Advantages and disadvantages of emergency arbitration in comparison with interim relief

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Arbitration proceedings, although having a reputation of highly voluntary performance of the award by the parties, just as litigation might need a solution of support while the proceedings are pending (freeze of debtor's assets, prohibition of certain actions or termination of the contract, etc.). This support can be sought from national courts in support of arbitration proceedings or from the arbitral tribunal, with an important addition of an Emergency Arbitration option. Both of these platforms to obtain interim measures have (dis)advantages that must be considered prior to an application, such as: can the party request the measure it needs, can the party apply for measures at all; is it likely that the measure will be granted; will it be possible to enforce an interim relief. These aspects are briefly discussed in the article in comparative manner.

"*Status quo*, you know, is Latin for 'the mess we're in.'"
Ronald Reagan

Preservation of the *status quo* during the arbitration proceedings can sometimes become vital. One might initiate arbitration proceedings against a debtor only to find out, after a lengthy arbitration and further enforcement, that the debtor has passed its assets out of the company (e. g. to a connected company), and hence the creditor stands with an enforceable arbitration award, with no prospects of successful enforcement. Another example, when preservation of current state might be important, is when a party to the contract is seeking an arbitral tribunal to declare that the contract was terminated unlawfully and wishes to continue performance, however, another party is already seeking to hire someone else to perform the task. Once the tribunal declares that the claimant was right and the contract could not have been terminated, the third party will already stand in the claimant's shoes with barely any way back.

The main intention of the application of interim measures is to preserve the situation as is, to ensure that further award will in fact secure the right of the party.[1] The risen interest in the application of interim measures in support of pending arbitration is very much a result of globalization, more lengthy and more complex arbitration proceedings.[2] However, in the context of arbitration, such measures are applied somewhat chaotically: there is no consistent view towards the application and no clearly consistent system. In practice, issues still arise in the procedure of application

[1] Julian D. M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 585.

[2] Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005) 14-15.

and, especially, further enforcement of interim measures.

A party, seeking to preserve the *status quo* whilst arbitration proceedings are pending, has a right to seek application of interim measures either from an arbitral tribunal or a national court in support of arbitration. Over the last several years a new trend of Emergency Arbitration provides another tool for the party to ensure its interests during the proceedings. All of these instruments have their own pros and cons, which will be further discussed.

2015 Queen Mary/White & Case International Arbitration Survey reveals that "46% of respondents would, at present, look to domestic courts for urgent relief before the constitution of the tribunal, versus 29% who would opt for an emergency arbitrator. Nonetheless, 93% favour the inclusion of emergency arbitrator provisions in institutional rules."[3]

A brief introduction to the application of interim measures in support of arbitration, or request for an Emergency Arbitrator will be further provided, followed by the discussion of qualities of both, in favor of one or another.

I. APPLICATION OF INTERIM MEASURES

Interim relief may be sought in support of an arbitration claim, but many times the question arises where to apply and how efficient interim measures are. Hence, it will be further discussed when and how the arbitral tribunal and the courts may apply interim measures in support of arbitration.

First, arbitral tribunal can apply interim measures.

Usually, parties do not expressly state in their arbitration agreement, who has the authority to impose interim measures, nor they expressly specify that the application of interim measures is outside the scope of the competence of arbitral tribunal. In practice, the competence is then decided by national arbitration laws of the arbitration seat and applicable arbitration rules. Many of the contemporary and developed arbitration laws, as well as institutional arbitration rules now allow arbitral tribunals to apply interim measures and generally, if the arbitration agreement is silent, the consent of the parties to resolve interim measures by the arbitral tribunal is implied.[4]

A logical response as to who has jurisdiction to resolve interim measure requests in support of an arbitration claim would be arbitral tribunal, because of the binding arbitration agreement. Arbitral tribunal, appointed to resolve a dispute, may also be the most appropriate forum to resolve the request to apply interim measures, simply for the fact that the same arbitral tribunal is hearing the case on the merits and is knowledgeable of the facts.[5] Thus, a request to the arbitral tribunal for interim measures is a natural and appropriate choice of a party, which should also be a priority choice, if the arbitral tribunal is already appointed.[6]

On the other hand, there are still several states that impose mandatory prohibitions to arbitral tribunal in respect to ordering interim relief. Although rare, that is still true in, e. g. Italy, China, Thailand, Argentina, where granting an interim relief is reserved to courts.[7]

[3] '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' (Queen Mary University of London, 2015) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf> accessed 30 May 2021.

[4] Julian D. M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 587.

[5] Dr. Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (1st ed., Sweet&Maxwell, 2000) 121.

[6] David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd ed., Sweet&Maxwell, 2010) 439.

[7] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed, Kluwer Law International 2015) 210.

An UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**")[8] can stand as the core example and guidance into the approach of application of the interim measures, whereas Article 17(1) provides: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures."

However, as will be further discussed, there are numerous practical issues with the interim measures, applied by the Arbitral Tribunal, starting from the fact that the time it takes to appoint the Arbitral Tribunal might be enough to make future interim measures useless, going further to the question of how to enforce the interim measure, should the party decide to ignore it.

Second, courts can apply interim measures in support of arbitration.

Most national arbitration laws, although allowing arbitral tribunals to impose interim measures, also allow such right to national courts. The same is true for Model Law: Article 9 of the Model Law provides that "[i]t is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."[9]

Hence, unless otherwise agreed by the parties or provided by national arbitration law, the parties are free to turn to national courts for assistance, if they wish interim measures to be applied by the court. Many times, courts would be reluctant to apply interim measures, if the arbitral tribunal is already formed and has the authority to apply interim measures itself. In such cases, it might happen that court intervention will impede, instead of assist, arbitration proceedings and intervene with the arbitrator's rights. However, in cases when there is no other available forum for interim relief application, the court intervention would be considered beneficial to arbitration.[10]

An important aspect to mention is that usually court assistance is sought in courts of the seat of arbitration. However, with respect to interim measures, it is not unprecedented to seek assistance from courts outside the seat. This might be important in cases where specific relief is necessary, for example, if a relief sought is a summons of a witness, it is the court of the domicile of the witness that is appropriate or if the relief sought is to attach the assets, it is logical to ask that from courts where the assets are located. Thus, the main role is assigned to the courts, where the relief will be performed.[11]

However, as will also be further discussed, court intervention, although beneficial, carries also several negative aspects, such as a lack of confidentiality, further enforcement abroad, and a general deviation from party intention to resolve issues in arbitration.

II. EMERGENCY ARBITRATION

Emergency Arbitration is a rising institute in international arbitration, as a competitor to court imposed interim measures, available from arbitrator as agreed by the parties, but before a formation of the arbitral tribunal, i. e. expedient. Not so long ago most of the main arbitral institutions amended their rules to introduce the Emergency Arbitrator procedure.[12]

[8] UNICTRAL 'Model Law on International Commercial Arbitration' (1985) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf> accessed 30 May 2021.

[9] *Ibid*.

[10] Julian D. M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 366.

[11] Thomas H. Webster, Michael W. Bühler, *Handbook of ICC Arbitration* (3rd ed. Sweet&Maxwell, 2014) 422.

[12] Art. 9A, 9B of LCIA Rules; Appendix II of SCC Rules and SCC Rules for Expedited Arbitrations; Art. 29, 30, appendix V and appendix VI of ICC Rules; Rule 30.3 and Schedule 1 of SIAC Rules; Art.41 and Schedule 4 of HKIAC Administered Arbitration Rules; Art. 42 and 43 of Swiss Rules; Art. 36 and 50 of CANACO Rules; art.6 and International Expedited Procedures of ICDR Rules; Schedule 1 of ACICA Arbitration rules and ACICA Expedited Arbitration Rules; art. 9A, 9B of DIFC-LCIA Rules; art. 3, 22 of JAMS Rules.

The rise of the Emergency Arbitrator procedure is related to the complicated application of interim measures prior to the formation of the arbitral tribunal and the wish to increase independence from national courts. The Emergency Arbitrator was intended to solve the problem of inactivity of the arbitration until the arbitral tribunal is formed.[13] Some authors, arguing in favor of the Emergency Arbitrator procedure even call this institute "revolutionary".[14]

The procedure is efficient due to the opt-out requirement (i. e. Emergency Arbitration is possible unless the parties expressly agreed otherwise). Emergency Arbitrator can be appointed quickly and impose interim measures that will be binding on the parties unless the formed arbitral tribunal decides otherwise.

Thus, Emergency Arbitrator solves a problem of an urgent need for relief before the arbitral tribunal is constituted and plays in favor of the party's intention to resolve disputes in arbitration. However favorably the institute may be described, there are indeed still many issues that need to be taken into account, such as a possibility to enforce Emergency Arbitrator's decision (is it a final award?), no possibility for Emergency Arbitrator in *ad hoc* arbitration, limited powers, etc., as further discussed.

III. EMERGENCY ARBITRATION AND COURT IMPOSED INTERIM RELIEF: WHICH ONE TO CHOOSE?

Measures, imposed on parties by the Emergency Arbitrator or in a form of interim relief by a court both have their pros and cons. A party may apply for an Emergency Arbitration, but later find out that the outcome will not give the result it wished or may apply to the court and regret taking the route outside the arbitration. In certain specific situations, any of the options might be better. The advantages and disadvantages should be considered carefully before the party decides which measure to choose.

Hence, the main aspects of the interim measures will be discussed making a distinction between Emergency Arbitration and Interim Relief.

3.1. CAN THE PARTY APPLY FOR A SPECIFIC REMEDY?

In arbitration, there is no unified list of possible remedy and most institutional rules provide categories, instead of an exhaustive list of possible remedies. Scholars suggest such possible classification of interim measures: measures to preserve the *status quo*; measures to regulate relations of the parties; an order to comply with obligations relating to the dispute.[15] For example, Article 28 of the ICC Rules provides that the arbitral tribunal may order any interim or conservatory measure it deems appropriate.

From this point of view, it might seem that available interim measures, applied in arbitration, might be more flexible than in courts, where national civil procedure laws might limit possible remedies. However, there are at least a couple of very important limitations in arbitration, shifting priority to the national courts.

First, arbitral tribunals cannot grant interim measures against third parties, e. g. persons that are not bound by the arbitration agreement. For example, an arbitral tribunal has no power to order a bank to freeze the account of a party to the proceedings. That arises from the core theory of arbitration, where the power of the tribunal is vested by the parties by the arbitration agreement. The ICC tribunal has explained that "[a]ny award made by an arbitral tribunal, be it final or interim, may only address the parties of the arbitration agreement and any award involving third persons is a domain strictly reserved to state courts and, may, consequently,

[13] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed, Kluwer Law International 2015) 219.

[14] Amir Ghaffari, Emmylou Walters, 'The Emergency Arbitrator – The Dawn of a New Age?' (2014) 30, Arbitration International, issue 1.

[15] Gabrielle Kaufmann-Kohler, Antonio Rigozzi, *International Arbitration. Law and Practice in Switzerland* (Oxford University Press, 2015) 331.

not be awarded by this arbitral tribunal."[16] Thus, in circumstances where certain remedy needs to be enforced against third parties, national courts might be a more appropriate forum, than arbitral tribunal (be it Emergency Arbitrator or a constituted tribunal).

Second, arbitral tribunals may not be able to grant seizure of assets. While it is acceptable for the tribunal to grant English style freezing orders (an order directed to the party, prohibiting to dispose of assets or transfer them),[17] tribunals will usually have no power to impose a measure that would prohibit any enforcement or transfer towards the specific asset. This is primarily related to the "coercive powers necessary for any kind of enforcement".[18] Thus, even with the freezing order in force, an asset may leave the property of the debtor, e. g. by enforcement from the asset or change of title as a result of another litigation. Hence, seizure of property is one of how recourse to a national court directly, bypassing arbitrators, remains in most cases more effective.

3.2. CAN THE PARTY SEEK THE REMEDY IT WISHES TO RECEIVE?

This question is related to jurisdiction and possible instruments. A party shall consider applicable arbitration rules and national arbitration laws, before deciding to take a recourse either to courts for interim measures, or request Emergency Arbitration.

First, a party should look at the applicable arbitration rules to see, whether the Emergency Arbitration is at all possible. Even if the parties did not opt-out from the Emergency Arbitration procedure, there might be limitations towards a possibility for a recourse. For example, Article 29(6)(a) of the ICC rules provides that the Emergency Arbitrator Provisions shall not apply if the arbitration agreement under the Rules was concluded before 1 January 2012.

On the other hand, if a party would rather wish to seek interim measures in national courts, it should necessarily look at the national laws to find out whether court assistance is possible.

3.3. WILL THE PARTY GET THE REQUESTED REMEDY?

Even though a recourse either to a court for interim measures or to the arbitral tribunal or Emergency Arbitrator is possible, it is also worthy considering a possibility of a positive outcome.

For example, courts can be reluctant to exercise their right to impose interim measures if the same measures may be obtained in arbitration. This comes from court hesitation to take away the powers vested by the parties to the arbitral tribunal.[19] "There is always a tension when the Court is asked to order, by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the Court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other hand the duty of the Court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision-makers) a power of decision which the parties have entrusted to them alone."[20]

[16] ICC Case 10062 (2000) in (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 31.

[17] Julian D. M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 595.

[18] Julian D. M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 598.

[19] Julian D. M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 370.

[20] Channel Tunnel Group v Balfour Beatty Ltd [1993] AC 334, 367-8.

On the other hand, arbitral tribunals might be reluctant to grant security for costs measure. This could be predetermined by the generally strong approach that orders for security for costs are not appropriate in arbitration.[21] Thus, such measure would not likely be achieved from arbitral tribunal once it's constituted (and barely imaginable in Emergency Arbitration).

3.4. WHAT ARE THE IMPORTANT ASPECTS OF THE PROCEDURE?

There are at least several important aspects towards the procedure of application of interim measures versus Emergency Arbitration.

First, national courts are usually able to apply interim measures in *ex parte* proceedings, i. e. with no notice to another party prior to the decision. On the other hand, Emergency Arbitrator must notify a party and give an appropriate possibility to present its case. Most institutional rules expressly prohibit *ex parte* proceedings. In this case, in Emergency Arbitration, compared to national courts, the element of surprise is vanished, which may lead to the disclosure of a trade secret, the waste of property, or the destruction of evidence.[22]

Worthy to note that the revised UNCITRAL Model Law allows *ex parte* interim measures in rare circumstances. *Ex parte* preliminary orders may be issued where the arbitrators conclude that "prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure."[23] However, prominent authors say that it is "doubtful that these provisions have much practical attraction; Article 17C provides that *ex parte* orders are not enforceable, which leaves them without practical importance in the vast majority of cases."[24]

Hence, even though Emergency Arbitration proceedings allow for an expedient solution, it is still less effective when speed is important due to possible dishonesty of the debtor. In such cases, interim measures applied by national courts are a better solution.

Second, in favor of the Emergency Arbitration procedure is the confidentiality aspect. Confidentiality, granted in general during arbitration proceedings, may be lost if a party pursues interim relief in a national court, where a general rule requires transparency. Hence, if the interim measure or even a fact of the dispute better to be left confidential, national courts provide no aid in this sense.

Third, another advantage of Emergency Arbitration versus interim measures applied by national courts is the very reason why the parties chose to arbitrate in the first place. National courts may be considered unreliable, biased, less effective, or less competent in certain fields of industry or law. Hence, if parties decided that they would better have an independent arbitrator to resolve their case, rather than national courts, the same reasoning may come at play in the application of interim measures in support of the same dispute. On the other hand, an Emergency Arbitrator, compared to the arbitral tribunal, would lose an important aspect in arbitration – an ability for a party to choose a competent and independent arbitrator because Emergency Arbitrator is appointed by arbitral institution, but the similar situation is also in a case where there is one arbitrator to be appointed.[25]

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[21] Julian D. M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 601.

[22] Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005) 220.

[23] UNICTRAL 'Model Law on International Commercial Arbitration' (1985) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf> accessed 30 May 2021.

[24] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed, Kluwer Law International 2015) 271.

[25] Lee Anna Tucker, 'Interim Measures Under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty' (2011) 1 International Commercial Arbitration 8.

3.5. CAN THE REMEDY BE ENFORCED?

Further enforcement of the interim measure is definitely one of the most important aspects to take into account when seeking an interim measure.

It is often the truth in the world of arbitration, that interim orders are complied by the parties voluntarily. "[M]ost parties hesitate to disobey such orders for fear of antagonising a tribunal that has yet to rule on their claims".[26] However, to trust that a party will comply with anything the court or the Emergency Arbitrator orders, would be a too high risk to take.

Arbitral awards enjoy a wide system of enforcement granted by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**Convention**"). However, the lack of clarity in the Convention, as well as national laws, left an uncertainty of how the Emergency Arbitrator's orders can be further enforced. Some authors argue that only "final" awards may be enforced under the Convention, whereas Emergency Arbitrator's order for interim measures is questionably and award and more arguably not "final" – a constituted arbitral tribunal may easily revoke the Emergency Arbitrator's measure.

In order to resolve the issue, currently, some recent arbitration laws include special provisions with regards to enforcement of provisional measures, ordered by Emergency Arbitrators (or arbitral tribunals in general).[27] Some states adjusted their implementation of the Convention "so that it would apply 'as if a reference to an award in those provisions were a reference to such an order' for interim measures."[28]

However, it still remains confusing, as some states have not specified their national laws in order to enforce Emergency Arbitration orders, and even those that did, often limit enforcement of arbitral orders issued in the same state and the "enforcement of interim measures ordered by an arbitration tribunal in one country by the courts of another country continues to be an intractable problem."[29]

What is more, if expediency is highly important, to enforce Emergency Arbitrator's order a party may still have to go to the national courts through the enforcement procedure, which might take time and reveal the measure to the public.

On the other hand, enforcement of a court-ordered interim measure, while very effective in the state where the measure was sought, may also be difficult to enforce abroad. Enforcement of foreign judgments falls under the bilateral (or multilateral) treaties which may not exist between states in question. Hence, to enforce a foreign interim measure judgment may be lengthy and non-effective, especially if interim measures were resolved *ex parte*.

Thus, if quick and efficient enforcement is necessary, national courts of a state where enforcement will proceed may still be the best solution.

CONCLUSIONS

Emergence of the Emergency Arbitrator, although still not the most popular choice of parties seeking interim relief, compared to national courts, provides a better solution for the parties to resolve their issues in arbitration – where they

[26] James E Castello and Rami Chahine, 'Enforcement of Interim Measures', (*Global Arbitration News*, 4 January 2019) <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/1st-edition/article/enforcement-of-interim-measures> accessed 30 May 2021.

[27] Julian D. M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 611.

[28] James E Castello and Rami Chahine, 'Enforcement of Interim Measures', (*Global Arbitration News*, 4 January 2019) <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/1st-edition/article/enforcement-of-interim-measures> accessed 30 May 2021.

[29] Julian D. M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 613.

initially intended – before the arbitral tribunal is constituted. Emergency Arbitrator can work well instead of the recourse to national courts for support and indeed also has several advantages: arbitrators may be more flexible to choose relevant measures; Emergency Arbitration provides more confidentiality and all other general advantages of arbitration, such as impartiality or competence.

On the other hand, recourse for interim measures to national courts still remains a popular option. Courts may be more effective if there is a necessity to enforce interim measures in that particular state, especially if the measures concern restriction to dispose of the assets. Courts can also apply interim measures *ex parte* and may direct measures towards third parties, which is rarely a possibility in Emergency Arbitration.

In light of a vivid discussion towards effective enforcement of an Emergency Arbitrator's orders, it may seem that the acceptance of an Emergency Arbitration procedure will grow. For the time being, parties should be careful in choosing whether to apply to national courts or an Emergency Arbitrator: any of those may be more advantageous in specific circumstances.