consider EA in the context of investment treaty disputes by looking at the implications of the doctrine of State sovereignty and the application of two common BIT provisions (cooling-off periods and most-favoured-nation clauses) to EA, and by examining the institutional rules that allow for EA in investment treaty disputes.

## II. Commencement of EA proceedings

### A. Availability and applicability of EA rules

#### Key takeaways:

- EA is generally only available if the parties (i) specifically opt in to EA, or (ii) have opted to arbitrate their dispute under arbitration rules that offer EA and the arbitration agreement was entered into after the EA provisions were introduced in the rules, and the parties did not opt out.
- The scope of the arbitration agreement or arbitration rules may lead to the application of EA provisions, even if they were incorporated to the arbitration rules after the parties' agreement to arbitrate their disputes.

10. EA is now available in the rules of most major arbitral institutions. EA rules generally apply by default to parties having opted to arbitrate their dispute under arbitration rules that offer EA, unless they agreed to opt out of the EA procedure.<sup>3</sup>
11. As EA – like arbitration in broad terms – is based on consent and it has been incorporated into arbitration rules over the years, most arbitration rules do not authorise a retroactive application of EA provisions to arbitration agreements concluded before those provisions were incorporated into the arbitration rules.<sup>4</sup> This is unless (i) the parties opted-in to EA,<sup>5</sup> (ii) the arbitration agreement refers to the arbitration rules in force at the time of commencement of the arbitration and the EA provisions were incorporated into the arbitration rules by that time,<sup>6</sup> or (iii) the arbitration rules state that the parties are deemed to have submitted to the arbitration rules in effect on the date of commencement of the arbitration or the filing of an application for the appointment of an emergency arbitrator.<sup>7</sup>
12. Although EA provisions are usually not intended to prevent any party from seeking urgent interim or conservatory measures from a competent state court or other legal authority,<sup>8</sup> some arbitration rules exclude the application of EA provisions when the parties opted for expedited procedures.<sup>9</sup>

<sup>3</sup> ICC Arbitration Rules (2021), Art. 29(6); LCIA Arbitration Rules (2020), Art. 9(16).

<sup>4</sup> See for instance ICC Arbitration Rules (2021), Art. 29(6); LCIA Arbitration Rules (2020), Art. 9(16).

<sup>5</sup> LCIA Arbitration Rules (2020), Art. 9(16).

<sup>6</sup> Some emergency arbitrators concluded that the parties were aware that the arbitration rules were subject to modifications, even if they were unaware of their specific content, thus implicitly agreeing to EA (A. Carlevaris and J. R. Feris, 'Running in the ICC Emergency Arbitrator Rules: The First Ten Cases', 2014 ICC International Court of Arbitration Bulletin, Vol. 25, No. 1, p. 7). However, some emergency arbitrators declined jurisdiction (i) on the basis that future amendments of some clauses in the main contract did not reaffirm the arbitration clause after the EA provisions were included in the arbitration rules, or (ii) in the situation of multi-contracts with several arbitration agreements, some made prior to and some after the inclusion of EA provisions in the arbitration rules, in the understanding that it was not possible to read all contracts together and rely on the later arbitration clauses for jurisdictional purposes to request EA relief with respect to all contracts (ICC Commission Report, 'Emergency Arbitration Procedures', 2019, p. 14).

<sup>7</sup> SCC Arbitration Rules (2023), p. 3. See J. D'Agostino, 'First Aid in Arbitration: Emergency Arbitrators to the Rescue', 15 November 2011, Kluwer Arbitration Blog.

<sup>8</sup> ICC Arbitration Rules (2021), Art. 29(7); LCIA Arbitration Rules (2020), Art. 9.13.

<sup>9</sup> AAA Commercial Arbitration Rules and Mediation Procedures (2022), Art. R-39(a). This measure was adopted as part of the AAA's ongoing efforts to manage cases as economically as possible (American Arbitration Association, 'The 2022 AAA Commercial Arbitration Rules and Mediation Procedures Significant Amendments', 1 September 2022, p. 2).

13. As explained below, a few arbitration rules exclude the applicability of EA provisions to non-signatories, and when the arbitration agreement arises out of an investment treaty.

## B. Jurisdiction of emergency arbitrators

### Key takeaways:

- Emergency arbitrators usually make a *prima facie* assessment of their jurisdiction.
- Most rules do not afford the emergency arbitrator jurisdiction over third parties.
- National courts and emergency arbitrators have concurrent jurisdiction over interim measures.
- Joinder and consolidation are not regulated in EA proceedings.

### 1. *Kompetenz-Kompetenz*

14. Emergency arbitrators shall determine whether they have jurisdiction to hear the application.<sup>10</sup>
15. According to scholars, emergency arbitrators are not expected to delve into jurisdictional questions as an arbitral tribunal would do before rendering an award and should, therefore, conduct a *prima facie* analysis of their jurisdiction (*i.e.*, determining whether they manifestly lack jurisdiction) given the urgent nature of EA and their provisional role (as discussed below, the arbitral tribunal may revoke the emergency arbitrator's decision and compensate the party against whom the relief was issued for any damage suffered).<sup>11</sup>
16. Emergency arbitrators have repeatedly rejected jurisdictional objections that the case was being heard by national courts or subject to other dispute resolution forums,<sup>12</sup> as many arbitration rules expressly state that the emergency arbitrator's jurisdiction is non-exclusive.<sup>13</sup>
17. Three of the ten arbitral institutions who answered the survey carried out by the Working Group reported precedents in which jurisdictional challenges were made in the context of an EA, but none of them reported instances in which the procedure was requested to be bifurcated.<sup>14</sup>

### 2. *Jurisdiction over third parties*

18. Some arbitration rules expressly provide that EA provisions apply only to the parties that are signatories of the arbitration agreement or their successors.<sup>15</sup>

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10 ICC Arbitration Rules (2021), Appendix V, Art. 6(2); CIAM-CIAR Arbitration Rules (2024), Art. 61(3).

11 R. Alnaber, 'Emergency Arbitration: Mere Innovation or Vast Improvement', 2019 *Arbitration International*, Vol. 35, Issue 4, p. 450; A. Carlevaris and J. R. Feris, 'Running in the ICC Emergency Arbitrator Rules: The First Ten Cases', 2014 *ICC International Court of Arbitration Bulletin*, Vol. 25, No. 1, p. 20.

12 ICC Commission Report, 'Emergency Arbitration Procedures', 2019, p. 15.

13 ICC Arbitration Rules (2021), Art. 29(7); LCIA Arbitration Rules (2020), Art. 9(13); SIAC Arbitration Rules (2025), Art. 45(2); HKIAC Administered Arbitration Rules (2024), Art. 23(9); ICDR International Arbitration Rules (2021), Art. 7(7); AAA Commercial Arbitration Rules and Mediation Procedures (2022), Art. R-39(h); CIAM-CIAR Arbitration Rules (2024), Art. 64(3); ACICA Arbitration Rules (2021), Schedule 1, Art. 7(1).

14 These were HKIAC, CCL and CAMARB. The full list of the arbitral institutions that completed the Working Group survey is: ARBITAC, CAMARB, CCL, CEMARC, DIAC, HKIAC, ICDR, LCIA, SIAC and Swiss Arbitration Centre.

15 ICC Arbitration Rules (2021), Art. 29(5).

19. The rationale underlying this rule is twofold. On the one hand, it avoids the delays that would be caused by a jurisdictional objection posed by a third party.<sup>16</sup> On the other hand, it excludes investment treaty arbitration from the scope of EA, on the understanding that the investor and the host State are not ‘signatories’ of the arbitration agreement formed by the State’s offer contained in the treaty and the investor’s acceptance contained in its notice of claim or request for arbitration.<sup>17</sup>
20. Although most arbitration rules do not state expressly that EA provisions apply only to signatories, emergency arbitrators have in practice denied requests to extend the application of EA provisions to non-signatories because of their lack of jurisdiction.<sup>18</sup> In the view of some scholars, interim measures cannot be directed to third parties because the contractual nature of arbitration implies that the tribunal’s authority is limited to the parties in the arbitration, and if emergency arbitrators were to grant such a measure, national courts could refuse its recognition and enforcement.<sup>19</sup>
21. However, there is at least one reported case in which the emergency arbitrator held that it would be theoretically possible to include non-signatories in EA proceedings.<sup>20</sup> This opinion is shared by some scholars, who nevertheless stress that the burden of proof to be borne by the petitioner to extend the emergency arbitrator’s jurisdiction over non-signatories would necessarily be high, as it will have to prove that (i) the non-signatory actively participated in the contract’s execution, (ii) it was aware of the arbitral clause, and (iii) its inclusion in the emergency order is imperative to avoid irreparable harm.<sup>21</sup>

### 3. Joinder and consolidation

22. Arbitration rules do not specifically address issues of joinder and consolidation within their EA provisions. However, some sets of rules expressly indicate that, for procedural matters not covered within the section dedicated to EA, the other provisions of the rules apply.<sup>22</sup>
23. There is a reported precedent in which a request for emergency relief raised by a second (previously undisclosed) applicant was declared inadmissible because such ‘joinder’ was not provided for in the applicable EA provisions.<sup>23</sup>
24. None of the ten arbitral institutions which answered the survey carried out by the Working Group reported precedents in which a joinder was requested in the context of an EA.

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16 A. Carlevaris and J. R. Feris, ‘Running in the ICC Emergency Arbitrator Rules: The First Ten Cases’, 2014 ICC International Court of Arbitration Bulletin, Vol. 25, No. 1, p. 6. The ICC reported at least five precedents in which the inclusion of third parties in requests for EA caused the application to be rejected. See ICC Commission Report, ‘Emergency Arbitration Procedures’, 2019, pp. 15-16.

17 ICC Commission Report, ‘Arbitration Involving States or State Entities’, 2014, pp. 6-7. ICC Arbitration Rules (2021), Art. 29(6) expressly excludes the application of EA provisions when the arbitration agreement arises out of a treaty.

18 See SCC Case No. 064/2010 (SCC Arbitration Institute, ‘SCC Practice: Emergency Arbitrator Decisions 2010-2013’, pp. 3-5).

19 G. B. Born, *International Commercial Arbitration* (3<sup>rd</sup> ed. 2021), pp. 2626-2627.

20 In the SCC Case No. 2017/184 the arbitrator found it was ‘undisputed that the second respondent was not a signatory to the Agreement containing the arbitration clause’, but pointed out that it is ‘generally accepted that parties can become bound by an arbitration agreement by other means than by signing the agreement and that the burden of establishing its case on jurisdiction lay on the claimant,’ although it was not met (SCC Arbitration Institute, ‘SCC Practice Note: Emergency Arbitrator Decisions 2017-2018’, pp. 5-7).

21 D. De Andrade Levy, ‘Emergency Arbitrators: Characters in Search of Author’, in ‘International Arbitration and the Rule of Law: Contribution and Conformity’, ICCA Congress Series, Vol. 19, 2017.

22 SIAC Arbitration Rules (2025), Schedule 1, Art. 13; CIAM-CIAR Arbitration Rules (2024), Art. 60(4).

23 ICC EA Case No. 32 (ICC Commission Report, ‘Emergency Arbitration Procedures’, 2019, p. 14).

## C. Admissibility of claims and reliefs

### Key takeaways:

- Multi-tier dispute resolution clauses usually do not apply to EA.
- There can be tension between when the EA rules state that the main arbitration must be commenced, and any cooling off or negotiation periods in a multi-tier dispute resolution clause, and this tension needs to be navigated.
- In some jurisdictions, only courts can order certain types of interim relief.

### 1. Admissibility of the applicant's claim

25. Arbitration rules envision EA as a procedure that takes place prior to the constitution of the arbitral tribunal or the transmission of the file to the tribunal. Some institutions also provide for the possibility of initiating EA before the submission of the request for arbitration, provided, however, that the latter is submitted shortly after filing the application for emergency relief,<sup>24</sup> or within a certain number of days from the issuance of the decision by the emergency arbitrator.<sup>25</sup>

### 2. Multi-tier dispute resolution clauses

26. Arbitration rules do not regulate the potential impact of multi-tier dispute resolution clauses on EA. Most of the reported decisions state that those clauses are not applicable to EA and are limited to the substantive claims submitted to arbitration.<sup>26</sup> Some scholars consider that only specific contractual wording should prohibit recourse to EA before the exhaustion of the tiers prior to arbitration, given that the contrary solution would bar access to time-sensitive remedies, which could ultimately result in a denial of access to justice.<sup>27</sup>

27. A tension arises when a contract imposes a cooling-off period before arbitration, while the applicable arbitration rules require a party that has obtained emergency relief to commence arbitration within a set deadline to preserve that relief. This creates the risk that compliance with the rules could be construed as a breach of the contractual clause, whereas waiting for the cooling-off period to expire would cause the emergency decision to lapse. In practice, the requesting party may mitigate this conflict by filing the arbitration within the prescribed deadline but seeking immediately a suspension of proceedings until the cooling-off period ends, or by securing the other party's agreement to waive

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24 Seven days: SIAC Arbitration Rules (2025), Schedule 1, Art. 6. Ten days: ICC Arbitration Rules (2021), Art. 29(1) and Appendix V, Art. 1(6); Swiss Rules of International Arbitration (2021), Art. 43(3). Fifteen days: CIAM-CIAR Arbitration Rules (2024), Art. 56(6).

25 Thirty days: SCC Arbitration Rules (2023), Appendix II, Art. 9(4)(iii). Under the HKIAC Administered Arbitration Rules (2024), Schedule 4, Art. 18(d)), and the CIETAC Arbitration Rules (2024), Appendix III, Art. 6(6)(e), the decision of the emergency arbitrator ceases to be binding on the parties if the tribunal in the main proceedings is not constituted with ninety days from the date of the emergency arbitrator's decision.

26 *SCM Port-Royal v Pebay et Samper*, Cour d'Appel de Paris (14e Ch. A), 23 May 2001, 2003 *Revue de l'Arbitrage*, Issue 2, p. 405, cited by G. B. Born, *International Commercial Arbitration* (3rd ed. 2021), p. 2638. The same course of action was taken by at least three ICC-administered EAs, where the respondent's jurisdictional objection was dismissed on the ground that the mandatory mediation period did not preclude EA. However, there is a reported ICC precedent in which the emergency arbitrator rejected the application based on the non-compliance of a multi-tier dispute resolution clause (ICC Commission Report, 'Emergency Arbitration Procedures', 2019, pp. 14-15).

27 G. B. Born, *International Commercial Arbitration* (3rd ed. 2021), p. 2638.

or shorten the waiting period. Although the emergency arbitrators cannot override institutional deadlines, unless the rules grant them that power, they may acknowledge the contractual requirement in their decision, clarify that the filing of the request for arbitration is solely to comply with the rules, and direct the parties to continue with the agreed pre-arbitration process in good faith until the cooling-off period has expired.

### 3. Admissibility of the specific relief sought

28. In some jurisdictions, certain relief may be outside the emergency arbitrator's purview, as national laws may limit the power of arbitrators to issue interim measures.<sup>28</sup>
29. Arbitration rules generally do not specify the type of relief that the parties may seek in EA proceedings. Some institutions list possible reliefs (e.g., maintain or restore the *status quo*, prevent or refrain from taking action that could cause current or imminent harm, preservation of assets and preservation of evidence), clarifying that the list is not exhaustive.<sup>29</sup> Absent specific provisions, it should be assumed that emergency arbitrators can grant the same types of interim reliefs as an arbitral tribunal, provided that this does not conflict with mandatory limits contained in the national law of the seat of arbitration or of the jurisdiction where the emergency arbitrator's decision is to be enforced.<sup>30</sup>

## D. Timeline and procedure to appoint emergency arbitrators

### Key takeaways:

- Emergency arbitrators are usually appointed by the appointing authority within one to three days of the application.
- Rules provide for a sole emergency arbitrator, either expressly or tacitly.

30. Appointment timelines and procedures are a key element of EA, as a correct balance must be struck between the need for expeditiousness, the selection of a competent arbitrator, and the parties' right to challenge the arbitrator, if necessary.<sup>31</sup>
31. The procedures described in different sets of arbitration rules are broadly similar. They may contain minor differences regarding the timeline, but the procedural steps are practically identical. Over time, minor differences in procedure between different sets of rules have been progressively amended, such

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28 P. Cavalieros and J. Kim state that in England and Wales, only courts are empowered to grant freezing orders; in France, only courts can order attachments and security; and in the Czech Republic arbitrators cannot order preliminary measures ('Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations', 2018 *Journal of International Arbitration*, Vol. 35, Issue 3, pp. 295-297).

29 HKIAC Administered Arbitration Rules (2024), Art. 23(3) and Schedule 4, Art. 17.

30 C. Boog, 'The Laws Governing Interim Measures in International Arbitration', in *Conflict of Laws in International Commercial Arbitration* (F. Ferrari and S Kröll eds.), 2019, pp. 345-346.

31 A. Carlevaris and J. R. Feris, 'Running in the ICC Emergency Arbitrator Rules: The First Ten Cases', 2014 *ICC International Court of Arbitration Bulletin*, Vol. 25, No. 1, p. 9.

that the EA mechanisms offered by various institutions are increasingly standardised, as described below.<sup>32</sup>

32. Once the application for EA is submitted, most institutional rules provide for an initial review by the institution's competent authority.<sup>33</sup> Subsequently, if the application complies with all the requirements, the emergency arbitrator must be appointed within a stringent time limit, usually between one and three days.<sup>34</sup> Most rules leave the selection of the emergency arbitrator at the appointing authority's discretion.<sup>35</sup> The sample answers received from the survey conducted by the Working Group indicates that most, but not all, arbitral institutions maintain lists of prospective arbitrators.<sup>36</sup> The survey further showed that in choosing an emergency arbitrator, arbitral institutions consider several factors, including: expertise in the subject matter of the arbitration, availability, ability to clear conflicts quickly, experience and diversity.
33. Regarding the number of arbitrators, most rules expressly or tacitly state that the emergency arbitrator must be a sole arbitrator.<sup>37</sup> There is no reported precedent of an EA application being heard by a panel of three arbitrators.

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- 32 An analysis of previous differences between arbitral institution rules can be found in P. Cavalieros and J. Kim, 'Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations', 2018 Journal of International Arbitration, Vol. 35, Issue 3, pp. 276-283.
- 33 ICC Arbitration Rules (2021), Appendix V, Art. 1(5); LCIA Arbitration Rules (2020), Art. 9(6); SIAC Arbitration Rules (2025), Schedule 1, Art. 7; HKIAC Administered Arbitration Rules (2024), Schedule 4, Art. 4; SCC Arbitration Rules (2023), Appendix II, Art. 4(2); Swiss Rules of International Arbitration (2021), Art. 43(2); CIETAC Arbitration Rules (2024), Appendix III, Art. 2(1). Within the ICC framework, three of the first 80 cases administered were dismissed for failing to meet the prior review standard (ICC Commission Report, 'Emergency Arbitration Procedures', 2019, p. 4).
- 34 24 hours: SIAC Arbitration Rules (2025), Schedule 1, Art. 7; HKIAC Administered Arbitration Rules (2024), Schedule 4, Art. 4; SCC Arbitration Rules (2023), Appendix II, Art. 4(1). One day: CIETAC Arbitration Rules (2024), Appendix III, Art. 2(1). One business day: ICDR International Arbitration Rules (2021), Art. 7(2); AAA Commercial Arbitration Rules and Mediation Procedures (2022), Art. R-39(c); ACICA Arbitration Rules (2021), Schedule 1, Art. 2(1). Two days: ICC Arbitration Rules (2021), Appendix V, Art. 2(1). Three days: LCIA Arbitration Rules (2020), Art. 9(6). The Swiss Rules provide for the EA to be appointed '*as soon as possible*' (Swiss Rules of International Arbitration (2021), Art. 43(2)).
- 35 ICC Arbitration Rules (2021), Appendix V, Art. 2(1); LCIA Arbitration Rules (2020), Art. 9(6); SIAC Arbitration Rules (2025), Schedule 1, Art. 7; HKIAC Administered Arbitration Rules (2024), Schedule 4, Art. 4; ICDR International Arbitration Rules (2021), Art. 7(2); SCC Arbitration Rules (2023), Appendix II, Art. 4(1); Swiss Rules of International Arbitration (2021), Art. 43(2); AAA Commercial Arbitration Rules and Mediation Procedures (2022), Art. R-39(c); ACICA Arbitration Rules (2021), Schedule 1, Art. 2(1); CIETAC Arbitration Rules (2024), Appendix III, Art. 2(1). This was confirmed by the survey carried out by the Working Group: all nine arbitral institutions who answered it indicated that the emergency arbitrator is chosen at the appointing authority's discretion.
- 36 List: ICDR, ARBITAC, CAMARB, CCL, CEMARC and HKIAC (specific for emergency arbitrators). No list: DIAC, LCIA, Swiss Arbitration Centre.
- 37 Implied wording: ICC Arbitration Rules (2021), Appendix V, Art. 2(1); SIAC Arbitration Rules (2025), Schedule 1, Art. 7; HKIAC Administered Arbitration Rules (2024), Schedule 4, Art. 4; SCC Arbitration Rules (2023), Appendix II, Art. 4(1); ACICA Arbitration Rules (2021), Schedule 1, Art. 2(1); CIETAC Arbitration Rules (2015), Appendix III, Art. 2(1). Expressly stated: LCIA Arbitration Rules (2020), Art. 9(4); ICDR International Arbitration Rules (2021), Art. 7(2); Swiss Rules of International Arbitration (2021), Art. 43(2); AAA Commercial Arbitration Rules and Mediation Procedures (2022), Art. R-39(c).

## E. Challenging emergency arbitrators

### Key takeaways:

- Time periods for challenges usually vary from one to three days.
- EA proceedings may continue while the challenge is pending.

34. The possibility of challenging an emergency arbitrator is provided for in all the arbitration rules analysed. However, in line with the spirit underlying this procedure, time limits are very brief in comparison with ordinary arbitration.
35. Challenges must be submitted within a very short period, which varies from one to three days from the notification of the arbitrator's appointment, or from the date on which the challenging party was informed of the facts and circumstances that give rise to the challenge.<sup>38</sup>
36. Thereafter, some arbitration rules provide for the institution's competent authority to afford a *suitable* period for the arbitrator and opposing party to provide comments in writing, whose duration is generally not specified, after which the competent body decides on the challenge.<sup>39</sup> Other sets of rules are silent on the specific steps to be followed.<sup>40</sup>
37. While EA rules are generally silent on whether the challenge to the emergency arbitration should result in the suspension of the EA proceedings,<sup>41</sup> some expressly provide that the EA proceedings 'shall continue',<sup>42</sup> or that they 'may continue',<sup>43</sup> pending the decision on the challenge. This was also the approach taken by the emergency arbitrator in at least one case where the rules were silent on the

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38 24 hours: SIAC Arbitration Rules (2025), Schedule 1, Art. 9; SCC Arbitration Rules (2023), Appendix II, Art. 4(3). One business day: ICDR International Arbitration Rules (2021), Art. 7(2); AAA Commercial Arbitration Rules and Mediation Procedures (2022), Art. R-39(c); ACICA Arbitration Rules (2021), Schedule 1, Art. 2(1). Two days: CIETAC Arbitration Rules (2024), Appendix III, Art. 3(4). Three days: ICC Arbitration Rules (2021), Appendix V, Art. 3(1); HKIAC Administered Arbitration Rules (2024), Schedule 4, Art. 7, Swiss Rules of International Arbitration (2021), Art. 43(4). Three business days: CIAM-CIAR Arbitration Rules (2024), Art. 59(1). However, not all rules are entirely clear. For instance, Art. 9(6) of the LCIA Rules (2020) provides that its provisions regarding challenges (*i.e.*, Art. 10) shall apply to EA, without amending the time periods, and this could result in a 14-day span to challenge the emergency arbitrator (*i.e.*, the same time limit that the EA has to issue a decision).

39 ICC Arbitration Rules (2021), Appendix V, Art. 3(2); LCIA Arbitration Rules (2020), Arts. 9(6) and 10(5); SIAC Arbitration Rules (2025), Art. 28(1) and Schedule 1, Art. 11; SCC Arbitration Rules (2023), Art. 19(4) and Appendix II, Art. 4(3); CIAM-CIAR Arbitration Rules (2024), Art. 59(2).

40 This is the case, for instance, under the ICDR International Arbitration Rules (2021) and the CIETAC Arbitration Rules (2024). Instead, the HKIAC Administered Arbitration Rules (2024), Arts. 43(4) and 13(3), and the Swiss Rules of International Arbitration (2021), Art. 11 and Schedule 4, Art. 7, provide that the challenged emergency arbitrator can resign or the non-challenging party can agree to the challenge within 3 days; however, they do not specify the procedure to be followed if neither of these situations occurs.

41 This is the case, for instance, under the ICC Arbitration Rules (2021), the SIAC Arbitration Rules (2025), the SCC Arbitration Rules (2023) and the ICDR International Arbitration Rules (2021).

42 CIETAC Arbitration Rules (2024), Appendix III, Art. 3(6). Under the SIAC Arbitration Rules (2025), Art. 27(4) and Schedule I, Art. 11, the emergency arbitrator 'shall be entitled to continue' with the EA pending the challenge, unless the suspension is ordered by the Registrar.

43 HKIAC Administered Arbitration Rules (2024), Art. 11(9) and Schedule 4, Art. 7.

effect of the challenge. The emergency arbitrator went so far as to issue a decision while the challenge was pending.<sup>44</sup>

38. Generally, reported challenges are rare, and successful challenges are rarer still.<sup>45</sup> One successful challenge has been reported in an EA conducted under the ICDR Rules. After the challenge of the first emergency arbitrator and the resignation of the second, a third emergency arbitrator was successfully appointed. The speed of EA is illustrated by the fact that this series of replacements delayed the case by only five days.<sup>46</sup>

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44 This has occurred in an ICC-administered EA, where the challenge was filed one day before the deadline for rendering the order. The order was handed down within the required timeframe and the challenge was later dismissed by the ICC Court (A. Carlevaris and J. R. Feris, 'Running in the ICC Emergency Arbitrator Rules: The First Ten Cases', 2014 ICC International Court of Arbitration Bulletin, Vol. 25, No. 1, p. 10).

45 The first 80 EAs administered by the ICC registered only four challenges, including the one previously mentioned, which were all dismissed (ICC Commission Report, 'Emergency Arbitration Procedures', 2019, p. 20).

46 B. Giaretta, 'The practice of emergency arbitration', 2017 Belgian Review of Arbitration, Issue 1, p. 91.

## III. Conduct of EA proceedings

### A. Procedural issues

#### Key takeaways:

- Emergency arbitrators have broad discretion in the conduct of the proceedings; they need not consult the parties before adopting procedural decisions on the procedural timetable, submissions, evidence, and the organization and conduct of hearings.
- Most rules do not provide for the possibility to initiate ex parte EA proceedings.
- Most rules provide for a lump sum corresponding to the emergency arbitrator's fees and administrative costs – regardless of the amount at stake – to be paid in full by the applicant when filing its request.

#### 1. Procedural discretion of emergency arbitrators

39. Emergency arbitrators are vested with broad procedural discretion in the conduct of the proceedings as they may adopt procedural decisions without prior consultation of the parties regarding the procedural timetable, submissions, evidence, and the organisation and conduct of hearings.
40. These discretionary powers are only constrained by the binding provisions of EA rules which may provide a specific timeframe for the rendering of a decision, as well as, where applicable, a *road map* of procedural steps.<sup>47</sup>
41. *Case management conference.* A case management conference is not a mandatory step in EA proceedings. Notably, the ICC Task Force reports that more than half of the cases reviewed (55 out of 80) proceeded without a case management conference.
42. Yet, when held at the outset of the EA proceedings, the case management conference may significantly facilitate their conduct: it can serve as a space for setting out the procedural timetable, determining whether a hearing should be held, agreeing on the administration of evidence, deciding the number of submissions, clarifying the emergency relief sought, and even determining the legal standards applicable to the application.<sup>48</sup>

#### Tip box:

Reaching an agreement between the parties and the emergency arbitrator on the standards applicable for awarding emergency relief, during the case management conference or through correspondence, could simplify the emergency arbitration process and lead to a quicker decision.

43. *Procedural timetable.* Under most EA rules, the emergency arbitrator's first task is to establish the procedural timetable in a relatively short time. Some rules specify a deadline – usually two (business)

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47 See ¶¶ 61-63 below, on timeline to render a decision.

48 ICC Commission Report, 'Emergency Arbitration Procedures', 2019, ¶ 123.

days – whilst other rules urge the emergency arbitrator to issue the procedural timetable immediately upon his or her appointment.<sup>49</sup>

44. The emergency arbitrator usually contacts the parties after receiving the case file to establish the procedural timetable and consult them on the number of written submissions to be exchanged and on whether a hearing is required.
45. When prior consultation is not feasible, emergency arbitrators typically either:
  - a) establish, on their own, a procedural timeframe which ensures that all parties have a reasonable opportunity to be heard and are treated with fairness and equality; or
  - b) provide the parties with a draft procedural timetable and request their comments in a short timeframe.<sup>50</sup>
46. When establishing the procedural timetable, the emergency arbitrator should be mindful that the respondent may be put at a disadvantage if it is required to file a response in the EA proceedings prior to the filing of the request for arbitration and must thus assess whether the filing of a response should be delayed until after the filing of the request for arbitration.<sup>51</sup>
47. The emergency arbitrator must also ascertain whether a hearing will be necessary and, if so, the most appropriate format. When the procedural timetable features a hearing, the emergency arbitrator must ensure that sufficient time is left after the hearing to draft the decision.
48. Once the procedural timetable has been set, the parties may still attempt to deviate from the procedural schedule through requests for an extension of time to file a submission, requests to include new steps in the proceedings, or even unsolicited submissions. Such deviations from the procedural timetable must be assessed strictly as, considering the short timeframe of EA proceedings, the emergency arbitrator and parties should have already anticipated procedural scenarios likely to arise during the proceedings.
49. *Submissions.* EA rules usually do not provide any guidance on the practical conduct of the proceedings, and especially the form and number of pleadings to be submitted by the parties. This enables greater flexibility and tailoring of the procedure to each specific circumstance.<sup>52</sup>

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49 24 hours: SIAC Arbitration Rules (2025), Schedule 1, Art. 14. Two days: ICC Arbitration Rules (2021), Appendix V, Art 5(1); CIAM-CIAR Arbitration Rules (2024), Art. 60(2); CIETAC Arbitration Rules (2024), Appendix III, Art. 5(1). Two business days: ICDR International Arbitration Rules (2021), Art. 7(3); AAA Commercial Arbitration Rules and Mediation Procedures (2021), Art. R-38(d); KCAB Arbitration Rules (2016), Appendix 3, Art. 3(2). Immediately after appointment: JCAA Arbitration Rules (2021), Art. 77(2).

50 ICC Commission Report, 'Emergency Arbitration Procedures', 2019, ¶ 124.

51 ICC Commission Report, 'Emergency Arbitration Procedures', 2019, ¶ 125.

52 C. Sim, *Emergency Arbitration* (2021), ¶¶ 5.162-5.163.

50. While EA rules typically require the application to be written, there is sometimes no such requirement for the response.<sup>53</sup> Therefore, the emergency arbitrator may decide to require the parties to present oral submissions only.
51. When the exchange of written submissions is agreed upon, the emergency arbitrator must determine the number of submissions to be filed by each party. When the rules provide for shorter timeframes to render a decision (one week or less), parties usually exchange one set of submissions (*i.e.*, application and response). Where the applicable rules set a two-week timeframe – or no deadline at all – two sets of submissions can be exchanged (application, response, reply and rejoinder).
52. The emergency arbitrator may further decide to cap the length and scope of submissions to ensure the efficiency of the proceedings. The applicant should be mindful that a lengthy application accompanied by voluminous evidence, witness statements and expert reports, may imply that the applicant had plenty of time to prepare the application, thus potentially undermining the ‘urgency’ requirement.
53. Most EA rules do not regulate the respondent’s right to submit counterclaims. It therefore falls upon the emergency arbitrator, vested with procedural discretion, to determine whether counterclaims should be heard as part of the EA proceedings.
54. Witness statements and expert reports. Most EA rules do not contain specific provisions on the administration of evidence. Therefore, emergency arbitrators are generally granted discretion as to whether parties may submit witness statements and expert reports. The emergency arbitrator may allow the parties to submit witness statements and expert reports and decide not to hear from the witnesses and experts at the hearing, or to hear from only some of them. The ICC practice reveals that the submission of witness statements and expert reports remains rare: only 18 applications out of the 80 analysed by the ICC Task Force included a witness statement, whilst just three included an expert report.<sup>54</sup>

**Tip box:**

In deciding whether to submit a witness statement or expert report, parties – especially the applicant – should bear in mind the potential impact on the procedural timetable as additional time may be required to analyse the witness or expert testimony.<sup>55</sup>

55. *Hearing.* The emergency arbitrator has discretion whether to hold a hearing, subject to the applicable EA rules or any applicable mandatory law provision which may impose on the emergency arbitrator an obligation to hold a hearing at the request of a party. Thus, provided it is not prevented by the

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53 AAA Commercial Arbitration Rules and Mediation Procedures (2022), Art. R-39(B); ACICA Arbitration Rules (2021), Schedule 1, Art. 1; CIAM-CIAR Arbitration Rules (2024), Art. 56; CIETAC Arbitration Rules (2024), Appendix III, Art. 1; ICC Arbitration Rules (2021), Appendix V, Art 1; ICDR International Arbitration Rules (2021), Art. 7(1); HKIAC Administered Arbitration Rules (2024), Schedule 4, Art. 2; LCIA Arbitration Rules (2020), Art. 9B(9.5); SCC Arbitration Rules (2023), Appendix II, Art. 2; SIAC Arbitration Rules (2025), Schedule 1, Art. 3; Swiss Rules of International Arbitration (2021), Art. 43(1).

54 ICC Commission Report, ‘Emergency Arbitration Procedures’, 2019, ¶ 127.

55 ICC Commission Report, ‘Emergency Arbitration Procedures’, 2019, ¶ 126.

applicable EA rules or mandatory provisions, the emergency arbitrator may render a decision on a document-based analysis only.<sup>56</sup>

56. The format of the hearing is also left to the discretion of the emergency arbitrator, who may elect to hold an in-person or remote hearing. Due consideration should be given to the hearing format, taking into account whether in-person testimony or arguments would be both feasible and beneficial given the time constraints of the proceeding and the basis of the application.<sup>57</sup>

**Tip box:**

When the emergency arbitrator decides to hold a remote hearing, it is advisable for the parties to agree on the implementation and tailoring of a protocol on remote hearings to facilitate the preparation and conduct of the hearing.<sup>58</sup>

57. In case of an in-person hearing, the selection of the venue is also left to the discretion of the emergency arbitrator.
58. The duration of the hearing is also typically left to the discretion of the emergency arbitrator, although some EA rules, such as those of the Japan Commercial Arbitration Association, limit the duration of the hearing to one day.<sup>59</sup>
59. Parties are encouraged to agree on the different administrative services required for the hearing from the outset of the EA and to provide sufficient time for the parties to find and engage the appropriate service. Yet, despite this precaution, it may be difficult to secure an interpreter or transcription services on short notice. Parties are thus encouraged to record the hearing and add it to the case record so that it may assist the emergency arbitrator when drafting the decision and, afterwards, the parties and the arbitral tribunal.
60. *Defaulting respondents.* When the respondent does not participate in the proceedings, the emergency arbitrator should continue with the EA whilst notifying the non-participating respondent of each procedural step so as to enable it to participate in the proceedings at any later stage (to the extent permitted by applicable rules and law) and to ensure compliance with the due process principle.<sup>60</sup>
61. *Timeline to render decision.* EA rules typically provide for a short timeframe for emergency arbitrators to render their decisions, varying from 5 days to 2 weeks, starting either on the day the case file is transferred to the emergency arbitrator by the institution or on the day of the emergency arbitrator's

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56 A review of the responses provided by the surveyed institutions suggests that a hearing has been held in approximately 50% of the cases.

57 S. Khan and B. Lim, 'Emergency Arbitrator Procedures: What Should a Practice Note of Best Practices Consider?', 11 January 2019 Kluwer Arbitration Blog.

58 See, for example, the CIArb Guidance Note on Remote Dispute Resolution Proceedings, 2020; Africa Arbitration Academy protocol on virtual hearings in Africa, 2020; the ICC checklist for a protocol on virtual hearings, 2020; or the Vienna Protocol – A practical checklist for remote hearings, 2020.

59 Art. 77(3) of the JCAA Arbitration Rules (2021) provides that the hearing shall last 'for one day only'.

60 This is expressly provided for in the SIAC Arbitration Rules (2025), Schedule 1, Art. 14.

appointment.<sup>61</sup> It is advisable that, where the EA Rules requires scrutiny of the decision, the emergency arbitrator reserves sufficient time (ideally, in consultation with the institution) ahead of the deadline fixed by the rules for the scrutiny.

62. Depending on the applicable rules, the deadline to issue the decision may be extended by the institution at the request of the emergency arbitrator. However, such extensions are generally exceptional, given the inherently expedited nature of EA.<sup>62</sup>
63. Although in rare cases the emergency arbitrator may be granted an extension of time to complete his or her duties, failing to comply with the original timeframe has consequences. Most arbitral institutions that responded to the Working Group's survey indicated that if an emergency arbitrator fails to meet the timeframe set by the rules, they might not be considered for future appointments. Additionally, one institution mentioned that the fees of the delayed emergency arbitrator would be reduced as a consequence of not meeting the timeframe.

## 2. Availability of *ex parte* applications

64. Most rules do not provide for the possibility to initiate *ex parte* EA proceeding. This is to preserve due process and, in particular, the parties' right to be heard and to be treated equally. The vast majority of EA rules stipulate that the respondent must be notified of any application for an emergency measure at the very beginning of the proceedings by either the arbitral institution or the applicant itself.
65. The inability for an applicant to initiate an *ex parte* procedure can be a real concern as to the effectiveness of certain reliefs, particularly when there is a risk of dissipation of assets, concealing of evidence, or destruction of property.
66. To reconcile the central requirement of due process with the applicant's urgency interest, certain EA rules provide for a limited mechanism whereby the emergency arbitrator may grant relief before receiving the respondent's submissions, while ensuring that the respondent is given an opportunity to be heard within a very short time period. For instance, the newly revised SIAC Rules 2025 expressly empower the emergency arbitrator to grant a Protective Preliminary Order ('**PPO**') on an *ex parte* basis, subject to strict safeguards, including but not limited to, the requirement that emergency arbitrators must provide the parties against whom a PPO has been issued with an opportunity to present their case at the earliest practicable time.<sup>63</sup>

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61 Five days from the day the application is referred to the emergency arbitrator: SCC Arbitration Rules (2023), Appendix II, Art. 8(1); ACICA Arbitration Rules (2021), Schedule 1, Art. 3(1). Fourteen days from the day of the emergency arbitrator's appointment: LCIA Arbitration Rules (2020), Art. 9B(9.8); SIAC Arbitration Rules (2025), Schedule 1, Art. 17. Fourteen days from the day of the case file transmission: HKIAC Arbitration Rules (2024), Schedule 4, Art. 12. Fifteen days from the day of the emergency arbitrator's appointment: CIETAC Arbitration Rules (2024), Appendix III, Art. 6(2). Fifteen days from the day of the case file transmission: ICC Arbitration Rules (2021), Appendix V, Art 6(4); CIAM-CIAR Arbitration Rules (2024), Art. 61(2); Swiss Rules of International Arbitration (2021), Art. 43(7). The AAA Commercial Arbitration Rules and Mediation Procedures (2022) and the ICDR International Arbitration Rules (2021) do not provide for such a time limit.

62 Some rules allow for the extension of the time limits with the agreement of all parties or by decision the institution: HKIAC Arbitration Rules (2024), Schedule 4, Art. 12; LCIA Arbitration Rules (2020), Art. 9B(9.8); Swiss Rules of International Arbitration (2021), Art. 43(7). Other rules refer only to the institution's decision to extend the time limit: ACICA Arbitration Rules (2021), Schedule 1, Art. 3(1); CIAM-CIAR Arbitration Rules (2024), Art. 61(2); CIETAC Arbitration Rules (2024), Appendix III, Art. 6(2); ICC Arbitration Rules (2021), Appendix V, Art 6(4); SCC Arbitration Rules (2023), Appendix II, Art. 8(1); SIAC Arbitration Rules (2025), Schedule 1, Art. 17.

63 SIAC Arbitration Rules (2025), Schedule 1, Arts. 25-34.

67. Earlier versions of the SIAC Rules had already introduced a narrower tool, allowing the emergency arbitrator to make a preliminary order pending any hearing, telephone or video conference or written submissions by the parties.<sup>64</sup>
68. Similarly, in an EA administered by the ICC, the emergency arbitrator granted a request by the applicant to order the respondent to maintain the status quo before the respondent filed its response. The respondent was granted an opportunity to comment on the preliminary order after it had been rendered, and the order was later revoked.<sup>65</sup>
69. This decision has been criticised by the ICC Task Force for violating the respondent’s right to be heard, which led to the suggestion of various mechanisms to safeguard the respondent’s right in similar circumstances:
- a) ‘the EA could notify the respondent that the requested provisional order will be granted absent the respondent’s objection within a very short deadline’;
  - b) ‘the EA could issue the requested temporary measure while, at the same time, expressly allowing the respondent the opportunity to object to it within a very short time period’;
  - c) ‘A further alternative envisions the temporary measure being granted for only a very limited duration so that it expires as of right unless extended by way of a full hearing’.<sup>66</sup>

### 3. Costs

70. Most EA rules provide for a lump sum corresponding to the emergency arbitrator’s fees and administrative costs – regardless of the amount at stake – to be paid in full by the applicant when filing its request for emergency interim relief.<sup>67</sup> This avoids delay associated with valuation of claims and promotes expediency and efficiency.
71. The applicant may recover its costs by submitting a statement of costs either to the emergency arbitrator, in the time and format prescribed by the latter, or to the arbitral tribunal in the main arbitration. When the emergency arbitrator decides on costs, he or she may order the parties to annex their submission on costs to their last submission or separately before or after the hearing.<sup>68</sup>

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64 SIAC Arbitration Rules (2016), Schedule 1, Art. 8; SIAC Arbitration Rules (2025), Schedule 1, Art. 16.

65 ICC Commission Report, ‘Emergency Arbitration Procedures’, 2019, ¶ 113; This possibility is now expressly recognised in the Secretariat’s Guide to ICC Arbitration (J. Fry, S. Greenberg and F. Mazza, *The Secretariat’s Guide to ICC Arbitration* (2012), ¶ 3-1058(d)).

66 ICC Commission Report, ‘Emergency Arbitration Procedures’, 2019, ¶ 117; C. Sim, *Emergency Arbitration* (2021), ¶¶ 5.81-5.84.

67 See for instance, ICC Arbitration Rules (2021), Appendix V, Art. 7: ‘[t]he applicant must pay an amount of US\$ 40,000, consisting of US\$ 10,000 for ICC administrative expenses and US\$ 30,000 for the emergency arbitrator’s fees and expenses’; CIETAC Arbitration Rules (2024), Appendix III, Art. 7 ‘“[t]he Applicant shall advance an amount of RMB 30,000 as the costs of the emergency arbitrator proceedings consisting of the remuneration of the emergency arbitrator and the administrative fee of CIETAC’; CIAM-CIAR Arbitration Rules (2024), Annex 2, Art. 11 ‘[t]he party applying for appointment of an emergency arbitrator shall pay EUR 15,000. This amount is broken down as follows: EUR 5,000 on account of MIAC’s administrative fees, and EUR 10,000 on account of emergency arbitrator fees’; SIAC Arbitration Rules (2025), Schedule of Fees, ‘[t]he deposit towards the Emergency Arbitrator’s fees and expenses shall be fixed at S\$30,000, unless the Registrar determines otherwise pursuant to Schedule 1 to the SIAC Rules. The Emergency Arbitrator’s fees shall be fixed at S\$25,000, unless the Registrar determines otherwise pursuant to Schedule 1 of the SIAC Rules’.

68 C. Sim, *Emergency Arbitration* (2021), ¶ 5.165.

72. If both the EA proceedings and the main arbitration are withdrawn before costs are awarded, the parties can agree on the allocations of costs. When the EA proceedings are withdrawn before the emergency arbitrator issues a decision, the applicant may recover the remaining portion (if any) of the advance it paid on the emergency arbitrator's fees.<sup>69</sup>

## B. Burden of proof and applicable standards for granting emergency relief

73. This section analyses the burden of proof and applicable standards in EA as well as customary standards for granting emergency relief.

### Key takeaways:

- There is consensus in EA practice that (i) the applicant's burden of proof is to establish a *prima facie* compelling case, and (ii) each party has the burden of proving the facts it relies on to support its case.
- Emergency arbitrators have broad discretion to determine and interpret requirements to grant interim relief on a case-by-case basis.
- As a matter of practice, emergency arbitrators often consider the following criteria: (i) urgency, (ii) risk of irreparable harm, (iii) existence of a *prima facie* case on the merits, (iv) proportionality / balance of interests, and (v) necessity.

### 1. Burden of proof

74. While there is no universal approach as to the burden of proof to be applied in EA proceedings, due to the diverse legal background of emergency arbitrators, there is a general consensus in EA practice that (i) the applicant's burden of proof is to establish a *prima facie* compelling case, and (ii) each party has the burden of proving the facts it relies on to support its case.<sup>70</sup>

75. It has been argued that the burden of proof must be adapted according to the degree of intrusiveness of the relief sought, with a less intrusive measure requiring a less rigorous burden of proof.<sup>71</sup> Others have argued that establishing the likelihood of success on the merits and the emergency arbitrator's jurisdiction only requires a *prima facie* case as the emergency arbitrator is not well positioned to assess a higher burden of proof, whilst proof of irreparable harm should be based on the balance of probabilities.<sup>72</sup>

76. In any event, when determining the applicable burden of proof, the parties and the emergency arbitrator must take into consideration the very essence of EA, which, given the limited timeframe available, does not allow for an extensive consideration of the evidence.<sup>73</sup>

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69 CIETAC Arbitration Rules (2024), Appendix III, Art. 7(3); CIAM-CIAR Arbitration Rules (2024), Art. 63(3) and 48; ICC Arbitration Rules (2021), Appendix V, Art. 7(5); HKIAC Administered Arbitration Rules (2024), Schedule 4, Art. 22.

70 Upon reviewing the first 80 ICC EA cases, the ICC Task Force found that while the allocation of the burden of proof was not '*highly controversial*', emergency arbitrators have '*usually held*' that the applicant's bears the burden to establish a *prima facie* compelling case. Additionally, where the burden of proof was explicitly addressed, the general rule '*actori incumbit probatio*' has '*often been applied*' (ICC Commission Report, 'Emergency Arbitration Procedures', 2019, ¶¶ 131-132).

71 ICC Commission Report, 'Emergency Arbitration Procedures', 2019, ¶ 133.

72 C. Sim, *Emergency Arbitration* (2021), ¶ 5.120.

73 C. Sim, *Emergency Arbitration* (2021), ¶ 5.116.

## 2. Customary standards for granting emergency relief

77. Whilst certain EA rules expressly specify the applicable standards for granting emergency relief, the majority of them only refer to an ‘urgency’ or ‘emergency’ requirement, without further guidance.<sup>74</sup>
78. In circumstances where the EA rules do not expressly stipulate the standards to be applied, the parties can implicitly agree on the list of criteria by referring in their pleadings to the same standards. If no such agreement exists, it will be the subject of a ruling by the emergency arbitrator, which would be made on the basis of the parties’ submissions in that respect.
79. Regardless of whether the applicable EA rules set out requirements that an applicant must meet to be granted emergency relief, emergency arbitrators have broad discretion to determine and interpret such requirements on a case-by-case basis, with guidance from relevant international practice regarding interim measures.
80. As a matter of practice, emergency arbitrators often consider some or all of the following criteria: (i) urgency, (ii) risk of irreparable harm, (iii) existence of a *prima facie* case on the merits (*fumus boni iuris*), (iv) proportionality / balance of interests, and (v) necessity.

## 3. Urgency

81. Urgency is the crux of EA. The applicant is required to establish that the emergency relief sought is sufficiently urgent that it cannot await the constitution of the arbitral tribunal.

### Tip box:

There are debates around whether the urgency standard should be characterised as either a condition of admissibility of the application for emergency measures or as a substantive requirement for the granting of emergency measures, or both.

The point of view of the ICC Task Force Report is that urgency should be understood both as setting an admissibility threshold that must be satisfied *prima facie* and a substantive requirement that needs to be met following a more comprehensive analysis.<sup>75</sup>

82. If interim relief is capable of being granted by the arbitral tribunal, notwithstanding that it could not await the final award, the emergency arbitrator should dismiss the application.<sup>76</sup>

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74 Most arbitration rules provide that ‘in the case of emergency’ parties may refer to an emergency arbitrator (LCIA Arbitration Rules (2020), Art. 9(4)) or that the emergency arbitrator shall take into account in the conduct of the proceedings ‘the urgency of the Application’ without further guidance, even as regard to the degree of ‘urgency’ that is required (CIETAC Arbitration Rules (2024), Appendix III, Art. 5(1); CIAM-CIAR Arbitration Rules (2024), Art. 60(1); ICC Arbitration Rules (2021), Appendix V, Art. 5(2); HKIAC Administered Arbitration Rules (2024), Schedule 4, Art. 10; SCC Arbitration Rules (2023), Appendix II, Art. 7; SIAC Arbitration Rules (2025), Schedule 1, Art. 13; Swiss Rules of International Arbitration (2021), Art. 43(6)). The AAA and ACICA Rules are exceptions as they provide for specific standard that the emergency arbitrators ‘shall’ or ‘may’ apply in reaching a decision (AAA Commercial Arbitration Rules and Mediation Procedures (2022), R-39(e); ACICA Arbitration Rules (2021), Schedule 1, Art. 3.5).

75 ICC Commission Report, ‘Emergency Arbitration Procedures’, 2019, ¶ 147.

76 ICC Commission Report, ‘Emergency Arbitration Procedures’, 2019, ¶ 8; B. Giaretta, ‘The practice of emergency arbitration’, 2017 Belgian Review of Arbitration, Issue 1, p. 98; C. Sim, Emergency Arbitration (2021), ¶ 7.50.

83. Accordingly, the longer it takes for the constitution of a tribunal, the more likely it is that the emergency arbitrator would consider an application for emergency relief favourably.<sup>77</sup>
84. Several factors may guide the emergency arbitrator in determining how long the constitution of the tribunal is likely to take, including, but not limited to:
- a) the size of the tribunal, as selecting a sole arbitrator requires generally less time than the constitution of a panel of three arbitrators;
  - b) whether the parties have agreed on a process for the constitution of the tribunal with binding deadlines, curtailing parties' attempts to stall the process;
  - c) any challenges already raised by the parties against the arbitrators, in case the EA application has been filed pending the constitution of the tribunal;
  - d) the conduct of the parties, where the emergency arbitrator is able to identify dilatory tactics adopted by the respondent or where the applicant has not taken steps to expedite the constitution of the tribunal;
  - e) any formalities to be complied with by the tribunal such as the issuing of Terms of Reference, before the tribunal is authorised to address the parties' request for interim relief.<sup>78</sup>
85. Other factors may be relevant when assessing the urgency requirement, including whether the order of an emergency measure would override the contractual arrangements provided by the parties.<sup>79</sup>

#### 4. Risk of irreparable harm

86. Terminology used to refer to the '*irreparable harm*' requirement varies across EA rules (in the rare cases where they do contain an express reference thereto)<sup>80</sup> and EA decisions. The terms '*irreparable harm*', '*irreparable loss or damage*' and '*harm not adequately reparable by an award of damages*' are used interchangeably in this regard.<sup>81</sup> This varied terminology echoes the diversity of practice in assessing the degree of harm that the applicant will suffer, absent a relief:
- a) a rigorous reading of this requirement would entail that an applicant may not claim to have suffered *irreparable harm* unless it demonstrates that the prejudice it would face in the absence of the emergency measure cannot be compensated by any form of relief, whether monetary or

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77 C. Sim, *Emergency Arbitration* (2021), ¶ 7.60.

78 C. Sim, *Emergency Arbitration* (2021), ¶¶ 7.55-7.60; ICC Commission Report, 'Emergency Arbitration Procedures', 2019, ¶ 148.

79 ICC Commission Report, 'Emergency Arbitration Procedures', 2019, ¶ 149.

80 AAA Commercial Arbitration Rules and Mediation Procedures (2022), R-39(e) '*the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief*'; ACICA Arbitration Rules (2021), Schedule 1, Art. 3.5 '*the Emergency Arbitrator orders or awards any Emergency Interim Measure, the party requesting it shall satisfy the Emergency Arbitrator that: a. irreparable harm is likely to result if the Emergency Interim Measure is not ordered*'.

81 C. Sim, *Emergency Arbitration* (2021), ¶ 7.85.

otherwise.<sup>82</sup> The emergency arbitrator is not required to provide an estimation of the quantum of the damages, but rather to assess whether the applicant's harm could be repaired in principle by an award of damages;<sup>83</sup>

- b) a less stringent view, consistent with international arbitration practice on interim measures and adopted by around a quarter of ICC EA decisions, is that irreparable harm should be understood as a '*serious and substantial harm*', that is, a harm that is characterised by a certain degree of severity yet may still be compensated by way of money.<sup>84</sup>

**Tip box:**

The respondent is not required to establish that damages would be an adequate remedy for the harm suffered by the applicant. It is the applicant's burden to demonstrate that it would suffer irreparable harm.<sup>85</sup>

87. The risk of imminent harm can arise out of (i) the respondent's risk of impecuniosity, that would undermine the applicant's attempt to recover damages, or (ii) damages being an unsuitable remedy, meaning that there is no compensation readily available to compensate the applicant for its loss.<sup>86</sup>
88. The '*irreparable harm*' requirement is strictly intertwined with that of 'urgency' so much so that some arbitral tribunals have considered that they form one requirement.<sup>87</sup> Indeed, the risk of harm must be imminent, meaning that it needs to materialise during the period where the arbitral tribunal is being constituted, failing which, the urgency standard would not be met.<sup>88</sup>

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82 In an SCC-administered EA, the emergency arbitrator held '[s]ubstantial, but reparable, harm does not, as a rule, provide sufficient grounds for granting interim measures.' The emergency arbitrator granted the claimants' application reasoning that, although the loss of customers or delay in deliveries of certain goods could in principle be compensated by an award of damages, such an award would be practically meaningless if the claimants were not able to survive as companies, and this was a concrete risk in the circumstances of the case (SCC Case No. 2016/142, in SCC Arbitration Institute, 'SCC Practice Note: Emergency Arbitrator Decisions 2015-2016', p. 16). In another EA administered under the SCC, the emergency arbitrator explained that '[i]t is generally accepted that need not rise to the level of "irreparable harm" as the term is used in some domestic legal systems. But it must normally be a harm of more than a purely monetary nature- otherwise the tribunal can award compensation with interest that will cure the harm in due course without the need for interim intervention' (SCC Case No. 2016/046, in SCC Arbitration Institute, 'SCC Practice Note: Emergency Arbitrator Decisions 2015-2016', p. 7).

83 ICC Commission Report, 'Emergency Arbitration Procedures', 2019, ¶ 157.

84 In the SCC Case No. 2016/095, the emergency arbitrator granted an application consisting in ordering the respondent State to refrain from enforcing a decree that obliged the investor to divest its shares held in a bank of the respondent State. The emergency arbitrator reasoned that the possibility of monetary compensation does not necessarily eliminate the need for interim relief and concluded that, even if the investor could have received compensation for the forced sale of the shares, this compensation may not reflect the shares' real value (SCC Arbitration Institute, 'SCC Practice Note: Emergency Arbitrator Decisions 2015-2016', p. 13). See also ICC Commission Report, 'Emergency Arbitration Procedures', 2019, ¶ 157; R. Alnaber, 'Emergency Arbitration: Mere Innovation or Vast Improvement', 2019 *Arbitration International*, Vol. 35, Issue 4, p. 451.

85 C. Sim, *Emergency Arbitration* (2021), ¶¶ 7.95-7.96.

86 C. Sim, *Emergency Arbitration* (2021), ¶¶ 7.81-7.83.

87 In the SCC Case No. 2018/140, the emergency arbitrator held that '[t]he concept of urgency is interdependent on the existence of imminence of a threat: if the threat of grave harm is imminent, there is a need for urgent relief' (SCC Arbitration Institute, 'SCC Practice Note: Emergency Arbitrator Decisions 2017-2018', p. 9). See also ICC Commission Report, 'Emergency Arbitration Procedures', 2019, ¶ 148; I. Knoll-Tudor, 'The Arbitrator and the Arbitration Procedure, Emergency Arbitration: Evidence and Practice from Seven Arbitral Institutions', *Australian Yearbook on International Arbitration*, Vol. 2019, pp. 264-265.

88 I. Knoll-Tudor, 'The Arbitrator and the Arbitration Procedure, Emergency Arbitration: Evidence and Practice from Seven Arbitral Institutions', *Australian Yearbook on International Arbitration*, Vol. 2019, p. 265.

## 5. Likelihood of success on the merits (*fumus boni iuris*)

89. EA rules incorporate different terminology to describe the likelihood of success, such as ‘prima facie case’, ‘*good prospects of success on the merits*’, and ‘*reasonable possibility*’ of success on the merits. Regardless of the terminology used, emergency arbitrators must be satisfied that there is a prima facie reasonable probability that the applicant will succeed on the merits.<sup>89</sup> However, as voiced by some scholars, given the inherently swift nature of EA, there might necessarily be limited opportunities for emergency arbitrators to engage in a detailed inquiry into the prima facie likelihood of success.<sup>90</sup>

## 6. Proportionality or balance of interest

90. Where all other criteria are met, i.e., urgency, risk of irreparable harm and likelihood of success on the merits, emergency arbitrators have proceeded to balance the interests of parties, that is, to assess whether the harm avoided by the applicant outweighs the potential harm inflicted upon respondent if the said relief is granted.<sup>91</sup>

91. In conducting the proportionality test, emergency arbitrators have considered different factors, including, but not limited to:

- a) *the risk of aggravation of the dispute*, which may be considered as a standalone standard and is intended to protect the parties from suffering further damages;
- b) *the relative financial positions of the parties, to ensure that no substantial disadvantage occurs as a result of ordering the emergency measure*;
- c) *whether the application for emergency measure was diverted from its legitimate ends to represent a form of abuse*, in order to exert pressure on the respondent to obtain undue concessions;
- d) whether the requested order would place the respondent under conflicting legal obligations.<sup>92</sup>

92. The proportionality test is a relatively well accepted standard by emergency arbitrators.<sup>93</sup>

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89 ICC Commission Report, ‘Emergency Arbitration Procedures’, 2019, ¶¶ 152 and 155; C. Sim, *Emergency Arbitration* (2021), ¶¶ 7.104 and 7.110.

90 G. B. Born, *International Commercial Arbitration* (3rd ed. 2021), p. 2666.

91 ICC Commission Report, ‘Emergency Arbitration Procedures’, 2019, ¶¶ 166 and 169; I. Knoll-Tudor, ‘The Arbitrator and the Arbitration Procedure, Emergency Arbitration: Evidence and Practice from Seven Arbitral Institutions’, *Australian Yearbook on International Arbitration*, Vol. 2019, pp. 265.

92 ICC Commission Report, ‘Emergency Arbitration Procedures’, 2019, ¶¶ 160, 162 and 166; C. Sim, *Emergency Arbitration* (2021), ¶¶ 7.137-7.139; SCC Case No. 010/2012 (in SCC Arbitration Institute, ‘SCC Practice: Emergency Arbitrator Decisions 2010-2013’, p. 19).

93 At least 16 decisions out of the first 80 ICC EA cases have referred to the balance of interests’ factors (ICC Commission Report, ‘Emergency Arbitration Procedures’, 2019, ¶ 168); at least 11 decisions out of the 29 SCC EA cases published by the SCC in its reports referred to the proportionality standard as a prerequisite for granting interim measures.

## 7. Necessity

93. Some EA rules refer to the ‘necessity’ or ‘appropriateness’ of the requested relief as a criterion to be assessed by emergency arbitrators.<sup>94</sup> The ICC Task Force notes that there is no consensus in the manner this criterion was assessed in the 25 ICC EA cases that addressed the nature and type of relief sought by applicants. Some emergency arbitrators have referred to the availability of the requested relief in the *lex arbitri* whilst others have assessed whether the measures sought were ‘*fit*’, ‘*appropriate*’ or ‘*possible*’.<sup>95</sup>
94. EA proceedings conducted under the aegis of the SCC have referred to the necessity requirement as an overarching standard to be assessed when all other standards are met.<sup>96</sup>

## C. Forms of relief available

95. As mentioned above,<sup>97</sup> emergency arbitrators are empowered to grant any form of emergency relief that an arbitral tribunal may issue under the applicable arbitration rules, provided no limitation is imposed by mandatory provisions contained in the applicable national law(s).<sup>98</sup>
96. A minority of EA rules list the types of relief that the emergency arbitrator may grant, whilst the majority leave the type of relief available to an applicant to the discretion of the emergency arbitrator.<sup>99</sup>
97. Provided that the applicant satisfies the applicable standards, it may seek:
- a) *Maintenance or restoration of the status quo;*
  - b) *Prevention of imminent harm of prejudice to the arbitral process, such as anti-suit injunctions;*<sup>100</sup>
  - c) *Preservation of assets;*
  - d) *Preservation of evidence;*

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94 CIETAC Arbitration Rules (2024), Appendix III, Art. 6(1) ‘*the necessary emergency relief*’; SCC Arbitration Rules (2023), Art. 37(1) ‘*any interim measure it deems appropriate*’; ICDR International Arbitration Rules (2021), Art. 7(4) ‘*any interim or conservatory measures that the emergency arbitrator deems necessary*’.

95 ICC Commission Report, ‘Emergency Arbitration Procedures’, 2019, ¶ 180.

96 SCC Case No. 2014/138: ‘*The emergency arbitrator finally stated that, even if the necessary prerequisites for granting an interim measure had been fulfilled, the measure requested would not be suitable to grant as an interim measure, considering the nature of the parties’ contractual relationship*’ (in SCC Arbitration Institute, ‘SCC Practice Note: Emergency Arbitrator Decisions Rendered 2014’, p. 4); SCC Case No. 2015/002: ‘*Considering the claimants’ request in the totality of the circumstances, the emergency arbitrator further found the requested interim measure “appropriate”. Although the new legislation amounted to a restructuring of the country’s entire gas market, the claimants’ request was limited to the narrow segment of the market that affected its own rights*’ (in SCC Arbitration Institute, ‘SCC Practice Note: Emergency Arbitrator Decisions Rendered 2015-2016’, p. 4).

97 See above, Section II.C.3.

98 B. Giaretta, ‘The practice of emergency arbitration’, 2017 *Belgian Review of Arbitration*, Issue 1, p. 98; C. Sim, *Emergency Arbitration* (2021), ¶ 8.12.

99 EA Rules listing the types of reliefs are: HKIAC Administered Arbitration Rules (2024), Art. 23(3) and Schedule 4, Art. 11; JCAA Arbitration Rules (2021), Arts. 71(1) and 77(1); KCAB Arbitration Rules (2016), Arts. 32(1) and Appendix 3, Art. 3(1); CI Arb Arbitration Rules (2015), Art. 26(3); PRIME Arbitration Rules (2022), Art. 26.

100 ICC Commission Report, ‘Emergency Arbitration Procedures’, 2019, p. 40; R. Alnaber, ‘Emergency Arbitration: Mere Innovation or Vast Improvement’, 2019 *Arbitration International*, Vol. 35, Issue 4, p. 450.

- e) *Specific performance*;<sup>101</sup>
  - f) *Security*;<sup>102</sup>
  - g) *Undertakings by the respondent after the application for emergency relief is filed*;<sup>103</sup>
  - h) *Declaratory relief*. This type of relief is controversial as it would be difficult for the applicant to justify why declaratory relief could not await the constitution of the arbitral tribunal. For the time being, no emergency arbitrator ruling under the aegis of the ICC or SCC has even decided on such a relief.<sup>104</sup>
98. General injunctive relief<sup>105</sup>, preservation of assets<sup>106</sup>, and maintaining the status quo<sup>107</sup> appear to be the most commonly requested measures in EA proceedings conducted under the auspices of the surveyed institutions.

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101 ICC Commission Report, 'Emergency Arbitration Procedures', 2019, ¶ 179.

102 Most rules provide that the emergency arbitrator may order the applicant to pay an appropriate amount of security as a precondition to grant emergency measures, yet such decisions remain rare in practice. ICC Commission Report, 'Emergency Arbitration Procedures', 2019, ¶ 173. See AAA Commercial Arbitration Rules and Mediation Procedures (2022), Art. R-39(g); ACICA Arbitration Rules (2021), Schedule 1, Art. 37(4); CIETAC Arbitration Rules (2024), Appendix III, Art. 5(2); CIAM-CIAR Arbitration Rules (2024), Art. 61(3); ICC Arbitration Rules (2021), Appendix V, Art. 6(7); SIAC Arbitration Rules (2025), Schedule 1, Art. 18.

103 C. Sim, *Emergency Arbitration* (2021), ¶ 8.83.

104 ICC Commission Report, 'Emergency Arbitration Procedures', 2019, ¶ 181.

105 Nine out of the ten institutions reported that such measures were sought by applicants (ARBITAC, CAMARB, CCL, CEMARC, DIAC, HKIAC, ICDR, LCIA and Swiss Arbitration Centre).

106 Seven out of the ten institutions reported that such measures were sought by applicants (ARBITAC, CAMARB, CCL, DIAC, HKIAC, LCIA and Swiss Arbitration Centre).

107 Six out of the ten institutions reported that such measures were sought by applicants (CAMARB, CCL, DIAC, HKIAC, LCIA and Swiss Arbitration Centre).

# IV. Status and enforcement of emergency relief and post-EA proceedings

## A. Legal effects of emergency orders/awards

### Key takeaways:

- The legal status of emergency orders/awards is unclear in some jurisdictions, which may lead to challenges to their enforceability under the New York Convention.
- Emergency orders/awards do not have res judicata effect in the arbitration proceedings, but are usually binding on the parties.

### 1. Legal status of emergency orders/awards

99. Emergency orders/awards regularly face challenges to their enforceability under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**'New York Convention'**) due to their unclear status in arbitration proceedings in most jurisdictions. Article III of the New York Convention imposes an obligation upon the contracting States to recognise and enforce arbitral '*awards*'. In a judgment dealing with a decision rendered by a pre-arbitral referee (a precursor of emergency arbitrator) under the ICC Arbitration Rules, the Paris Court of Appeals held that such a decision was not final and hence not enforceable as an '*arbitral award*'.<sup>108</sup> Considering that emergency decisions typically offer temporary remedies, these are not considered as final '*awards*' under many arbitration rules.
100. While decisions by emergency arbitrators are termed as '*orders*' under the ICC Arbitration Rules,<sup>109</sup> some institutions give discretion to the emergency arbitrators to term these as '*orders*' or '*awards*'.<sup>110</sup> Moreover, some institutional rules merely term them as '*emergency decisions*' without elaborating further upon their status.<sup>111</sup> Emergency decisions which are not termed as '*awards*' may face more difficulties in enforcement in some countries for not being final and binding.<sup>112</sup>
101. However, it is worth stressing that, in several jurisdictions, courts look at the substance of an emergency decision, rather than its form as an order or an award, to determine if it is enforceable in the country.<sup>113</sup> For instance, in Singapore, the International Arbitration Act, 1994 (**'Singapore IAA'**)

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108 *Société Nationale des Pétroles du Congo and République du Congo v. Total E & P Congo*, (France) referred to in E. Gaillard and P. Pinsolle, 'The ICC Pre-Arbitral Referee: First Practical Experiences', *Arbitration International*, Vol. 20, 2004, pp. 32–37, and D. Paraguacuto-Maheo and C. Lecuyer-Thieffry, 'Emergency Arbitrator: A New Player in the Field – The French Perspective', *Fordham International Law Journal*, Vol. 40, 2017, pp. 763–764.

109 ICC Arbitration Rules (2021), Art. 29(2) and Appendix V, Art. 6(1).

110 LCIA Arbitration Rules (2020), Art. 9(9); SIAC Arbitration Rules (2025), Schedule 1, Art. 17; ICDR Arbitration Rules (2021), Art. 7(4); AAA Commercial Arbitration Rules and Mediation Procedures (2022), Art. 39(e); HKIAC Administered Arbitration Rules (2024), Schedule 4, Art. 12; CIAM-CIAR Arbitration Rules (2024), Art. 61(1); CIETAC Arbitration Rules (2024), Appendix III, Art. 6(1).

111 SCC Arbitration Rules (2023), Appendix II, Art. 8; Swiss Rules of International Arbitration (2021), Art. 43(7).

112 ICC Commission Report, 'Emergency Arbitration Procedures', 2019, p. 31.

113 ICC Commission Report, 'Emergency Arbitration Procedures', 2019, p. 31.

was amended in 2012 to include an ‘*emergency arbitrator*’ within the definition of an ‘*arbitral tribunal*’, thereby enabling the enforcement of emergency decisions in international commercial arbitrations seated in Singapore regardless of whether they are framed as an order or award.<sup>114</sup> Also the English courts look at the content of a decision, rather than its form, to determine if it finally resolves some or all claims in the arbitration such that it can be enforced or challenged as an award.<sup>115</sup> Similarly, in the United States, the Seventh Circuit held that the finality and enforceability of an arbitral decision is determined based on its substance, and not its form as an ‘order’ or an ‘award’.<sup>116</sup> Likewise, in Australia, courts have held that a decision of an arbitral tribunal needs to finally determine all or at least some of the issues in the dispute to be termed as an award, and cannot be deemed to be an order or award merely because the decision characterises itself as one.<sup>117</sup> In India, the Supreme Court concluded that an emergency decision (in an Indian-seated arbitration) rendered as an ‘award’ would still be enforceable as an interim ‘order’ of an arbitral tribunal in India.<sup>118</sup>

**Tip box:**

Emergency arbitrators – and to some extent arbitral institutions – need to be careful in labelling an emergency decision as an ‘award’ or an ‘order’, since it may have implications for the enforceability of such a decision in some jurisdictions.

## 2. Binding effect on parties

102. The ‘binding’ nature of an emergency order/award has implications for its enforceability under the New York Convention. Article V of the New York Convention provides that a contracting State may refuse to recognise or enforce an award on the ground that it has not become binding upon the parties. Moreover, national laws of some countries, such as Singapore, provide that arbitral awards are enforceable so long as they are ‘binding’ even if they are not ‘final’.<sup>119</sup>
103. Most arbitral institution rules – such as those of the ICC, LCIA, SIAC, HKIAC and the SCC – explicitly provide that emergency orders/awards are binding on the parties.<sup>120</sup> However, these rules also set out situations wherein such orders/awards will no longer be binding on the parties.

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114 International Arbitration (Amendment) Act, 2012 (passed on June 1, 2012), S. 2. As explained below, Singapore courts have since clarified through case law that emergency orders or awards issued in foreign-seated arbitrations may also be enforced in Singapore.

115 *ZCCM Investments Holdings Plc v. Kansanshi Holdings Plc & another*, [2019] EWHC 1285 (Comm) (UK); *The Republic of Uganda v. Rift Valley Railways (Uganda) Ltd & others*, [2021] EWHC 970 (Comm) (UK); *Charles M Willie & Co (Shipping) Ltd v. Ocean Laser Shipping Ltd* (The Smaro), [1999] 1 Lloyd’s Rep 225 (UK); *Michael Wilson v. John Forster Emmott* [2008] EWHC 2684 (Comm) (UK).

116 *Publicis Communication and Publicis S.A. v. True North Communications Inc.*, 206 F.3d 725 (7th Cir., 2000) (USA).

117 *Resort Condominiums International Inc. v. Ray Bolwell*, Supreme Court of Queensland, 29 October 1993 (Australia).

118 *Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Others*, (2022) 1 SCC 209 (India).

119 International Arbitration Act (Singapore), S. 29; *CVG v. CVH*, [2022] SGHC 249 (Singapore).

120 ICC Arbitration Rules (2021), Appendix V, Art. 6(1); LCIA Arbitration Rules (2020), Arts. 9(9) and 26(8); ICDR Arbitration Rules (2021), Art. 7(4); SIAC Arbitration Rules (2016), Schedule 1, Art. 23; SCC Expedited Arbitration Rules (2023), Art. 46 and Appendix II, Art. 9; HKIAC Administered Arbitration Rules (2024), Schedule 4, Art. 17; CIAM-CIAR Arbitration Rules (2024), Art. 62(1); CIETAC Arbitration Rules (2024), Appendix III, Art. 6(4).

104. An emergency order/award may also cease to bind the parties when: (i) the arbitral tribunal issues the final award in the main arbitration proceedings, unless the tribunal expressly decides otherwise,<sup>121</sup> (ii) the emergency arbitrator or arbitrator decides that such decision shall no longer be binding,<sup>122</sup> (iii) the case is not referred to an arbitrator within a specific deadline after the date of the emergency decision,<sup>123</sup> (iv) a challenge against the emergency arbitrator is successful,<sup>124</sup> and (v) the claims are withdrawn or the main arbitration is terminated before the issuance of the final award.<sup>125</sup>

**Tip box:**

Parties seeking to enforce an emergency order/award should be careful to ensure that conditions for keeping an emergency order/award binding under institutional rules are met.

For example, under the SCC Arbitration Rules, an emergency order/award will cease to be binding, *inter alia*, if the main arbitration proceedings are not commenced within 30 days, or if the case is not referred to the arbitral tribunal within 90 days, from the date of the emergency decision.<sup>126</sup> Similarly, the ICC Arbitration Rules provide that an emergency arbitrator's decision will no longer be binding upon the parties if the ICC does not receive a request for arbitration within 10 days of the date of submission of the application for emergency relief.<sup>127</sup>

### 3. Res judicata effect

105. In a nutshell, the doctrine of *res judicata* sets out that a final decision (award or judgment) may not be relitigated by the parties. Despite being binding on parties, an emergency decision generally does not have *res judicata* effect in arbitration proceedings. After rendering an emergency order/award and before an arbitral tribunal is appointed, an emergency arbitrator may reconsider and modify their decision.<sup>128</sup> Moreover, an arbitral tribunal, once constituted, is not bound by an emergency arbitrator's decision.<sup>129</sup> However, the tribunal may consider the analysis adopted by the emergency arbitrator when deciding the same issues and analysing the same evidence. The ICC practice reveals that arbitral tribunals have sometimes modified emergency decisions after finding that they were not bound by them.<sup>130</sup>

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121 SCC Expedited Arbitration Rules (2023), Appendix II, Art. 9(4); ICC Arbitration Rules (2021), Appendix V, Art. 6; HKIAC Arbitration Rules (2018), Schedule 4(17).

122 SCC Expedited Arbitration Rules (2023), Appendix II, Art. 9(4); HKIAC Administered Arbitration Rules (2024), Schedule 4, Art. 18.

123 SCC Expedited Arbitration Rules (2023), Appendix II, Art. 9(4); HKIAC Administered Arbitration Rules (2024), Schedule 4, Art. 18.

124 ICC Arbitration Rules (2021), Appendix V, Art. 6(6).

125 ICC Arbitration Rules (2021), Appendix V, Art. 6(6); HKIAC Administered Arbitration Rules (2024), Schedule 4, Art. 18.

126 SCC Arbitration Rules (2023), Appendix II, Art. 9(4).

127 ICC Arbitration Rules (2021), Appendix V, Art. 1(6).

128 ICC Arbitration Rules (2021), Appendix V, Art. 6(8); LCIA Arbitration Rules (2020), Art. 9(12); SIAC Arbitration Rules (2025), Schedule 1, Art. 19.

129 ICC Arbitration Rules (2021), Art. 29(3); LCIA Arbitration Rules (2020), Art. 9(11) to be read in conjunction with the Notes to LCIA Arbitration Rules, at para. 50; SIAC Arbitration Rules (2025), Schedule 1, Art. 21; ICDR International Arbitration Rules (2021), Art. 7(4).

130 ICC Commission Report, 'Emergency Arbitrator Proceedings', 2019, p. 35.

## 4. Appeal and challenges

106. Many arbitral institution rules do not set out rules on appeals or challenges of emergency decisions. However, the SIAC and the LCIA Rules explicitly provide that parties waive their rights to appeal an emergency decision under the rules.<sup>131</sup> Emergency decisions which are deemed as ‘awards’ may be appealed or challenged as any other award, depending on whether the law of seat provides for such remedies.

## B. Enforceability of emergency orders/awards

### Key takeaways:

- Increasingly, many countries recognise and enforce emergency orders/awards through amendments to their arbitration law or through case law.
- However, some countries still do not allow their recognition and enforcement.

107. As mentioned above, one of the major concerns for a party seeking an emergency relief is the enforceability of the emergency order/award. The 2015 Queen Mary International Arbitration Survey found that merely 29 per cent of the respondents to the survey would prefer to seek urgent relief from an emergency arbitrator rather than a domestic court prior to the formation of the tribunal, while 46 per cent of the respondents would prefer seeking such relief from State courts.<sup>132</sup> For 79 per cent of the respondents, concerns surrounding the enforceability of an emergency order/award was the major factor affecting their choice.<sup>133</sup> Despite this, 93 per cent of the respondents answered that they would favour the inclusion of EA provisions in institutional rules.<sup>134</sup>

108. The 2021 Queen Mary International Arbitration Survey made similar findings on how the possibility to resort to EA increases the attractiveness of the arbitral seat. It found that 39 per cent of the respondents considered a seat more attractive when its law allowed for the enforcement of emergency decisions or interim measures ordered by an arbitral tribunal.<sup>135</sup> Moreover, 13 per cent of the respondents also answered that EA provisions in institutional rules would make such an institution more attractive.<sup>136</sup> These statistics show that arbitration users favour EA; however, its popularity is affected by concerns surrounding the enforceability of emergency decisions.

109. The enforceability of emergency orders/awards is affected by the national laws of the State where enforcement is sought and the law of the seat. If the enforcement jurisdiction does not recognise emergency relief, the emergency order/award may have no practical effect, leaving the party unable to secure urgent relief in the relevant jurisdiction, especially to preserve assets or maintain the *status*

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131 SIAC Arbitration Rules (2025), Schedule 1, Art. 23; LCIA Arbitration Rules (2020), Arts. 9(9) and 26(8).

132 Queen Mary, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, <[https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2015\\_International\\_Arbitration\\_Survey.pdf](https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2015_International_Arbitration_Survey.pdf)> accessed 11 June 2025, p. 27.

133 Id., p. 28.

134 Id., p. 29.

135 White & Case and Queen Mary, 2021 International Arbitration Survey: Adapting Arbitration to a Changing World, <[https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021\\_19\\_WEB.pdf](https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf)>, accessed 11 June 2025, p. 8.

136 Id., p. 12.

*quo*. Moreover, if the law of the seat does not recognise emergency arbitrators or their decisions, such orders or awards may be set aside, thereby creating significant obstacles to enforcement in other jurisdictions.

110. While the arbitration laws of several countries treat emergency orders/awards as enforceable, in other jurisdictions they are merely enforced if rendered in domestic arbitrations. It has been found that countries which have adopted the UNCITRAL Model Law in their national laws are more likely to enforce emergency decisions as compared to countries which have not adopted the Model Law or have merely been inspired by it.<sup>137</sup> This is because the Model Law was amended in 2006 to include Articles 17H and 17I which provide for the recognition and enforceability of interim measures ordered by an arbitral tribunal. For example, domestic legislation of Hong Kong, Singapore, New Zealand and the Netherlands include provisions for the recognition of emergency orders/awards.<sup>138</sup> For several other countries, courts have provided such recognition even when the domestic legislation does not expressly recognise EA.

111. Some examples of jurisdictions that have legislated or whose judges have ruled on the status of emergency decisions are set out below:

- a) *Hong Kong*. Having adopted the UNCITRAL Model Law, the Hong Kong Arbitration Ordinance provides that interim decisions of arbitral tribunals in foreign and domestic arbitrations are enforceable in the same manner as court orders, with the leave of the Hong Kong High Court of First Instance.<sup>139</sup> The ordinance also permits a party in a Hong Kong-seated arbitration to request the tribunal to convert an interim measure into an award, facilitating enforcement in jurisdictions that recognise only arbitral awards.<sup>140</sup> Further, Section 22B of the Hong Kong Arbitration Ordinance (introduced in 2013) explicitly sets out that any emergency relief granted by an emergency arbitrator (inside or outside Hong Kong) shall be enforceable as an order or direction of the Hong Kong High Court of First Instance that has the same effect, but only with the leave of this court.<sup>141</sup>

In 2018, the Hong Kong High Court [of First Instance] enforced an emergency decision rendered in an arbitration administered under the arbitration rules of the Beijing Arbitration Commission.<sup>142</sup> In 2021, the Hong Kong High Court of First Instance refused to enforce an emergency decision; however, it considered the emergency decision as any other award and refused enforcement on the ground that there was no valid arbitration agreement between the parties.<sup>143</sup>

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137 ICC Commission Report, 'Emergency Arbitrator Proceedings', 2019, p. 30.

138 Hong Kong Arbitration Ordinance (Cap 609), S. 22B; International Arbitration Act, 1994 (Ch 143A) (Singapore), S. 2; New Zealand Arbitration Act, 1996, S. 2(1)(b); Dutch Arbitration Act, 2015 (part of the Dutch Code of Civil Procedure), Art. 1043b(2).

139 Hong Kong Arbitration Ordinance (Cap 609), S. 35(3).

140 Hong Kong Arbitration Ordinance (Cap 609), S. 35(3).

141 Hong Kong Arbitration Ordinance (Cap 609).

142 The GKML Decision, see L. Haifeng, 'First Emergency Arbitrator Proceedings in China and Enforcement in Hong Kong', 9 October 2018 <[www.globalarbitrationnews.com/2018/10/09/first-emergency-arbitrator-proceedings-in-china-and-enforcement-in-hong-kong/](http://www.globalarbitrationnews.com/2018/10/09/first-emergency-arbitrator-proceedings-in-china-and-enforcement-in-hong-kong/)> accessed 11 June 2025; also see T. Xu, 'Emergency Arbitrator Proceedings and the GKML case', 14 November 2018 <[www.law.asia/emergency-arbitrator-proceedings-gkml-case/](http://www.law.asia/emergency-arbitrator-proceedings-gkml-case/)> accessed 11 June 2025.

143 *GD v. HY*, [2021] HKCFI 3900 (Hong Kong).

- b) *Singapore*. The Singapore IAA was amended in 2012 to explicitly provide recognition to emergency arbitrators' decisions in Singapore.<sup>144</sup> Section 2 of the Singapore IAA includes 'emergency arbitrator' under the definition of 'arbitral tribunal'.<sup>145</sup> This section also defines 'award' to include an 'interim, interlocutory or partial award'. In 2022, the Singapore High Court held that an interim order or direction issued by an emergency arbitrator in a foreign-seated arbitration constitutes a 'foreign award' under Sections 27 and 29 of the IAA and is therefore enforceable in Singapore.<sup>146</sup> As a result, Singapore provides recognition to emergency orders/awards rendered in arbitrations seated inside and outside Singapore.
- c) *India*. The Indian Arbitration and Conciliation Act, 1996 ('**Indian Arbitration Act**') currently does not explicitly include provisions for recognition of emergency decisions. This is despite the recommendations in the Justice BN Srikrishna Committee Report<sup>147</sup> as well as the 246th Law Commission Report<sup>148</sup> to amend the Indian Arbitration Act and include provisions providing express recognitions to EA and emergency decisions.

This notwithstanding, Indian courts have recognised emergency decisions rendered in India-seated arbitrations,<sup>149</sup> but have not yet recognised and enforced emergency decisions rendered in foreign-seated arbitrations.<sup>150</sup> In fact, in 2016, the Delhi High Court held that an emergency order/award given in a foreign-seated arbitration is not enforceable in India.<sup>151</sup> Yet, Indian courts have generally granted the same remedy when sought through an application for interim relief under Section 9 of the Indian Arbitration Act, with the foreign emergency order/award produced in support.<sup>152</sup> By doing so, Indian courts have provided indirect recognition to emergency orders/awards issued in foreign-seated arbitrations.

In 2024, an Expert Committee, constituted to review and reform the Indian Arbitration Act, issued a report recommending: (i) statutory recognition of emergency orders/awards issued in India-seated arbitrations; and (ii) continuation of the current position under which emergency orders/awards from foreign-seated arbitrations are enforced indirectly via applications for interim relief before Indian courts.<sup>153</sup> The Draft Arbitration and Conciliation (Amendment) Bill, 2024, proposes a new provision deeming orders/awards passed by emergency arbitrators

144 International Arbitration (Amendment) Act, 2012 (passed on 1 June, 2012), S. 2.

145 International Arbitration Act, 1994 (Ch 143A).

146 *CVG v. CVH*, [2022] SGHC 249.

147 High Level Committee to Review the Institutionalization of Arbitration Mechanism in India, Report, 2017, <[www.legalaffairs.gov.in/sites/default/files/Report-HLC.pdf](http://www.legalaffairs.gov.in/sites/default/files/Report-HLC.pdf)> accessed 11 June 2025.

148 246th Report on Amendment to the Arbitration and Conciliation Act 1996 (2014).

149 *Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Others*, (2022) 1 SCC 209 (India).

150 M. Hunter, S. Weber and S. Sasiprabhu, 'Chapter 9: Arbitral Awards in Indian Arbitrations', *Arbitration in India* (D. Dave, M. Hunter, F. Nariman and M. Paulsson eds.), 2021, p. 182.

151 *Raffles Design International India Private Ltd v. Educomp Professional Education Ltd*, (2016) 234 DLT 349 (India).

152 *HSBC PI Holdings (Mauritius) Ltd v. Avitel Post Studios Ltd*, Arbitration Petition No 1062 of 2012 (India); *Raffles Design International India Private Ltd v. Educomp Professional Education Ltd*, (2016) 234 DLT 349 (India); *Ashwani Minda & Anr v. U-Shin Ltd & Anr*, 2020 SCC OnLine Del 721 (India).

153 Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996 to Make it Alternative in the Letter and Spirit, <[https://www.livelaw.in/pdf\\_upload/report-of-the-expert-committee-members-on-arbitration-law-2-526205.pdf](https://www.livelaw.in/pdf_upload/report-of-the-expert-committee-members-on-arbitration-law-2-526205.pdf)> accessed 11 June 2025, ¶3.13.

as interim orders of an arbitral tribunal in India-seated arbitrations.<sup>154</sup> It further proposes that all emergency arbitrators, including those appointed in foreign-seated arbitrations, must conduct proceedings in accordance with the rules prescribed by the Arbitration Council of India.<sup>155</sup> However, no such rules have been prescribed to date, and the draft bill (or any revised version thereof) is yet to be introduced in the Indian Parliament.

- d) *United Kingdom*. The English Arbitration Act, 1996 (**‘English Arbitration Act’**) did not expressly provide for the recognition of emergency orders/awards. However, the decisions of English courts could be interpreted to hint at some acceptance of EA. These decisions interpreted Section 44(5) of the English Arbitration Act which allows courts to intervene (including granting of any interim relief) only if the arbitral tribunal has no power or is unable to act effectively for the time being.<sup>156</sup>

In the case of *Seele Middle East FZE v. Drake and Scull Int SA Co*,<sup>157</sup> the England & Wales High Court accepted a request for urgent relief by finding that it could grant such relief since ICC Arbitration Rules (which include EA provisions) did not apply. Further, in *Gerald Metals S.A. v. Timis* (**‘Gerald Metals’**),<sup>158</sup> the English Commercial Court suggested that the parties’ selection of the LCIA Arbitration Rules (which provide for EA) may oust the jurisdiction of English courts to provide urgent interim relief. These decisions may indicate that English courts recognise the power and ability of emergency arbitrators to act effectively while granting interim relief.

However, in a consultation paper issued in September 2022, the Law Commission stated that the reach of the finding in *Gerald Metals* has been ‘exaggerated’.<sup>159</sup> The Law Commission held that *Gerald Metals* merely restated Section 44(5) to state that the court has the discretion to decide when a tribunal may act effectively or not and does not necessarily preclude court involvement merely because an emergency arbitrator provision is available. Further, in this paper, the Law Commission also took a provisional view that provisions of the English Arbitration Act should generally not apply to EAs.<sup>160</sup>

In 2025, the English Arbitration Act was amended to, among other things, formally recognise EA proceedings. Key changes included: (i) amending Section 44, applicable to both England-seated and foreign-seated arbitrations, to permit court intervention with the emergency arbitrator’s permission or where the emergency arbitrator lacks power or is unable to act effectively; (ii) introducing Section 41A to empower emergency arbitrators in England-seated

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154 Draft Arbitration and Conciliation (Amendment) Bill, 2024, <<https://www.scobserver.in/wp-content/uploads/2025/02/2024-Draft-Arbitration-Amendment-Bill.pdf>> accessed 11 June 2025, p. 33.

155 Draft Arbitration and Conciliation (Amendment) Bill, 2024, <<https://www.scobserver.in/wp-content/uploads/2025/02/2024-Draft-Arbitration-Amendment-Bill.pdf>> accessed 11 June 2025, p. 33.

156 Arbitration Act, 1996 (UK), S. 44(5).

157 [2013] EWHC 4350 (TCC) (UK).

158 [2016] EWHC 2327 (Ch) (UK).

159 Law Commission Consultation Paper 257, Review of the Arbitration Act 1996, <[www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/](http://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/)> accessed 4 April 2023, ¶ 7.54.

160 Law Commission Consultation Paper 257, Review of the Arbitration Act 1996, <[www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/](http://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/)> accessed 4 April 2023, ¶ 7.47.

arbitrations to issue peremptory orders; and (iii) amending Section 42 to allow courts to enforce such peremptory orders by emergency arbitrators.

- e) *United States*. While the US Federal Arbitration Act, 1926 ('**FAA**') does not include EA provisions, several US courts have recognised and enforced emergency orders/awards.<sup>161</sup> US courts tend to treat emergency orders/awards as interim awards and recognise them only if they are '*final*' in nature.<sup>162</sup> For this purpose, these courts have found that decisions which are dispositive of at least one self-contained issue in the dispute are sufficiently '*final*' to be enforced. In the context of EA, finality does not mean permanence, but rather that the decision conclusively resolves a specific issue without requiring further arbitral action on that point, making it capable of immediate enforcement, even if the arbitral tribunal may later revisit or modify it.

Further, in *Draeger Safety Diagnostics, Inc. v. New Horizons Interlock Inc.*,<sup>163</sup> the US District Court for the Eastern District of Michigan held that the ripeness of an emergency order/award must be confirmed before granting enforcement. For this purpose, it set out a three-prong test to determine whether the emergency decision is '*ripe*', namely: '*(i) the likelihood that harm suffered by a party will pass; (ii) the hardship to the parties if judicial relief is denied at the stage in the proceedings; and (iii) whether the factual record is sufficiently developed to produce a fair adjudication of the merits.*'<sup>164</sup>

- f) *Ukraine*. In *JKX Oil & Gas Plc, Poltava Gas BV v. Ukraine*, the Supreme Court of Ukraine suggested that an emergency decision (given under the SCC Arbitration Rules) in an investor-State arbitration may in principle be enforceable in Ukraine.<sup>165</sup> However, it ultimately decided that the decision in question could not be enforced since it violated the fundamental public policy of Ukraine and that sufficient notice of the EA proceedings was not given to Ukraine. The courts have also refused enforcement in *Ostchem v. Odesa Portside Plant*, and most recently in *Vnesheconombank v. Ukraine*.<sup>166</sup>
- g) *Switzerland*. The approach taken by Swiss courts seems to suggest that emergency orders/awards may hardly be enforceable in Switzerland. The Swiss Federal Tribunal took the view that it would be '*dangerous*' to treat interim provisional orders as '*awards*' and, because they do

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161 *Vital Pharmaceuticals d/b/a VPX Sports v. PepsiCo, Inc.*, Case No. 20-CIV-62415-RAR (US); *Draeger Safety Diagnostics, Inc. v. New Horizons Interlock Inc.*, No. 11-50160, 2011 U.S. Dist. LEXIS 14414 (E.D. Mich. Feb. 14, 2011) (US); *Yahoo v. Microsoft Corporation*, 983 F. Supp. 2d 310 (SDNY 2013) (US); *Yonir Techs., Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp 2d 195, 204 (SDNY 2002) (US).

162 *Island Creek Coal Sales v. City of Gainesville, Fla.*, 729 F.2d 1046 (6th Cir. 1984) (US); *Ecopetrol S.A. v. Offshore Expl. & Prod. LLC*, 46 F. Supp. 3d 327 (S.D.N.Y. 2014) (US); *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 937 (N.D. Cal. 2003).

163 *Draeger Safety Diagnostics, Inc. v. New Horizons Interlock Inc.*, No. 11-50160, 2011 U.S. Dist. LEXIS 14414 (E.D. Mich. Feb. 14, 2011) (US).

164 *Draeger Safety Diagnostics, Inc. v. New Horizons Interlock Inc.*, No. 11-50160, 2011 U.S. Dist. LEXIS 14414 (E.D. Mich. Feb. 14, 2011) (US), p. 9.

165 *JKX Oil & Gas Plc, Poltava Gas BV v. Ukraine*, No. 824/22/2019, 21 November 2019 <[www.italaw.com/sites/default/files/case-documents/italaw11144.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw11144.pdf)> accessed 11 June 2025.

166 Global Arbitration Review, '*Enforcing Emergency Awards in Ukraine: near miss or impossibility?*', published on 2 February 2022, available on <<https://globalarbitrationreview.com/enforcing-emergency-awards-in-ukraine-near-miss-or-impossibility>> accessed 29 September 2025.

not classify as awards, they cannot be annulled under Article 190 of the Swiss Law on Private International Law.<sup>167</sup>

- h) *Nigeria*. Recently, Nigeria enacted the Arbitration and Mediation Act 2023 ('**AMA 2023**'), repealing the Arbitration and Conciliation Act 1988, which had governed arbitration and conciliation in Nigeria for last three decades. AMA 2023 specifically allows for appointment of emergency arbitrators, in so far as Section 16(1) requires a party seeking emergency relief to apply for appointment of an emergency arbitrator before the arbitral tribunal is formed, either alongside or after filing the request for arbitration. The application is made to the designated arbitral institution or, if no institution is named, to the court. If accepted, an emergency arbitrator is appointed within two business days unless the parties agree otherwise. Further, Article 27 of the First Schedule to the AMA 2023 states that (i) the emergency arbitrator shall have the power to rule on jurisdictional objections, objections in relation to the existence, validity or scope of the arbitration, (ii) the decision has to be rendered within 14 days from the date on which the emergency arbitrator received the file, and (iii) the emergency decision shall be recognised and enforced in the same manner as an interim measure and shall be binding on the parties when rendered.
- i) *Brazil*. The Brazilian Arbitration Act 1996 was amended to introduce Articles 22-A and 22-B to govern the granting of interim measures and urgent reliefs.<sup>168</sup> These provisions do not prohibit the appointment of emergency arbitrators. Therefore, parties can appoint emergency arbitrators for any urgent reliefs, either on an *ad hoc* basis, or by adopting institutional arbitration which provides for such emergency arbitration. The two most popular arbitral institutes in Brazil, namely ICC<sup>169</sup> and CAM-CCBC,<sup>170</sup> have both adopted EA provisions in their rules.<sup>171</sup> Under Article 237(4) of the Brazilian Code of Civil Procedure, orders of emergency arbitrators can be enforced by issuing 'arbitral letter'.<sup>172</sup>

**Tip box:**

Parties anticipating the need for emergency relief may, to the extent possible, have to account for these differences in national laws when selecting a seat and identifying potential enforcement jurisdictions. This is especially important when the subject of the urgent relief, such as assets or evidence, is spread across multiple countries. Once an emergency order/award is secured, the prevailing party should evaluate the enforceability landscape across relevant jurisdictions and strategically pursue enforcement where courts are more likely to recognise and give effect to such relief.

When such an anticipation is not possible, parties may need to consider the laws of the jurisdictions relevant to their dispute to determine whether it is better to seek provisional relief through EA or in other fora (e.g., courts).

167 Judgment of 13 April 2010, DFT 136 III 200 (Switzerland).

168 Brazilian Arbitration Act, 1996 (Law No. 9.307), Articles 22-A and 22-B.

169 ICC 2021 Arbitration Rules, Article 29 and Appendix V.

170 CAM-CCBC Arbitration Regulations, 2022, Articles 21 and 22.

171 P. Marinho Nunes and G. Teixeira Alves, 'An overview of Brazil's Arbitration Landscape', Global Arbitration Review, <<https://globalarbitrationreview.com/guide/the-guide-arbitration-in-latin-america/fourth-edition/article/overview-of-brazils-arbitration-landscape>> accessed 29 September 2025

172 Brazilian Code of Civil Procedure, Article 237. See *IBA Arbitration Committee Arbitration Guide, Brazil* <<https://www.ibanet.org/document?id=Brazil-arbitration-guideline-2024>> (page 11) (updated November 2024), accessed 29 September 2025.

## C. Financial consequences for non-performance

### Key takeaways:

- While there are concerns surrounding enforceability of emergency orders/awards, data suggests that there is a high rate of: (i) voluntary compliance with such decisions; and (ii) settlement of disputes following an EA proceeding. However, parties seeking to enforce an emergency order/award against a non-conforming party may have to seek relief from national courts in the absence of any concrete consequences for such non-compliance in arbitration rules.
- Arbitral tribunals may consider the non-compliance of a party with an emergency order/award while apportioning costs in the main arbitration and reaching adverse findings (depending upon the nature of the decision) against the non-complying party.
- A party may also claim damages for the other party's non-compliance with the emergency decision by showing direct harm and losses caused by such non-compliance.

112. While the enforceability of emergency orders/awards may vary across jurisdictions, data suggests that parties usually voluntarily comply with these decisions to avoid any negative consequences on the adjudication of the merits in the main arbitration proceedings.<sup>173</sup> However, rules of arbitral institutions, apart from a few exceptions, usually do not set out the consequences for when a party fails to comply with an emergency order/award.<sup>174</sup>
113. The ICC Arbitration Rules, pursuant to Article 29(4) and Appendix V, provide that the emergency arbitrator must decide the apportionment of the EA costs in its order/award, which may subsequently be reallocated by the arbitral tribunal.<sup>175</sup> Article 29(4) of the ICC Arbitration Rules also allows an arbitral tribunal to decide any claims arising out of or in connection with a party's non-compliance with an emergency order/award. Similarly, the SCC, the ICDR, the SIAC, the LCIA and the CIETAC Rules allow an emergency arbitrator to initially apportion the costs of the emergency proceedings, which remain subject to any reapportionment by the final arbitral tribunal.<sup>176</sup> By contrast, the HKIAC Rules confer express authority only on the final arbitral tribunal to apportion the EA costs.<sup>177</sup> A final arbitral tribunal under these rules may be able to use its power to award or reapportion the EA costs to sanction non-compliance with an emergency order/award. Arbitral tribunals may also consider non-compliance with an emergency order/award by a party (as part of its overall conduct during the proceedings) while exercising their power to award costs in the arbitration.<sup>178</sup>
114. Moreover, before the arbitral tribunal in the main proceedings, a party may be able to claim damages suffered by it on account of non-compliance with an emergency decision by the other party. For this

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173 ICC Commission Report, 'Emergency Arbitrator Proceedings', 2019, pp. 6 and 30; G. B. Born, *International Commercial Arbitration* (3rd ed. 2021), ¶ 17.02[C].

174 N. Blackaby, C. Partasides, A. Redfern and M. Hunter (eds), *Redfern and Hunter on International Arbitration* (7th ed., 2023), ¶ 4.15.

175 ICC Arbitration Rules (2021), Art. 29(4): '*The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.*'

176 SCC Expedited Arbitration Rules (2023), Art. 10; SCC Arbitration Rules (2023), Art. 10; ICDR International Arbitration Rules (2021), Art. 7(8); SIAC Arbitration Rules (2025), Schedule 1, Art. 24; LCIA Rules (2020), Art. 9.10; CIETAC Arbitration Rules (2024), Appendix III, Art. 7(3).

177 HKIAC Administered Arbitration Rules (2024), Art. 34.1(e).

178 IBA Rules on Taking of Evidence in International Arbitration (2020), Art. 9(8).

purpose, the party may have to satisfy tests of remoteness and show the harm directly caused to it by the other party's failure to comply with the emergency decision.

115. Apart from financial relief, a party may also seek different forms of relief from a tribunal upon the other party's non-compliance with an emergency decision. For example, a party may request a tribunal to reach an adverse finding against the other party when the emergency decision concerned the preservation of certain evidence to be used in the main arbitration.<sup>179</sup>

## D. Post-EA settlements

### Key takeaways:

EA proceedings are said to result in a high rate of settlement of disputes.

116. As elucidated above, there are several risks associated with EA, including potential unenforceability of such decisions and lack of concrete consequences for non-compliance with such decisions in arbitral institution rules. However, EA may still be worthwhile for parties since they result in a high rate of settlement of disputes.<sup>180</sup>

117. In many situations, an emergency decision may act as a 'reality check' for parties and inform them of the strengths and weaknesses of their case. It would also allow parties to gather available relevant evidence for their case. Accordingly, like the non-binding arbitration process in the United States and Canada, this would allow parties to predict the chances of their win in the main arbitration and may encourage them to settle their disputes.

## E. Correlation with main proceedings

### Key takeaways:

- Arbitral tribunals are not bound by emergency decisions and can apply *de novo* review to issues decided in EA.
- However, a tribunal may give deference to emergency decisions which have previously decided the factual and legal issues before the tribunal.

118. As explained above, emergency decisions do not have *res judicata* effect in the main arbitration proceedings. Accordingly, an arbitral tribunal can consider the issues decided by an emergency arbitrator *de novo*. However, a tribunal may give some deference to the interpretations undertaken by an emergency arbitrator on the same factual and legal issues in question before the tribunal. Such deference may strengthen the credibility of the EA process and may prove to be valuable in situations where the evidence gathered during the EA is no longer available for the tribunal to assess (for example, a witness who may have become unavailable subsequently).

119. Many arbitral institution rules, such as the ICC Arbitration Rules, do not permit the re-appointment of an emergency arbitrator to the main tribunal.<sup>181</sup> However, some sets of rules, such as the

179 IBA Rules on Taking of Evidence in International Arbitration (2020), Art. 9(5).

180 ICC Commission Report, 'Emergency Arbitrator Proceedings', 2019, pp. 6, 30 and 35; G. B. Born, International Commercial Arbitration (3rd ed. 2021), ¶17.02[C].

181 ICC Arbitration Rules (2021), Appendix V, Art. 2.

HKIAC, SIAC, ICDR and the SCC Rules, allow the re-appointment of an emergency arbitrator in any future arbitrations related to the dispute if the parties consent to such re-appointment.<sup>182</sup> The AAA Arbitration Rules also allow an emergency arbitrator to be named as a merits arbitrator or be appointed to the main tribunal.<sup>183</sup>

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182 SIAC Arbitration Rules (2025), Schedule 1, Art. 22; SCC Arbitration Rules (2023), Appendix II, Art. 4; SCC Expedited Arbitration Rules (2023), Appendix II, Art. 4; HKIAC Administered Arbitration Rules (2024), Schedule 4, Art. 19; ICDR Arbitration Rules (2021), Art. 7(5); Swiss Rules of International Arbitration (2021), Art. 43(1); CIETAC Arbitration Rules (2024), Appendix III, Art. 3(7); CIAM-CIAR Arbitration Rules (2024), Art. 64(1).

183 AAA Commercial Arbitration Rules and Mediation Procedures (2022), Art. R-39(f).

## V. EA in investment treaty disputes

120. Requests for interim relief occur in both investment treaty and commercial disputes. Where interim relief under time constraints is sought in the context of investment treaty disputes, it is important to be aware of the available options and their limitations.
121. Overall, EA in investment treaty arbitration is very similar to EA in commercial arbitration. The cases seen to date have taken place under the SCC Arbitration Rules, which do not distinguish between investment and commercial cases. It is therefore unsurprising that EA proceedings have been treated similarly regardless of whether the cause of action is a breach of contract or a violation of an investment treaty. However, investment treaty disputes do give rise to a number of unique issues not applicable to general commercial arbitrations. As a result, the topic of EA in the context of investor-State disputes warrants specific consideration.
121. Possibly as a result of these complexities in the area of investment treaty disputes, there is a notable absence of provisions for EA in the vast majority of investment treaty arbitration rules, including the ICSID and UNCITRAL Rules. The mechanism is therefore currently only available under the SCC Rules, the SIAC Investment Arbitration Rules (**‘SIAC IA Rules’**), and the CIETAC Investment Arbitration Rules (**‘CIETAC IA Rules’**).

### A. EA under the relevant rules

#### Key takeaways:

Only three sets of arbitral institution rules allow for the use of EA in investment treaty arbitration. Each of these rules treat EA slightly differently, so the rules, law of the seat, and any relevant national laws should all be carefully considered when initiating proceedings.

123. As noted above, the only rules that currently allow for the use of EA in investment treaty disputes are the SCC Rules, along with the more recent SIAC IA Rules and CIETAC IA Rules. Of these, only the EA provisions of the SCC Rules have actually been used in investment disputes.
124. There is no distinction in the SCC Rules between commercial and investment arbitrations, though in the context of investment disputes, applicability of the EA under the SCC Rules following its introduction in 2010 raises the important issues of consent and sovereignty for States and State entities.
125. The SIAC IA Rules came into force on 1 January 2017. They were enacted specifically to cater to investment treaty disputes and to address some of the issues with other institutional rules in this area, such as the long lead times and high costs.<sup>184</sup> In contrast with the SCC Rules, the EA provisions under

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<sup>184</sup> C. Sim, *Emergency Arbitration* (2021), ¶ 11.22.

the SIAC IA Rules require the parties to specifically opt in. Under Schedule 1 of the SIAC IA Rules, the EA provisions only apply ‘*if the Parties have expressly agreed*’ on their application.<sup>185</sup>

126. Under the SIAC IA Rules, an emergency arbitrator should normally be appointed within one day of the receipt of the application by the registrar and payment of the necessary fees. The timeline for the emergency arbitrator to deliver the interim order or award is 14 days from the date of appointment, unless extended by the registrar, which is longer than the period envisioned under the SCC Rules (5 days).<sup>186</sup> As at the date of this Guide, there are no reported examples of the use of EA in a dispute under the SIAC IA Rules.
127. The CIETAC IA Rules, which came into force on 1 October 2017, allow for the appointment of an emergency arbitrator either with the agreement of the parties or in accordance with the law applicable to the arbitration.<sup>187</sup> The lead times under this set of rules are closer to the SIAC IA Rules, and provide for the appointment of an arbitrator within one day and a decision within 15 days.<sup>188</sup> At the time of publication of this Guide, there have been no reports of the use of EA in arbitrations conducted under the CIETAC IA Rules, which are most likely to be used for treaties in which China is a counterparty. However, it should be noted that the enforcement of emergency and interim measures in Mainland China may face some challenges,<sup>189</sup> and is currently an evolving space.
128. As mentioned, EA is not available under other institutional rules popular with investment treaty disputes, despite multiple propositions to include such a mechanism. For instance, whilst the revision to the ICC Rules in 2012 introduced an EA mechanism, EA is not available in investment treaty arbitrations under the ICC Rules (even when the 2017 and 2021 revisions apply) despite calls to open the Rules to these types of disputes.<sup>190</sup> Similar pleas exist in relation to the ICSID Rules.<sup>191</sup>

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185 SIAC IA Rules (2017), Art. 27(4) and Schedule 1, Art. 1. Whilst there are no current examples of BITs that have opted into the rules, some may allow this indirectly, e.g. the China-Uzbekistan BIT allows claims to be commenced under a number of rules including ‘*any other arbitration institutions or ad hoc arbitral tribunals agreed by the disputing parties*’, opening up the possibility of submitting disputes under the BIT to SIAC or CIETAC.

186 SIAC IA Rules (2017), Schedule 1, Arts. 3 and 9.

187 CIETAC IA Rules (2017), Art. 40.

188 CIETAC IA Rules (2017), Appendix II, Arts. 2 and 6.

189 J. Fei, A. Crockett and P. Chen, ‘Facilitating the Belt and Road: CIETAC launches investment arbitration rules’, 2017 <<https://hsfnotes.com/arbitration/2017/12/04/facilitating-the-belt-and-road-cietac-launches-investment-arbitration-rules/>>. Though not expressly prohibited, China’s arbitration laws do not officially recognise the EA procedure. This is in contrast to Hong Kong, where the Arbitration Ordinance expressly recognises the enforceability of emergency relief ordered by an emergency arbitrator.

190 Article 29(5) of the 2012, 2017, and 2021 ICC Rules provides that the emergency arbitration rules ‘*apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories*’, which many interpreted it to exclude arbitrations which arise out of standing offers in BITs. The ICC clarified that this was intended to exclude States from the scope of the procedure, see ICC Commission Report, ‘Emergency Arbitrator Proceedings’, 2019. The 2021 edition expressly excludes treaty-based arbitration agreements from the application of the procedure. See P. Pinsolle, ‘A Call to Open the ICC Emergency Arbitrator Procedure to Investment Treaty Cases’, 2015 International Arbitration Under Review: Essays in Honour of John Beechey (A. Carlevaris, L. Lévy, A. Mourre and E. A. Schwartz eds.), 2015, pp. 307-318.

191 ICSID Secretariat, ‘Proposals for Amendment of the ICSID Rules – Working Paper’, Vol. 3, 2 August 2018; Clifford Chance, ‘ICSID Rules 2022 Promote Efficiency in Investor-State Arbitration and Mediation’, 2022; ICSID Arbitration Rules (2022).

## B. Key considerations for EA in investment treaty disputes

129. There are two main peculiarities of investment-related EA proceedings.

130. *First*, the participation of a State can give rise to concerns related to sovereignty and a State's 'agility'. In relation to the latter, a State's lack of 'agility' due to, for example, bureaucratic procedures, means that the formation of investment tribunals generally has longer lead times as compared to commercial arbitration.<sup>192</sup> This may increase the need for EA. Conversely, the States' lack of 'agility' may make it difficult for them to participate in fast-track EA, raising the question of whether such proceedings are even appropriate when a State is involved.

131. *Second*, differences between commercial arbitration and investment arbitration arise when EA interacts with treaty provisions, particularly those that commonly lead to jurisdictional objections. Examples of such interaction have already been encountered in respect of cooling-off periods and MFN provisions, as will be discussed below.

132. While jurisdictional objections are also common in commercial arbitrations, their increased prevalence in investment arbitration makes deciding them on a truncated timeline challenging for an emergency arbitrator, despite such issues being decided on only a *prima facie* basis in EA and the possibility to later overturn the decision in the main arbitration.

### 1. State sovereignty in investment treaty disputes

#### Key takeaways:

- The risks imposed by EA to a State's sovereignty have limited the use of this procedure in the investment treaty context.
- Even where EA is available under the applicable rules, questions of whether a State has actually consented to their application can arise, and investors may face issues stemming from State sovereignty relating to the types of emergency relief available or when enforcing the emergency decision.

133. One of the key aspects of investment treaty arbitrations arising out of bilateral investment treaties ('BITs') and multilateral investment treaties is that the resolution of the issues in dispute often impacts the choices a State makes in its sovereign capacity.<sup>193</sup> States are protective of their sovereignty and the ability to regulate their affairs without external interference. They are therefore cautious of any attempts to expand the scope of investment treaty arbitrations and the powers of a tribunal beyond their existing limits.<sup>194</sup> The thorny and wide-ranging concept of State sovereignty, and the lengths a State is willing to go to preserve it, is therefore central to all aspects of investment treaty disputes, including EA. In this context, the difficulties posed by State sovereignty become most apparent in three key areas: consent, remedies, and enforcement.

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192 See for example, section 12 of the UK State Immunity Act 1978, where certain procedural privileges are afforded to States, including an extended two-month period for responding to the initiation of proceedings in the UK courts.

193 J. Lee, 'Is the Emergency Arbitrator Procedure Suitable for Investment Arbitration?', 2017 Contemporary Asia Arbitration Journal, Vol. 10, No. 1, pp. 73.

194 C. Sim, *Emergency Arbitration* (2021), ¶ 11.13.

### (a) State sovereignty and consent

134. As mentioned in the introduction of this Guide, EA is still relatively novel, despite being increasingly available under the rules of arbitral institutions. Most investment treaties were negotiated before the advent of EA, and, therefore, pre-date the inclusion of this mechanism in the relevant rules to which their provision on dispute resolution makes reference. For example, the SCC Rules, frequently used in investment treaty arbitrations, only introduced EA in their 2010 revision.<sup>195</sup> As a result, EA was unlikely to have been contemplated or accounted for when many States agreed to settle their investment treaty disputes by arbitration under the SCC Rules.<sup>196</sup> It is thus unsurprising that, in these circumstances, States should view EA as an unwarranted expansion of the scope of arbitration in relation to their investment treaties.
135. As a general rule, investment treaties are often silent as to which edition of the arbitration rules apply.<sup>197</sup> The issue that arises as a result is whether a State is deemed to have consented to the EA procedure contained in a newer version of the rules agreed to in the treaty's arbitration provision. This is especially an issue where, as in the case of the SCC Rules, the provisions require parties to opt out of EA rather than opt in. The SCC Rules are also retroactive, which means that the 2010 revision of the Rules applies to all arbitrations commenced after 1 January 2010, irrespective of the date of the arbitration agreement. In contrast, the SIAC IA Rules require parties to expressly consent to the application of the procedure.<sup>198</sup> As such, State sovereignty and consent may prove to be less problematic in respect of the SIAC IA Rules.
136. In relation to the SCC Rules, the question of consent has been contemplated in two cases that arose out of the Russia-Moldova BIT.<sup>199</sup> At the time the BIT was signed in 1998 and later ratified in 2001, the 1988 and 1999 editions of the SCC Rules did not contain an EA procedure and the treaty was silent on what version of the SCC Rules should apply in an arbitration commenced under it. The Russian investor commenced arbitral proceedings in 2016, invoking the 2010 version of the SCC Rules, which provides for EA proceedings. Moldova objected on the basis that, at the time of signing of the BIT, it had envisaged an earlier version of the SCC Rules that did not contain an EA procedure. Both tribunals found the States to have consented to the application of a later version of the rules, as there was no explicit agreement in the BIT to a specific version of the rules and an update to the rules would have been within the parties' reasonable contemplation.<sup>200</sup>
137. It should be noted, however, that the resolution of such an issue will always be subject to the language and terms of the relevant treaty.<sup>201</sup> It may thus be that later tribunals interpreting different BITs will

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195 SCC Arbitration Rules (2010).

196 See *Evrobalt LLC v. Republic of Moldova*, SCC Case No. 2016/082, Award, 30 May 2016; *Kompozit LLC v. Republic of Moldova*, SCC Case No. 2016/095, Award, 14 June 2016.

197 M. Feigerlová, 'Emergency Measures of Protection in International Arbitration', 2018 *International and Comparative Law Review*, Vol. 8, No. 1, p. 173.

198 SIAC IA Rules (2017), Art. 27(4) and Schedule 1, Art. 1.

199 *Evrobalt LLC v. Republic of Moldova*, SCC Case No. EA 2016/082; *Kompozit LLC v. Republic of Moldova*, SCC Case No. EA 2016/095.

200 *Evrobalt LLC v. Republic of Moldova*, SCC Case No. EA 2016/082, ¶¶ 28-30; *Kompozit LLC v. Republic of Moldova*, SCC Case No. EA 2016/095, ¶¶ 39-47. See also M. Feigerlová, 'Emergency Measures of Protection in International Arbitration', 2018 *International and Comparative Law Review*, Vol. 8, No. 1, p. 174.

201 C. Sim, *Emergency Arbitration* (2021), ¶ 11.59.

come to a different conclusion. However, the approach taken to date is that, unless the contracting parties enter into an opt-out agreement or form an agreement that a specified version of the rules will apply for the duration of the BIT, tribunals can fairly assume that the parties anticipated that the institutional arbitration rules would be further amended in the future and that they could be bound by this later version.

138. Some arbitral rules, like the ICC Rules, exclude investment arbitration from the scope of EA because of the manner in which consent to arbitration is formed; the investor and the host State are not signatories of the arbitration agreement formed by the States' offer to arbitrate contained in investment treaties and the investor's acceptance contained in its notice of claim or request for arbitration.<sup>202</sup>
139. Finally, States often do not participate in EA proceedings,<sup>203</sup> either because they choose not to or because they cannot manage the truncated schedule. In such cases, emergency arbitrators are entitled to continue with the proceedings whilst encouraging States to participate,<sup>204</sup> and the non-participation of the State should not frustrate the EA proceedings.<sup>205</sup>

**Tip box:**

If a State does not participate in an EA proceeding, an emergency arbitrator should proceed with the same level of caution expected of any arbitrator managing a non-participating respondent. This entails: (i) familiarising oneself with the relevant rules, (ii) being mindful that the investor's contentions are not automatically deemed admitted and must be demonstrated in accordance with the applicable standard of proof, and (iii) considering whether further evidence might be appropriate.<sup>206</sup>

In an EA-specific context, the emergency arbitrator should ensure that the non-participating State receives proper notice of the application, and, before granting the emergency relief sought, he or she should be sufficiently satisfied that the investor demonstrated that there is urgency and risk of irreparable harm.<sup>207</sup>

**(b) State sovereignty and remedies**

140. Another aspect of EA that risks infringing a State's sovereignty is the forms of emergency relief requested and granted. As is noted in Section III.C of this Guide, applicants typically turn to EA to request specific performance or injunctive relief. These forms of non-pecuniary relief are relatively

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202 ICC Commission Report, 'Arbitration Involving States or State Entities', 2014, pp. 6-7. ICC Arbitration Rules (2021), Art. 29(6) expressly exclude the application of EA provisions when the arbitration agreement arises out of a treaty.

203 See for example, *Kompozit LLC v. Republic of Moldova*, SCC Case No. EA 2016/095 and *TSIKinvest LLC v. Republic of Moldova*, SCC Case No. EA 2014/053.

204 C. Sim, *Emergency Arbitration* (2021), ¶ 11.79.

205 S. Khan and B. Lim, 'Emergency Arbitrator Procedures: What Should a Practice Note of Best Practices Consider?', 11 January 2019, Kluwer Arbitration Blog.

206 C. T. Salomon and F. Loibl, 'How to Respond to Respondents' Non-Participation in International Arbitration', 2020 New York Law Journal (Online).

207 S. Khan and B. Lim, 'Emergency Arbitrator Procedures: What Should a Practice Note of Best Practices Consider?', 11 January 2019, Kluwer Arbitration Blog.

rare in investment treaty disputes, sometimes due to provisions in the treaties themselves that limit remedies to monetary awards.<sup>208</sup>

141. Therefore, any EA applications requesting relief in the form of such measures, and any interim order requiring a State to undertake specific performance would have a high risk of impinging on that State's exercise of its sovereignty and ability to regulate its own affairs.<sup>209</sup> Thus, any interim relief granted by an emergency arbitrator would need to be carefully balanced against respect for a State's sovereignty.<sup>210</sup> This is especially the case where the type of relief or measure sought is highly specific or unusual compared to ordinary measures.<sup>211</sup>
142. That being said, there have been cases where emergency arbitrators have felt comfortable awarding some forms of injunctive relief, such as ordering States to refrain from taking steps to suspend shareholder rights and cancel shares,<sup>212</sup> and ordering a stay of a central bank's decision relating to certain shareholder rights.<sup>213</sup>

### (c) State sovereignty and enforcement

143. As a third and final point, sovereignty may also pose an issue at the enforcement stage. As noted in Section IV.B above, the emergency arbitrator's rulings do not necessarily enjoy the same protections as arbitral awards.<sup>214</sup> In exercising their sovereignty, States may thus refuse to comply with any enforcement of emergency decisions where the relevant rules or national laws do not treat them as 'awards'.<sup>215</sup>

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208 The North American Free Trade Agreement (NAFTA) is one such multilateral investment treaty which specifically states that a tribunal may only award 'monetary damages and any applicable interest' and 'restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution' (Art. 1135(1)). Similarly, in arbitrations under the Energy Charter Treaty (ECT), relief is limited to compensation or restitution (Art. 12), with the right to elect to pay monetary damages in lieu of any other remedy (Art. 26(8)). Specific BITs, such as the US Model BIT, restrict the remedies in a similar way to NAFTA. This is also the case in ICSID arbitrations, which orders the enforcement of the 'pecuniary obligations imposed' by the award. ICSID Convention, Art. 54(1); see also C. Sim, *Emergency Arbitration* (2021), ¶ 11.91; J. Lee, 'Is the Emergency Arbitrator Procedure Suitable for Investment Arbitration?', 2017 *Contemporary Asia Arbitration Journal*, Vol. 10, No. 1, p. 93-94.

209 J. Lee, 'Is the Emergency Arbitrator Procedure Suitable for Investment Arbitration?', 2017 *Contemporary Asia Arbitration Journal*, Vol. 10, No. 1, p. 94.

210 This was noted for instance by the tribunal in *Caratube International Oil Co. LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants' Request for Provisional Measures, 4 December 2014, ¶ 121: 'this Tribunal must be mindful when issuing provisional measures not to unduly encroach on the State's sovereignty and activities serving public interests'.

211 For instance, in *Mohammed Munshi v. Mongolia*, the claimant sought an award requiring his release from prison, amongst other requests. The emergency arbitrator stated that he was 'not satisfied that the Claimant's fundamental rights in the procedural running of the arbitration extend so far as to interfere with the justice system of a sovereign state', and that this would go beyond what is necessary for the claimant to advance claims in the arbitration (*Mohammed Munshi v. State of Mongolia*, SCC Case No. 2018/007, Award on Emergency Measures, 5 February 2018, ¶ 47).

212 *Kompozit LLC v. Republic of Moldova*, SCC Case No. EA 2016/095.

213 *TSIKinvest LLC v. Republic of Moldova*, SCC Case No. EA 2014/053.

214 For instance, the SCC Rules specifically refer to decisions issued by emergency arbitrators as an 'emergency decision on interim measures', and not an award, though a number of emergency decisions appear to have been labelled as 'awards' on their face when rendered. In contrast, the SIAC IA Rules refer to such a decision as an 'interim order or Award'. Where this is disputed, it is likely to be resolved either by reference to the laws of the seat or national laws where appropriate.

215 K. Chung, 'Emergency Arbitrator Procedure in Investment Treaty Disputes: To Be or Not To Be', 2020 *The Journal of World Investment & Trade*, Vol. 21, pp. 131-132 and fn. 199. For a discussion of the status of emergency arbitration decisions under different jurisdictions, see J. Lee, 'Is the Emergency Arbitrator Procedure Suitable for Investment Arbitration?', 2017 *Contemporary Asia Arbitration Journal*, Vol. 10, No. 1, pp. 95-105.

144. Though a State may still resist enforcement on other grounds, in principle, and in a similar vein to commercial arbitrations, the emergency decision would be binding where it has been made under an agreed set of rules that recognise the binding effect of such decisions, e.g. the SCC Rules or the SIAC IA Rules.<sup>216</sup> The number of cases where the enforcement of an emergency decision has been sought against a State is extremely limited, making it difficult to draw any clear conclusions on enforcement outside of these contexts.<sup>217</sup>

## 2. The application of cooling-off periods

### Key takeaways:

There is a conflict between cooling-off periods and EA. The key question is whether or not the cooling off period is a jurisdictional matter. However, even if it is considered to be a jurisdictional matter, which might bar an EA if not complied with, jurisdiction only needs to be assessed on a prima facie basis.

145. EA proceedings in investment arbitration will often take place before the end of cooling-off periods, and may lead to an investor also initiating the main arbitration proceedings prior to the expiration of the cooling-off period.
146. Most investment treaties contain cooling-off periods. While the precise content of such cooling-off periods varies from treaty to treaty, at their most basic, these provisions require a claimant to abstain from initiating proceedings for a specified period of time, typically 3, 6, or 12 months after a written notice is provided. Usually, during the cooling-off period, the parties are required to attempt to settle the dispute through negotiation, mediation, local courts, or other methods. Cooling-off periods also serve the purpose of giving the respondent State, which is typically less agile than investors, an opportunity to catch up with the claimant in terms of hiring counsel and investigating the alleged treaty breaches.
147. Investment arbitration jurisprudence and doctrine is split on the results of failing to comply with cooling-off periods:
- i. the failure can be seen to interfere with consent, meaning that the tribunal lacks jurisdiction (possibly except if compliance would have been futile);
  - ii. the failure can be seen as an admissibility issue, whereby a failure to comply can be cured;
  - iii. the failure can be seen as a breach of the treaty resulting in damages; or
  - iv. the failure can be seen as simply procedural, and thus able to be ignored.

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216 C. Sim, *Emergency Arbitration* (2021), ¶¶ 11.95-11.97.

217 In *JKX Oil & Gas v. Ukraine*, an emergency arbitrator ordered Ukraine to refrain from imposing increased royalties. The Ukrainian courts initially granted enforcement, and the Supreme Court later confirmed that emergency arbitration decisions can, in principle, be enforced under Ukrainian law. However, in this specific case, enforcement was ultimately refused on the grounds that it would violate Ukraine's public policy. *JKX Oil & Gas plc, Poltava Gas BV, Poltava Petroleum Company v. Ukraine*, SCC Case No. EA 2015/002, Emergency Award, 14 January 2015; in contrast, the Moldovan courts refused to enforce the emergency arbitrator's award in *Kompozit LLC v. Republic of Moldova*, SCC Case No. 2016/095 on public policy grounds, amongst others. See A. Svetlicinii, 'Emergency Arbitration in the Investor-State Dispute Settlement Cases: Challenges and Perspectives for Arbitration Institutions', 2018 KLRI Journal of Law and Legislation, Vol. 8, No. 1, pp. 1-26, pp. 12-15.

148. As a first step, practitioners should consider whether a cooling-off provision is a matter of jurisdiction, admissibility, treaty breach, or procedure. If the cooling-off period goes to jurisdiction, that would necessarily complicate EA proceedings commenced before the end of any such period. However, even if conceptualised as such, it is important to recall that the assessment of jurisdiction in EA proceedings is on a *prima facie* basis only. Therefore, the failure to comply with cooling-off periods may not necessarily affect the EA proceeding itself, but it could affect final determination on jurisdiction in the arbitration.<sup>218</sup>
149. In commercial arbitration, the failure to comply with a pre-arbitration negotiation clause has not generally been seen as a bar to bringing an EA proceeding.<sup>219</sup> This approach has also been taken in respect of EA proceedings brought before the end of the cooling-off periods in investment treaties.<sup>220</sup> None of the SCC EA decisions to date have found that a cooling-off period precludes emergency relief, even where the period had not yet expired. When permitting EA proceedings despite the existence of a cooling-off period, emergency arbitrators have cited several reasons, such as procedural fairness,<sup>221</sup> general principles relating to the nature of EA,<sup>222</sup> futility,<sup>223</sup> and the intention of institutional rules.<sup>224</sup>
150. It is worth noting that in each of the publicly available awards to date, the claimant had triggered the cooling-off period prior to initiating the EA. The question remains as to whether a failure to trigger the cooling-off period prior to initiating the EA would have led to another outcome.
151. The discussion above concerns the circumvention of the cooling-off provisions in respect of EA. However, engaging in EA may also circumvent the cooling-off period in respect of the main arbitration proceedings. This is because, for example, under the SCC Rules, the decision of the emergency arbitrator ceases to be binding if the main ‘*arbitration is not commenced within 30 days from the date of the emergency decision*’.<sup>225</sup> Where a cooling-off period continues for months after the emergency decision has been rendered, the investor will be forced to either forgo the binding nature of a hard-fought emergency decision, or initiate the main proceedings before the cooling-off period ends. The question for the arbitrators in the main proceedings will then be whether the requirement under the

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218 K. Chung, ‘Emergency Arbitrator Procedure in Investment Treaty Disputes: To Be or Not To Be’, 2020 *The Journal of World Investment & Trade*, Vol. 21; L. Markert and R. Rawal, ‘Emergency Arbitration in Investment and Construction Disputes: An Uneasy Fit?’ 2020 *Journal of International Arbitration*, Vol. 37, Issue 1, p. 137.

219 See for example, ICC Commission Report, ‘Emergency Arbitrator Procedures’, 2019, p. 15.

220 *TSIKinvest LLC v. Moldova; Evrobalt LLC*, SCC Case No. EA 2014/053; *Kompozit LLC; Puma Energy Holdings v. Republic of Benin*. This award is not publicly available. Instead see J. Hepburn, ‘Analysis: Stockholm Arbitrator Finds Emergency Measures Justified Against Benin Where Entire Investment Faces Extinguishment due to Alleged Denial of Justice’ 2017 *Investment Arbitration Reporter*, <[www.iareporter.com/articles/analysis-stockholm-arbitrator-finds-emergency-measures-justified-against-benin-where-entire-investment-faces-extinguishment-due-to-alleged-denial-of-justice/](http://www.iareporter.com/articles/analysis-stockholm-arbitrator-finds-emergency-measures-justified-against-benin-where-entire-investment-faces-extinguishment-due-to-alleged-denial-of-justice/)> accessed 29 December 2022; *JKX Oil & Gas v. Ukraine*. This award is not publicly available. Instead see L. E. Peterson, ‘Investor Takes Emergency Arbitrator Award Under Energy Charter Treaty to a Ukraine Court and Obtains Enforcement of Tax-freeze Holdings’ 2015 *Investment Arbitration Reporter*, <<https://www.iareporter.com/articles/investor-takes-emergency-arbitrator-award-under-energy-charter-treaty-to-a-ukraine-court-and-obtains-enforcement-of-tax-freeze-holdings/>> accessed 29 December 2022.

221 *TSIKinvest LLC v. Republic of Moldova*, ¶ 66.

222 *TSIKinvest LLC v. Republic of Moldova* ¶ 66; *Puma Energy Holdings v. Republic of Benin* (see fn. 216 above).

223 *Evrobalt LLC v. Republic of Moldova*, SCC Case No. EA 2016/082, ¶¶ 22-23; *Kompozit LLC v. Republic of Moldova*, SCC Case No. EA 2016/095, ¶¶ 55-56.

224 *Puma Energy Holdings v. Republic of Benin* (see fn. 216 above).

225 SCC Arbitration Rules (2023), Appendix II, Art. 9(4)(iii).

SCC Rules to commence the arbitration excuses the failure to comply with the cooling-off period for the main arbitration proceedings.

**Tip box:**

When considering cooling-off periods, it can be helpful to consider the following questions:

- Are cooling-off periods a jurisdictional, admissibility, treaty breach, or procedural matter?
- Has the cooling-off period been triggered?
- Can non-compliance be excused by procedural fairness, general principles of EA, futility, or the intention of institutional rules?

### 3. The treatment of Most-Favoured-Nation provisions

**Key takeaways:**

Whilst MFN clauses may in theory allow for EA available under one treaty to be used in a dispute under another treaty with the same State, this has not been tested, and the applicability of MFN provisions to dispute resolution clauses is far from settled.

152. Some investment treaties provide for the choice of institutional rules which include EA (for example the SCC Rules) while other investment treaties do not. The question is therefore whether MFN provisions can be used to import the choice of institutional rules which includes EA.
153. MFN provisions are one of the most common provisions in investment treaties. The scope and language of such provisions vary from treaty to treaty. However, at their core, they require a State not to subject investors or investments of one State to treatment and protection less favourable than that offered to the investors or investments of other States. Thus, in essence, the purpose of an MFN provision is to ensure equality and non-discrimination of investors and investments covered by the investment treaty.
154. Investment arbitration jurisprudence and doctrine are split as to whether MFN provisions apply to the dispute settlement provisions in a treaty. Several investment awards have grappled with this issue. The two most important awards on either side of the debate are *Plama Consortium v. Bulgaria* (rejecting the application of MFN provisions to dispute settlement provisions) and *Maffezini v. Spain* (accepting the application of MFN provisions to dispute settlement provisions within limits).
155. MFN provisions could also be used to get around cooling-off provisions that pose an obstacle to EA or the continued binding nature of an emergency award/decision. However, there are no reported cases of MFN provisions in investment treaties being used in support of EA.

## VI. Conclusion

156. The defining challenge of EA lies in balancing the need for urgency against the equally fundamental requirements of due process and fairness. Emergency arbitrators, often working under extreme time pressure, must manage this balance carefully – ensuring that relief is granted, when necessary, but without undermining the integrity of the arbitral process. For counsel as well, EA demands a firm grasp of both procedural rules and strategic considerations.
157. For the younger generation of arbitration practitioners, EA represents both an opportunity and a responsibility. It is often the first occasion to step into the role of arbitrator, and it offers a chance to engage directly with some of the most pressing procedural and substantive issues in arbitration today. By embracing the complexities of EA and approaching them with both pragmatism and fairness, young practitioners can help shape a practice that remains true to the core values of arbitration while adapting to the needs of a fast-changing dispute resolution landscape.

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