Emergency Arbitration Procedures: A Comparative Analysis

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Arbitration awards; Comparative law; Emergency powers; Enforcement; International Chamber of Commerce; International commercial arbitration; International law

Introduction

International arbitration has significantly grown in prevalence in the last 50 years as commercial parties seek to minimise the potential uncertainties of local litigation procedures. More recently, arbitral institutions in their attempts to improve the functioning and practical benefits of their rules have started developing expedited or emergency procedures to assist parties in circumstances where they need urgent interim relief, before an arbitral tribunal has been formed. Prior to the development of these procedures parties would normally have to apply to national courts for emergency relief or await the constitution of the tribunal.

Numerous institutions have now introduced provisions that provide for some form of emergency relief, either through the appointment of an emergency arbitrator (EA) or through the expedited formation of the tribunal. Currently, the Singapore International Arbitration Centre (SIAC),[1] the Stockholm Chamber of Commerce (SCC),[2] the Swiss Chambers Arbitration Institution (SCAI),[3] the Mexico City National Chamber of Commerce (CANACO),[4] and the Netherlands Arbitration Institute (NAI)[5] all provide for both expedited formation of the tribunal as well as for the EA. The London Court of International Arbitration (LCIA),[6] JAMS,[7] the Dubai International Financial Centre (DIFC-LCIA),[8] the Dubai International Arbitration Centre (DIAC)[9] and the Hong Kong International Arbitration Centre (HKIAC)[10] provide for expedited proceedings to the exclusion of the EA. Conversely, the International Centre for Dispute Resolution of the American Arbitration Association (ICDR/AAA)[11] and the International Chamber of Commerce (ICC)[12] have opted to provide solely for the EA.

While approaches to emergency procedures vary to some extent from institution to institution, expedited formation of the tribunal and EAs has developed as common practical alternatives. In this article the emergency procedures of some of the world's leading international arbitration institutions are presented. This article examines in detail the rules for the:

- International Chamber of Commerce (ICC);
- Singapore International Arbitration Centre (SIAC);
- Stockholm Chamber of Commerce (SCC);
- International Centre for Dispute Resolution (ICDR)[13]; and
- London Court of International Arbitration (LCIA).

The rules and procedures associated with these institutions are compared, with discussion of the practical considerations associated with the various options and approaches.[14] In the course of this comparison, similarities will be identified in the manner in which these institutions address the need for urgent and timely responses to requests for emergency relief. The methods of empowering EAs whilst maintaining the jurisdiction of the arbitral tribunal will be a common theme along with the manner in which various jurisdictions are grappling with enforceability of EA orders or awards. Early experience of some leading institutions show that enforcement of EA decisions, whether within or outside the jurisdiction is developing as a practical challenge to the perceived benefits of having such provisions. As will be discussed below, enforcement of EA decisions involves consideration of the particular arbitration rules, and its interrelation with the provisions of the New York Convention[15] and relevant local legislation.

* K&L Gates LLP. The authors wish to acknowledge the valuable contributions in preparing this article made by K&L Gates London partner Peter R. Morton, Singapore associate Andrea Utasy, and London office assistant Rene C. Gayle.

[1] SIAC Rules (2010) art.26(2) and Sch.I.
[2] SCC Rules (2010), Expedited Rules and Appendix II.
[3] Swiss Rules (2012) arts 42–43.
[4] CANACO Rules (2008) arts 36 and 50.
[5] NAI Rules (2010) arts 42a and 42b.
[6] LCIA Rules (1998) art.9(1).
[7] JAMS Rules (2010) r.16.1. JAMS was formerly known as Judicial Arbitration and Mediation Services but is now simply known by the acronym.
[8] DIFC-LCIA Rules (2008) art.9.1.
[9] DIAC Rules (2007) art.12.
[10] HKIAC Administered Arbitration Rules (2008) art.38.
[11] ICDR/AAA Rules (2006) art.37.1.
[12] ICC Rules (2012) art.29(1) and Appendix II.
[13] The international arm of the American Arbitration Association (AAA).
[14] The institutions listed above have been chosen on the basis that the ICC has been the most recent institution to incorporate EA procedures into their rules; the SIAC and SCC have been able to provide specific case studies for comparison and the LCIA provides a long standing example of an alternative approach to interim measures which may reflect a preference on behalf of some parties to enjoy the added certainty in enforcement that comes from decisions emanating from a constituted arbitral tribunal.
[15] The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

International Chamber of Commerce (ICC)

In 1990 the ICC launched its "Pre-Arbitral Referee Procedure"—arguably the first attempt by a major institution to provide emergency relief prior to the constitution of the tribunal. Whilst the 1998 revision of the ICC Rules added provisions allowing applications for urgent measures to be made directly to courts, the ICC's most recent amendments provide the ICC Rules with an internal mechanism for dealing with urgent applications. On January 1, 2012 these latest amendments came into force. Article 29, supported by Appendix V of the 2012 Revised Rules, sets out the procedure for obtaining urgent interim relief prior to the constitution of the arbitral tribunal.

The new ICC EA Rules can be summarised with five key principles, all of which resonate to one degree or another with the principles associated with other institutions employing EA provisions:

- **Opt Out —**

  The first key principle of the new EA Rules is that they apply by default to parties having opted to arbitrate their dispute under the ICC Rules. There are, however, specific requirements that must be met in order for the "Emergency Arbitrator Provisions" as defined in art.29(5) of the Rules (EAP) to apply automatically, namely that: (a) the application is submitted prior to the transmission of the file to the arbitral tribunal; (b) the arbitration agreement was concluded after January 1, 2012; and (c) there is no agreement of the parties to opt-out of the EAP. According to ICC Institute for World Business Law Vice President, Antonias Dimolitsa, the opt-out preference was designed to address concerns over the low uptake of previous opt-in procedures and provide wider choices to parties who may not have specifically considered the requirement for interim relief at the time of contracting.

- **No Bar on Courts —**

  A second key principle is embodied in art.29(7) which expressly provides that the EAP are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority. This rule applies without restriction before an application has been made for Emergency Measures and may even apply afterwards "in appropriate circumstances".

- **Genuine Urgency —**

  A third key principle is that in order to avoid abuse of the EAP its scope has been narrowed to situations where a party seeks relief that truly cannot wait for the constitution of an arbitral tribunal. This principle is captured explicitly in art.29(1).

- **No Third Parties —**

  The fourth key principle is that the application of the EAP is limited to signatories to the arbitration agreement or their successors.[16] This provides the responding party faced with an application for Emergency Measures with a certain degree of protection and means that the application of the EAP to treaty-based arbitrations is excluded.

- **Respondent Protected —**

  The fifth and final key principle is the protection of the responding party. This principle is reflected such that there is no default answer to the application for Emergency Measures within a certain short deadline ensuring that the respondent has an opportunity to respond to the application, that the applicant must pay a fee for the EA procedure to the ICC upfront,[17] and that the applicant must, as a rule, file a request for arbitration within 10 days from the application, absent which the President will terminate the EA proceedings.[18]

Enforcement

Perhaps one of the main questions to emerge from the development of EA procedures is whether the benefits afforded to a party through access to EA are undermined by uncertainty over whether or not an order or award issued by an EA is enforceable. The various institutions have taken differing approaches to this question and whilst in many cases there has not been enough time and experience of the procedures to allow firm conclusions, there are some trends and lessons available which should assist institutions and jurisdictions coming to terms with the legal and jurisdictional role that EAs may play. Under the ICC's Rules the EA's decision is rendered in the form of an order[19] which is binding on the parties and which the parties undertake to comply with.[20] Whilst the Rules

[16] Article 29(5).
[17] Articles 1(3)(h), 7 of Appendix V.
[18] Article 1(6) of Appendix V.
[19] Articles 29(2), 6(1) of Appendix V.
[20] Articles 29(2), 6(6) of Appendix V.

and Appendix V are silent on the question of enforcement of the EA's Order, it is unclear whether the Order has the same legal effect as an order for interim measures by an arbitral tribunal under art.28(1) of the Rules. On one view, it may be enforceable in state courts under provisions such as arts 17H and 17I of the 2006 revision of the UNCITRAL Model Law providing for the recognition and enforcement of interim measures granted by arbitral tribunals.[21] Whether—applying a "substance-over-form" approach—the Order could qualify as an award so as to be enforceable under the New York Convention or legislation based thereon, is questionable. As will be discussed below, the US courts have also been forced to grapple with the question of enforceability and their approach has been to accept EA decisions as enforceable in the same manner as an arbitral award.

The intention behind the EA procedure in the ICC's 2012 Rules is that an applicant should be able to secure effective interim relief in less than three weeks from the commencement of the procedure. Although there are limits to what interim procedures can reasonably achieve, it appears that the ICC hopes that this new procedure will contribute to the expanding facilities available to parties resorting to arbitration to resolve their disputes.

As of March 9, 2012 there have been no EA applications under the ICC's Revised Rules.[22]

Singapore International Arbitration Centre (SIAC)

SIAC's approach to emergency procedures relies primarily on EAs who can be called upon to answer emergency issues before the arbitral tribunal has been constituted. It should be noted from the outset that these procedures apply to the relevant arbitration agreements by default—meaning that there is no requirement for the parties to "opt-in" to their availability. As will be seen, the default operation of EA rules or the requirement to explicitly opt out of their provisions is an important developing feature of EA procedures across the range of institutions discussed in this article. The practical effect of the default operation of these provisions is that EA procedures become more widely available to disputing parties and there will likely be a continuing increase in applications for EA interim relief.

Rule 26.2 and Sch.1 to the SIAC Arbitration Rules (4th edn), which came into effect on July 1, 2010, provide that a party in need of relief may make an application for emergency interim relief prior to the constitution of the arbitral tribunal provided it is done concurrently with or following the filing of a Notice of Arbitration.[23]

The Chairman of SIAC then must appoint an EA within one business day of receipt of the application.[24] In turn the EA must within two business days of appointment establish a schedule for considering the application.[25]

Whilst SIAC procedures provide the EA with broad discretionary powers to award any interim relief deemed necessary,[26] the EA has no power to act after the tribunal is constituted, and any relief granted by the EA ceases to be binding after 90 days if the tribunal is not constituted (Sch.1(7)). Additional jurisdictional protection is afforded to the subsequently-constituted tribunal as it is not bound by any determination made by the EA. The tribunal can reconsider, modify or vacate any interim award or relief issued by the EA (Sch.1(7)). Furthermore, the tribunal, once constituted has the power to award injunctions and other interim relief if appropriate on the application of a party to the dispute (r.26.1). However, a party may only apply to the courts for interim relief after the constitution of the tribunal in exceptional circumstances.

Enforcement in Singapore

Owing to uncertainties over whether orders and awards made by EAs are enforceable, the Singapore Parliament introduced amendments to the International Arbitration Act (IAA) on April 9, 2012. The amendments make clear that awards and orders given by EAs are enforceable in Singapore. The amendments have accorded EAs the same legal status as that of a regularly-constituted arbitral tribunal. This legislative amendment distinguishes Singapore from other institutions as it provides clarity that is otherwise unavailable in most other jurisdictions, save perhaps for the United States where courts' decisions suggest that awards and orders of pre-tribunal EAs under art.37 of ICDR Rules are enforceable. It should be noted, however, that uncertainty remains as to the enforceability of orders and awards outside Singapore.

Other jurisdictions have also taken steps to address the uncertainty regarding the legal status of decisions made by an EA. Switzerland and Austria have also enacted laws to establish the role of EAs.

Case studies

As at the time of writing there have been six occasions in which parties have sought the benefits of the EA provisions in the SIAC Rules. Two of those instances are ongoing and therefore it would be inappropriate to discuss them.[27]

[21] The countries that have adopted this revision are: Australia, Brunei, Hong Kong, Costa Rica, Georgia, Ireland, Mauritius, New Zealand, Peru, Rwanda, Slovenia and Florida, USA.
[22] The ICC's 2012 Rules apply to all new arbitrations commenced after January 1, 2012 but EA procedures only apply to *contracts* entered into after January 1. It is likely that there will be a time lag before any examples of its use come to light.
[23] SIAC Rules (2010) Sch.1(1).
[24] SIAC Rules (2010) Sch.1(2).
[25] SIAC Rules (2010) Sch.1(5).
[26] SIAC Rules (2010) Sch.1(6).
[27] The case studies provided have been anonymised to preserve the confidentiality of the proceedings. Of the four applications that have been completed K&L Gates LLP Singapore was instructed in three, two for the claimants and once by the respondent. In addition, one of our partners in Singapore was recently appointed as Emergency Arbitrator.

Case Study 1

In the first case where an EA was appointed, the following were the brief facts of the case:

- The Indian claimant initiated arbitration on the basis that even while it had fully performed its obligation under the contract, the Indian respondent had failed to make payments in excess of US $100 million.
- The claimant also filed an application for emergency interim relief.
- It was contended that the obligations under the contract stood fulfilled and consequently there was no liability surviving under the bank guarantees.
- The claimant alleged that it had a reasonable apprehension that the respondent would, purely as a means of retaliation, make a bad faith and/or fraudulent encashment of the bank guarantees without any cause or basis.
- The claimant sought emergency relief in the form of an injunction restraining the respondent from invoking the bank guarantees.
- SIAC received the application at 21.30 Singapore time.
- The Chairman of SIAC determined that the application should be accepted and on the basis of the nature of dispute, nationality of parties and relief sought, appointed the EA the next day.
- The EA appointed was well recognised as a leading international arbitrator, having sat as arbitrator in more than 170 cases and written numerous awards.
- Within one day of his appointment, the EA established a schedule for consideration of the application for emergency relief.
- As per the schedule, the parties made written submissions on the application and a telephonic hearing was conducted within one week of the appointment of the EA.
- The EA passed an ad-interim order one day thereafter.
- The parties, by consent, amended the terms of the order and the main arbitral tribunal was constituted.
- The parties, thereafter, settled the case.

Case Study 2

- An Indian company and a company from the British Virgin Islands (BVI) entered into a shareholders agreement to set up a joint venture.
- The Indian company initiated arbitration on the basis that the BVI company had breached the shareholders agreement and was alleging that it would breach the confidentiality obligation by initiating court action in multiple jurisdictions.
- The Indian company filed an application for emergency interim relief seeking an order: (i) restraining the BVI company from breaching the confidentiality provisions; and (ii) abiding by the contractual dispute resolution mechanism of arbitration at SIAC.
- Within 20 hours of the receipt of the application, SIAC appointed the EA.
- A preliminary hearing was scheduled within one day of the appointment of the EA.
- A preliminary order was issued on the same day to preserve the status quo.
- An interim award was issued two days thereafter.
- A supplemental interim award was issued 30 days thereafter.
- The parties, thereafter, settled the matter.

Case Study 3

- The application was filed over the Chinese New Year holiday.
- The dispute between a Chinese company and an Indonesian company was in relation to the quality of a shipment of coal.
- The Indonesian shipper wanted to sell the cargo of coal pending the resolution of the dispute as the cargo was deteriorating.
- The applicant (the Indonesian company) contacted SIAC on Monday morning warning of their intention to make an EA application.
- The applicant filed their papers at 14.00 and by 17.00, an experienced Singaporean shipping lawyer was appointed as the EA.
- The EA gave his preliminary directions that evening and a hearing was scheduled for the next day.
- On the next day, he made an order permitting the sale and directing the respondents to co-operate to permit the cargo to leave the port.

Case Study 4

- The claimants were companies incorporated in the Netherlands, Singapore and the United States. The respondent was a company incorporated in Hong Kong.
- Disputes arose between the parties in relation to a supply and distribution agreement.

- The claimants approached SIAC with an application seeking the appointment of an EA in relation to notices of termination of the agreement issued by the respondent.
- The claimants sought various reliefs to prevent termination of the agreement, amongst others.
- The EA was appointed within one business day.
- A procedural order was issued the next day.
- A hearing was conducted three days thereafter.
- A consent order was passed in the EA proceedings five days thereafter pursuant to which the respondent agreed not to act on its termination of the agreement pending further order of the main tribunal once constituted.

SIAC Rules also provide for expedited procedures for parties who are not in need of purely interim relief but who require the complete arbitration process to be as quickly executed as possible. Rule 5 allows for three situations in which parties can apply to SIAC, namely:

- when the aggregate amount in dispute does not exceed the equivalent amount of SGD $5 million (approximately US $4.5 million based on current exchange rates): r.5.1(a);
- when the parties agree to adopt the Expedited Procedure: r.5.1(b); and
- in cases of exceptional urgency: r.5.1(c).

The Expedited Procedure still has the hallmarks of a complete arbitration; however, the process is somewhat truncated in so far as it:

- allows the registrar of the SIAC to shorten time limits under the Rules;
- refers the case to a sole arbitrator unless otherwise determined by the Chairman;
- provides that the award shall be made within six months from the date when the tribunal is constituted unless the deadline is extended on account of exceptional circumstances; and
- allows the tribunal to state the reasons upon which the award is based in summary form—the parties may also agree that no reasons are required.

Unsurprisingly, to date the vast majority of applications for Expedited Procedures have been brought under r.5.1(a) where parties to a dispute of SGD $5 million or less seek to resolve the matter as quickly and efficiently as possible. Whilst these procedures provide a helpful addition to Singapore's arbitration landscape it may be that further clarification is required on what constitutes "exceptional urgency" so as to enable a broader range of disputes to be addressed.

While Expedited Procedures have proven successful under the SIAC, it is unlikely that in the future Expedited Procedures will be adopted by the ICC, whose rules require an award to be issued within six months of the signature of the Terms of Reference. Practice has, however, shown that under the ICC Rules, extensions are routinely given and only infrequently are time limits ever shortened. The criteria required under r.5 of the SIAC Rules assists parties to determine whether expedited procedures are appropriate considerations for the size and scope of their contract.

Stockholm Chamber of Commerce (SCC) In revisions which came into force on January 1, 2010 the SCC established a robust EA mechanism which sees the appointment of an EA in 24 hours and provides broad discretionary powers to the EA to conduct the proceedings as he or she sees fit. However, prior to the appointment of the EA it is the SCC board that is responsible for determining jurisdiction over the dispute in accordance with art.4(2) of the SCC Rules.

An emergency decision on interim measures shall be made not later than five days from the referral of the case to the EA and may be subject to provision of appropriate security. The five-day period may, however, be extended by the Board upon a reasoned request from the EA or if it is otherwise deemed necessary, e.g. if the defendant has not been served or the notification has taken a long time.

As with the SIAC and ICC Rules, the SCC Rules on an EA are designed as an opt-out solution and thus apply to all SCC arbitrations unless the parties expressly agree otherwise. Similarly, the rules are not intended to be available on an ex parte basis and therefore require notification of the opposing party. The SCC Rules go one step further, by applying the opt-out feature in respect of the EA provisions retroactively. This enables parties arbitrating under the SCC Rules to use the EA procedures even if their arbitration agreement was concluded prior to the commencement of the new procedures on January 1, 2010. The retroactivity of the new Rules has caused significant comment and debate amongst the arbitration community.

Since their commencement as at the beginning of June 2012 there had been seven applications under the SCC Rules for EA procedures.

Case studies

During 2010 and 2011 there were six occasions in which parties have sought the benefits of the EA provisions in the SCC Rules. The four primary examples of EA applications originated in 2010 and are provided as case studies below.

Case Study 1

In the first case where an EA was appointed, the following were the brief facts of the case:

- The Dutch claimant requested interim relief to secure a claim on an outstanding amount of US $145 million that the Cypriot respondent failed to pay with respect to a trans-shipment.
- An EA was appointed within 13 hours of the SCC receiving the application and a decision was laid down on day eight (after an extension to allow the respondent additional time to confirm its representation).
- Two of four other requests for interim measures were denied because they were directed towards third party entities.
- The remaining requests were aimed at prohibiting the respondent from disposing of real estate and shares in a certain company. The EA held that the claimant must show that the harm which is to be prevented by that measure is considered to be irreparable and of an urgent or imminent nature.
- The claimant did not show that the sale of such assets would be to the detriment and therefore the application for interim measures was denied.

Case Study 2

The second case study involved an Israeli claimant seeking an injunction restraining the Georgian respondent from receiving payments pursuant to bank guarantees:

- The claimant had provided the bank guarantees for its performance in a building project.
- The EA found the claimant's request to be substantiated but denied the relief requested based on the assessment that no irreparable harm would be caused, nor was this matter of an urgent nature. The decision was issued on the fifth day after receiving the application.

Case Study 3

The fourth request for interim measures was granted by the EA:

- It concerned an alleged breach of a shareholders agreement between a Swiss claimant and a Swedish respondent.
- The claimant sought an injunction restraining the respondent from selling, assigning or transferring any of its shares in a certain company as this would prejudice the claimant's interests arising out of the shareholders agreement.
- The EA found that the claimant had established the grounds and that the requested interim measure was necessary to safeguard the substantive rights of the claimant and therefore awarded the injunction.

International Centre for Dispute Resolution (ICDR/AAA)

The ICDR incorporated a provision, dealing with emergency measures of protection, into its International Arbitration Rules on May 1, 2006. Article 37 entitles parties to arbitrations under the ICDR Rules to appoint an EA, who will hear requests for emergency relief that may be necessary prior to the formation of the entire arbitration panel.[28]

Similar to the recently introduced ICCEA provisions, the ICDR provisions can be distilled into the following key principles:

- The rule applies to all arbitrations conducted by the ICDR or AAA under clauses or agreements signed after May 1, 2006, unless the parties specifically opt-out.
- It requires that the party seeking emergency relief provides detailed written notification to all other parties. The application must set out the nature of, and reasons for, the requested relief. There is no set format for the applications—submissions have ranged from a 2-page letter to a 60-page formal application with 500 pages of supporting documentation.
- The ICDR administrator shall appoint an EA within one business day. The EA must disclose, before accepting the appointment, any "circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence." Any challenge to the EA must be made within one business day—there is on record one instance of a challenge being successful in removing the EA.
- There is no requirement for a formal hearing and the EA has the power to "order or award any interim or conservancy measure … including injunctive relief and measures for the protection or conservation of property." The measure may be in the form of an interim award or an order, as the EA deems appropriate. The EA may modify or vacate an order or award he or she makes for good cause.

[28] ICDR Rules apply to arbitrations that are considered "international" whenever the parties have agreed that the AAA should administer the arbitration but where no specific set of AAA rules have been identified. What is considered "international" is determined by applying art.1(3) of the UNCITRAL Model Law on International Arbitration and therefore captures a broad range of disputes where the parties are from different countries, or where the dispute touches on international issues, legally or factually.

- It gives the EA other important powers, including "the authority to rule on her/his own jurisdiction", resolve disputes over the applicability of the new rule, and serve on the full arbitration tribunal with the consent of the parties.
- The full tribunal, once constituted, may also modify or vacate an interim award or order for any reason it considers appropriate.
- The EA provision does not preclude the right to pursue interim relief in court nor under the agreement to arbitrate. Neither shall "be deemed incompatible with Article 37."

Enforcement in the United States

Having had several years of operation the ICDREA provisions have also been subject to US judicial determination on issues such as enforceability of "awards" as opposed to "orders" and whether the perceived temporary nature of decisions from EAs accord with the finality requirement of the New York Convention.

In some instances parties have argued that only awards should be enforceable in the United States because orders are insufficiently "final". However, US courts have rejected such a formalistic distinction between "orders" and "awards". In *Publicis Communication v True North Communications*, the 7th Circuit considered a request to enforce an interim measure that had been rendered in the form of an order. Challenging both the substance of the order and its character as an order, the party attempted to resist enforcement on the basis that an order is not a final dispositive award as required by the US Federal Arbitration Act and the New York Convention. The court held that it is the content of a decision, not its nomenclature that determines its finality. It is on the basis of this decision that many commentators have concluded that US courts are very likely to enforce any relief decisions made under art.37 of the ICDR Rules whether they were orders or awards.

London Court of International Arbitration (LCIA)

The LCIA Rules do not provide emergency procedures. However, in 1998 the LCIA Rules were amended to incorporate a mechanism for the "expedited formation" of a tribunal. Article 9 provides for the expedited formation of the tribunal.

Article 9—expedited formation

Article 9.1—in exceptional urgency, on or after the commencement of the arbitration, any party may apply to the LCIA court for the expedited formation of the Arbitral Tribunal, including the appointment of any replacement arbitrator under arts 10 and 11 of these Rules.

Article 9.2—such an application shall be made in writing to the LCIA court, copied to all other parties to the arbitration; and it shall set out the specific grounds for exceptional urgency in the formation of the arbitral tribunal.

Article 9.3—the LCIA court may, in its complete discretion, abridge or curtail any time-limit under these Rules for the formation of the arbitral tribunal, including service of the response and of any matters or documents adjudged to be missing from the request. The LCIA court shall not be entitled to abridge or curtail any other time-limit.

As is clear in the text of art.9, the LCIA has complete discretion to shorten any time limit associated with the formation of the tribunal but would need to be persuaded of the "exceptional urgency" of the issue to be determined. However, once the tribunal is formed the parties must rely on the tribunal's power to make interim awards.

Despite the "expedited formation" provisions there is still potential for considerable delay as the LCIA is not authorised to override the right of the parties to nominate their own arbitrators—a process which itself may be subject to some debate and delay. The LCIA's approach is typically to limit the time within which the respondent must reply to the arbitration demand.

Use in practice

Since art.9 came into force in 1998 there have been 95 applications for expedited formation of the tribunal, 44 of these applications were granted, 27 were rejected and 24 did not require a determination. Despite an average of approximately seven applications a year, it appears from the use of "exceptional urgency" that art.9 is intended to be used only rarely. This suggestion is supported when considering that on average only three applications are granted a year.

Despite the high threshold of its operation, art.9 fulfils an important function, giving the parties the freedom to obtain, through arbitral channels, interim remedies similar to those available from a court should their circumstances satisfy the required criteria. As mentioned above,[29] the use of art.9 may reflect a belief that a properly-constituted tribunal is the most appropriate body to decide all matters relating to a particular dispute. Given the weight of support that tribunal decisions are given by legislation and by the New York Convention in many jurisdictions, enforcement of an interim order or award may be less problematic. There are also the additional benefits of being able to present arguments and material to a consistent set of arbitrators as opposed to an EA who may be barred from the arbitral tribunal. It has been suggested by some commentators that in some circumstances arbitrators may be reluctant to accept EA appointments by reason of being disqualified from subsequently acting

[29] See fn.14 above.

as arbitrator in the main arbitration proceeding, although there seems to be little empirical evidence of such a concern being justified.

Applications under art.9 are most commonly accompanied by an application for urgent interim relief under art.25. The arbitrator or tribunal may be appointed within 48 hours of the request if the LCIA court is satisfied that the circumstances justifiably require exceptional urgency. Where only one arbitrator needs to be appointed, the LCIA has done this on occasion within 24 hours. In other cases, the deadline for the response has been shortened by 5, 10 or 15 days. In contrast to some other arbitration rules, for example art.14 of the WIPO Expedited Rules, art.5(4) ensures that the LCIA court does not reduce the size of a tribunal from three to one in cases of exceptional urgency. If the parties have agreed on a three-member tribunal, this agreement will be honoured.

The respondent must always be given an opportunity to reply to the claimant's application, although if it fails to do so, the LCIA court may, nonetheless, proceed with the expedited appointment.

Conclusions

It appears certain that EA procedures are gaining momentum and prevalence as most arbitral institutions who have recently revised their rules have incorporated EA provisions;[30] other institutions revising their rules are rumoured to be considering EA provisions.[31] Despite this continuing growth enduring doubts as to the enforceability of such measures are likely to limit the ultimate employment of such measures. With the ICC being the latest institution to adopt EA procedures it is perhaps timely to reflect on what challenges and limitations have been experienced in other institutions and jurisdictions and more practically what lessons can be learnt.

Perhaps the most important lesson to be gleaned from the experience of other institutions and jurisdictions is that the legal effect of EA decisions can remain ambiguous, particularly with respect to enforcement. Singapore and the United States and their pro-EA stance provide examples of how some of these ambiguities may be addressed. However, questions still remain as to how EA decisions will be enforced outside the jurisdiction and what sanctions should apply to parties who refuse to abide by the decisions of EAs.

The case studies demonstrate that whether or not parties utilise EA procedures depends on the particular circumstances of each case, where the assets are located and the nature of the harm likely to be suffered, all of which determine whether or not an EA can provide effective relief.

The parties are more likely to opt for EA procedures where:

- the relief is exceptionally urgent and cannot await the fast track constitution of the tribunal or the potentially slow pace of national courts especially where the measure may be sought before the notice of arbitration is filed;
- the national courts are unreliable or inefficient; and
- where the applicable rules allow for inter partes relief.

The parties are less likely to opt for EA procedures where:

- the costs of the EA are prohibitive;
- where ex parte relief is needed (in which case national courts are likely to be the preferred option); and
- where relief against third parties to the arbitration agreement is needed (in which case national courts are again likely to be preferred).

Whilst the rise of EA procedures certainly adds another level of flexibility and autonomy to parties seeking to resolve disputes, it is a relatively novel and untested procedure with significant questions emerging regarding the relationship of EAs to existing legal frameworks. Its potential capacity to assist parties is substantial; however, in the current early stages of its development, it is critical that parties are aware of EA limitations particularly with respect to enforceability both domestically and internationally.

Comparison of A Selection of Provisions Relating to the Appointment of Emergency Arbitrators

Institution	Opt Out	Time-Limit for Application	Appointment Speed	Time to Render Award	Powers of the Emergency Arbitrator	Access to Courts
ICC	Yes	Application may be made irrespective of whether applicant has filed Request for Arbitration. However, EA proceedings will be terminated after 10 days if application not followed by Request for Arbitration. Application must be made prior to the file being	EA appointed in "as short a time as possible"—normally within two days.	EA schedule in "as short a time as possible"—normally within two days of transmission of file. EA order to be issued no later than 15 days from transmission of file.	EA determines admissibility and jurisdiction. EA may conduct proceedings in the manner he deems appropriate.	May seek measures from court prior to applying for emergency relief and thereafter in appropriate circumstances only.

[30] CIETAC is an exception as Chinese law provides that only state courts are empowered to issue interim remedies.
[31] The rumoured institution is the HKIAC.

Institution	Opt Out	Time-Limit for Application	Appointment Speed	Time to Render Award	Powers of the Emergency Arbitrator	Access to Courts
		transmitted to the tribunal.				
SIAC	Yes	Application must be made concurrent with or following the filing of the Notice of Arbitration. Application must be made prior to the constitution of the tribunal.	EA appointed within one day. EA schedule due within two days.	No provision.	Any relief deemed necessary. EA has same powers as tribunal to issue interim relief. Relief ceases in 90 days if no tribunal is constituted.	Prior to the constitution of the tribunal but only in exceptional circumstances thereafter.
SCC	Yes Applies retroactively to contracts entered into before Rules became effective.	Application may be made any time before "the case has been referred to an Arbitral Tribunal".	EA appointed within 24 hours of receipt of application.	EA order must be issued no later than five days from referral to EA.	Any relief deemed necessary. EA has all the powers of the tribunal to issue interim relief. Relief ceases in 90 days where case not referred to tribunal or in 30 days where arbitration not commenced.	At any time.
ICDR/AAA	Yes	Application must be made prior to the constitution of the tribunal.	EA appointed in one business day. EA schedule as soon as possible or within two business days of appointment	No provision.	Power to issue any relief deemed appropriate. Vested with all powers of the tribunal. Power ceases after tribunal is constituted.	At any time.
CANACO	Yes	Application must be made prior to the constitution of the tribunal.	EA appointed in one business day. EA schedule within two business days of appointment.	No provision.	Any measure deemed necessary. May be in the form of an award or order.	At any time.
SAIC/Swiss	Yes	Application must be made prior to the constitution of the tribunal.	"As soon as possible" after receipt of application, fees and deposit.	Within 15 days of date when file was transmitted, with the possibility of extension.	EA may conduct proceedings as he deems appropriate. Need not state reasons. EA has same powers as tribunal to issue interim relief.	No provision.