Stockholm Arbitration Yearbook 2023

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VOLUME 5

Editors

Christer Danielsson is an independent arbitrator based in Stockholm. After fifteen years of mainly transactional work with a leading Swedish firm, he has focused on dispute resolution in the last fifteen years as counsel and now as a full-time arbitrator. He is the previous President of the Swedish Bar Association and the Swedish Arbitration Association and is designated to the ICSID Panel of Arbitrators (Sweden).

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Introduction

The Yearbook is published under the auspices of the Stockholm Centre for Commercial Law, a part of the Stockholm University Faculty of Law. It is designed to meet the information needs of arbitration practitioners and parties from all over the world. The first volume was published in 2019.

Objective

The Yearbook is designed to meet the information needs of arbitration practitioners and parties from all over the world. It provides authoritative articles, some of them with a Swedish angle, that address current matters of global concern in arbitration. Each volume includes one or more chapters accounting for developments in Swedish case law and legislation since the previous volume.

Frequency

The publication is annual.

The titles published in this series are listed at the end of this volume.

Stockholm Arbitration Yearbook 2023

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Emergency Arbitration Meets the Courts

Cameron Sim

§7.01 INTRODUCTION

First encounters often do not go entirely as expected. This is particularly the case where there has been much trepidation prior to the meeting. Often, this turns out to have been both unnecessary and counterproductive. After initial contact, it may become clear, sometimes immediately, that there was nothing to be concerned about. Fear may morph into empowerment as a bright and certain future suddenly emerges.

When emergency arbitration first appeared in international arbitration, serious doubts, and at times vociferous opposition, were expressed in some quarters as to the viability of the procedure, and whether courts would, or even should, recognize and enforce decisions issued by emergency arbitrators. It is fair to say that the enforceability debate has dominated emergency arbitration jurisprudence. However, as has been identified, enforceability is 'the wrong debate'.[1] The debate has given rise to negative perceptions about emergency arbitration, with the focus on negative risks (viz. a court refusing enforcement) as opposed to positive outcomes (viz. obtaining urgent relief, with reported high levels of party compliance, thus avoiding the need to go to court).[2] The debate has also seen other contentious and complex issues in emergency arbitration not receive the attention they deserve, including most prominently, the role of the seat of emergency arbitration, applicable laws, and the application of due process norms.

Inevitably, emergency arbitration decisions have appeared before domestic courts. As emergency arbitration has found itself the subject of judicial consideration in

1. Diana Paraguacuto-Mahéo and Christine Lecuyer-Thieffry, *Emergency Arbitrator: A New Player in the Field – The French Perspective*, 40(3) Fordham International Law Journal 749, 761 (2017).
2. *See*, *e.g.*, ICC Commission Report: Emergency Arbitrator Proceedings (International Chamber of Commerce, April 2019), para. 202.

jurisdictions across the globe, a clear trend appears to be emerging. For the most part, courts have shown themselves to be willing to adhere to the expectations of international arbitration users, give efficacy to their use of the procedure, and display comity towards emergency arbitrators. In so doing, courts have also demonstrated their commitment to due process and to vindicating the rights of all parties involved in the proceedings. Broadly, with minor exceptions, the first encounters of emergency arbitration meeting the courts have been relatively uneventful and ought to have assuaged much of the apprehension surrounding the rise of the procedure.

After outlining the basics and benefits of emergency arbitration, this chapter explores how courts in several jurisdictions have reacted to key issues concerning emergency arbitration. These issues include the jurisdiction of the emergency arbitrator, the operation of the principle of concurrent jurisdiction between emergency arbitrators and courts, the application of due process norms, and the enforceability of emergency arbitration decisions.[3] Whilst there has been some inconsistency in approach, overall, courts have strengthened the foundations of emergency arbitration. In turn, this has reinforced party autonomy in international arbitration, and is likely to ensure the longevity and popularity of the procedure. There remain other key issues which still require further exploration in the courts. This chapter concludes by identifying those issues and how courts may choose to deal with them.

§7.02 THE BASICS AND BENEFITS OF EMERGENCY ARBITRATION

Emergency arbitration is a relatively recent innovation in international arbitration. Whilst the parties may be embroiled in rapid and escalating developments at the time of commencement of proceedings, somewhat paradoxically, arbitrations often get off to a slow start as the parties engage in the tribunal formation process. This can be lengthy, depending on the size of the tribunal, the process for arbitrator nomination and confirmation, the speed at which the arbitral institute operates, whether agreement can be reached between the parties and any challenges that are raised. During this period, it may become necessary for a party to apply for urgent interim relief to protect their rights pending the ultimate determination of their claims by the arbitral tribunal. Without such protection, it may be that the respondent's dissemination of assets, destruction of evidence or property, dissemination of confidential information, or engagement in some other form of harm or wrongdoing may defeat the purpose of pursuing claims and obtaining relief where it may end up being futile.

Prior to the advent of emergency arbitration, a party requiring urgent relief during the period required for tribunal formation could only turn to domestic courts for assistance.[4] Where emergency arbitration is available under the applicable arbitration rules, a party may now seek relief during that period from an emergency arbitrator. In 1999, the first emergency arbitration rules appeared in the Commercial Arbitration

3. Emergency arbitration rules refer variously to both awards and orders. For ease of reference, the term emergency arbitration decision is adopted to include both awards and orders.
4. Subject to instances where the parties have agreed on the availability of other fora for pre-tribunal relief, such as before a dispute board, or before a referee under the ICC Pre-Arbitral Referee Rules.

Rules of the American Arbitration Association (AAA), which included opt-in 'Optional Rules for Emergency Measures of Protection'.[5] In 2006, the International Centre for Dispute Resolution (ICDR) adopted out-out emergency arbitration rules.[6] Over the coming decade, many arbitral institutes worldwide followed suit. Emergency arbitration rules now appear in many of the leading international arbitration rules. The majority are on an opt-out basis with retroactive application.[7]

The reasons emergency arbitration may be preferable to seeking relief from courts reflect the reasons parties choose arbitration in the first place. The confidentiality of arbitral proceedings extends to emergency arbitrations, and parties may wish to retain confidentiality over all aspects of their dispute. The parties may also have concerns about the quality of decision-making in courts of competent jurisdiction, or even the neutrality of justice available, and may instead prefer to have an emergency arbitrator, potentially specialized in the relevant industry, determine the application for urgent relief. Equally, the parties may wish to avoid procedural complexity. This may arise if several courts need to be approached for interim relief, which in turn may require the application of different laws (and engagement of multiple legal teams), create the risk of inconsistent decisions between courts, and even lead to the issuing of incompatible forms of relief. Court judgments may also be subject to appeal, which risks causing delay. In contrast, emergency arbitration may present a streamlined method to obtain the relief that is required before a single decision-maker. In addition, there may be a risk that courts will prejudge the merits of the parties' claims, whereas an emergency arbitrator should only consider whether the claimant has a *prima facie* case, or reasonable prospects of success, on the merits of the underlying claims.

In summary, an emergency arbitration runs as follows. The applicant files an application with the relevant arbitral institute. Under most emergency arbitration rules, the respondent is notified of the proceedings, although some rules permit ex parte proceedings.[8] The arbitral institute appoints the emergency arbitrator in short order, typically within one day,[9] two days,[10] or three days.[11] The emergency arbitrator has

5. American Arbitration Association Commercial Arbitration Rules and Mediation Procedures (1999) Optional Rules for Emergency Measures of Protection, O-1 to O-8.
6. International Centre for Dispute Resolution International Arbitration Rules (2006) Art. 37(c).
7. *See*, *e.g.*, Commercial Rules of the American Arbitration Association (2013) (AAA Rules), R-38(d); Arbitration Rules of the Australian Centre for International Commercial Arbitration (2021) (ACICA Rules), Art. 2.4; China International Economic and Trade Arbitration Commission Arbitration Rules (2015) (CIETAC Rules), Arts 4(2)-4(3); Hong Kong International Arbitration Centre (2018) (HKIAC Rules), Art. 1.4; International Chamber of Commerce Arbitration Rules (2021) (ICC Rules), Art. 29(6)(a); International Centre for Dispute Resolution International Arbitration Rules (2021) (ICDR Rules), Art. 1(1); Arbitration Rules of the London Court of International Arbitration (2020) (LCIA Rules), Art. 9.16; Swiss Chambers' Arbitration Institution, Swiss Rules of International Arbitration (2021) (Swiss Rules), Art. 1(2); Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules (2017) (SCC Rules), Preamble; Arbitration Rules of the Singapore International Arbitration Centre (2016) (SIAC Rules), Rule 1.2.
8. Swiss Rules, Arts 29(3), 43(1); Arbitrators' and Mediators' Institute of New Zealand Arbitration Rules (2017) (AMINZ Rules), Art. 50.2.
9. *See*, *e.g.*, AAA Rules, R-38(c); ACICA Rules, Schedule 1, para. 2.1; ICDR Rules, Art. 7(2); SCC Rules, App. II, Art. 4(3).
10. *See*, *e.g.*, CIETAC Rules, App. III, Art. 3; SIAC Rules, Schedule 1, para. 5.
11. *See*, *e.g.*, HKIAC Rules, Schedule 4, para. 7; ICC Rules, App. V, Art. 3(1); Swiss Rules, Art. 43(4).

wide procedural discretion over the conduct of the proceedings, including as to the number and form of submissions, and whether a hearing is required.[12] In determining the application, the central issue is urgency and, specifically, whether the relief sought could await the constitution of the arbitral tribunal.[13] Other issues often include those typically arising for consideration in applications for interim measures, including whether the claimant has demonstrated a risk of irreparable harm,[14] a prima facie case or reasonable prospects of success on the merits of its substantive claims,[15] and that the balancing of the parties' interests militates in favour of the imposition of relief.[16]

Under most rules, the emergency arbitrator must issue a decision within a prescribed timeframe, ranging from five days[17] to fourteen days[18] to fifteen days,[19] although some rules are silent as to the permitted timeframe.[20] To sustain the application for emergency measures, and subject to the applicable rules, the applicant is required to file a notice of arbitration and thereby commence arbitration on the merits either prior to or simultaneously with,[21] or within a short period after filing for emergency arbitration (typically seven to ten days),[22] or within a longer thirty-day period.[23] The arbitral tribunal, once constituted, is not bound by the emergency arbitrator's decision, and is typically empowered to modify, terminate or annul it.[24]

§7.03 JURISDICTION OF THE EMERGENCY ARBITRATOR

The principle of Kompetenz-Kompetenz applies in emergency arbitration. This entails that the emergency arbitrator reaches a determination on their own jurisdiction. Many emergency arbitration rules expressly specify this to be the case.[25]

12. *See, e.g.*, CIETAC Rules, App. III, Art. 5(1); ICC Rules, App. V, Art. 5(2); LCIA Rules, Art. 9.7; SIAC Rules, Schedule 1, para. 14; SCC Rules, App II, Art. 7; Swiss Rules, Art. 43(6).
13. *See, e.g.*, CIETAC Rules, App. III, Art. 1(1); HKIAC Rules, Schedule 4, para. 2(d); ICC Rules, Art. 29(1) and App. V, Art. 1(3)(e); ICDR Rules, Art. 7(1)(b).
14. *See, e.g.*, AAA Rules, R-38(e); ACICA Rules, Schedule 1, para. 3.5(a).
15. *See, e.g.*, ACICA Rules, Schedule 1, para. 3.5(c); HKIAC Rules, Schedule 4, para. 11.
16. *See, e.g.*, ACICA Rules, Schedule 1, para. 3.5(b); HKIAC Rules, Schedule 4, para. 11.
17. *See, e.g.*, ACICA Rules, Schedule 1, para. 3.1; SCC Rules, App. II, Art. 8.
18. *See, e.g.*, HKIAC Rules, Schedule 4, para. 12; LCIA Rules, Art. 9.8; SIAC Rules, Schedule 1, para. 9.
19. *See, e.g.*, CIETAC Rules, App. III, Art. 6(2); ICC Rules, App. V, Art. 6(4); Swiss Rules, Art. 43(7).
20. *See, e.g.*, AAA Rules; ICDR Rules.
21. *See, e.g.*, ACICA Rules, Schedule 1, para. 1.2(b); ICDR Rules, Art. 7(1); LCIA Rules, Art. 9.5; SIAC Rules, Schedule 1, para. 1.
22. *See, e.g.*, HKIAC Rules, Schedule 4, para. 21; ICC Rules, App. V, Art. 1(6); Swiss Rules, Art. 43(3).
23. *See, e.g.*, SCC Rules, App. II, Art. 9(4)(iii).
24. *See, e.g.*, AAA Rules, R-38(f); ACICA Rules, Schedule 1, para. 5.2; CIETAC Rules, App. III, Art. 6(4); HKIAC Rules, Schedule 4, para. 11; ICC Rules, Art. 29(3); ICDR Rules, Art. 7(5); LCIA Rules, Art. 9.11; SCC Rules, App. II, Art. 9(4)(i); SIAC Rules, Schedule 1, para. 10; Swiss Rules, Art. 43(8).
25. *See, e.g.*, AAA Rules, R-38(d); HKIAC Rules, Schedule 4, para. 10; ICC Rules, App. V, Art. 6(2); LCIA Rules, Art. 9.14; SIAC Rules, Schedule 1, para. 7.

In *GD v. HY*,[26] the Hong Kong High Court accepted implicitly that the principle of Kompetenz-Kompetenz applies in emergency arbitration but disagreed with the emergency arbitrator's assessment of jurisdiction. The claimant had obtained an emergency arbitration award (albeit the Court's judgment does not specify under which rules the emergency arbitration took place). This included typical interim relief in the form of an order restraining the respondent from dissipating its assets and requiring the respondent to disclose a list of its assets. Unlike most jurisdictions which have yet to amend their arbitration laws following the advent of emergency arbitration, the Hong Kong Arbitration Ordinance expressly recognizes the enforceability of emergency arbitration awards, and permits *ex parte* enforcement of them.[27] The High Court granted the claimant leave for enforcement on such an *ex parte* application, following which the respondent applied to set aside the enforcement order on the basis that the emergency arbitrator did not have jurisdiction.

The emergency arbitrator had concluded that he had jurisdiction on the basis of an extension letter to a loan agreement. The extension letter contained an arbitration agreement, whereas the loan agreement contained an exclusive jurisdiction clause in favour of the Hong Kong courts. The loan agreement contained a stock standard variation provision, which required the written agreement of all parties to any variation of the terms of the loan. The extension letter had been signed by both the claimant and the respondent to the emergency arbitration, but it had not been signed by all parties to the loan agreement. In setting aside the enforcement order, the High Court held that this was fatal and that, as a matter of contractual interpretation, the loan agreement could only be varied by a written instrument signed by all parties.[28]

In reaching this decision, the High Court applied the test under Hong Kong law for the court to review and be satisfied as to the correctness of an arbitral tribunal's ruling on its own jurisdiction.[29] It is striking that in conducting this assessment, the Court did not call into question the status of the emergency arbitrator or query the power of the emergency arbitrator to rule on their own jurisdiction. This was taken for granted. The issue, instead, was whether the emergency arbitrator had reached the correct legal decision in the same manner in which the court would assess whether an arbitral tribunal had reached the correct legal decision on its jurisdiction.

§7.04 CONCURRENT JURISDICTION BETWEEN EMERGENCY ARBITRATORS AND COURTS

Concurrent jurisdiction refers to the principle of co-existence that remains between courts and arbitral tribunals when it comes to issuing interim measures in support of arbitral proceedings. Even where parties have agreed to arbitrate their disputes, in most circumstances, arbitral tribunals do not have exclusive jurisdiction to issue

26. *GD v. HY* [2021] HKCFI 3900.
27. Hong Kong Arbitration Ordinance (Cap. 609) section 22B(1).
28. *GD v. HY* [2021] HKCFI 3900, paras 10 to 12.
29. *S Co v. B Co* [2014] 6 HKC 421.

interim measures, and where appropriate, parties may also turn to courts for assistance. The principle of concurrent jurisdiction has been described as 'deeply-engrained' in the framework of international arbitration.[30]

[A] The Tensions Inherent in Concurrent Jurisdiction

Inevitable tensions arise where two decision-making bodies have jurisdiction over the same or similar issues. In the emergency arbitration context, this issue is whether interim measures are required prior to the constitution of the arbitral tribunal. Emergency arbitration rules generally expressly preserve the principle of concurrent jurisdiction. Several rules specify that an application to the court for interim measures is not to be deemed incompatible with the applicable emergency arbitration rules,[31] with some going further and stipulating that such an application should not be deemed incompatible with the parties' arbitration agreement and should not be deemed a waiver of the right to arbitrate.[32] Along similar substantive lines, other emergency arbitration rules stipulate that the availability of emergency arbitration should not prejudice or affect a party's right to apply to a court for interim measures[33] or that this availability is not intended to prevent a party from seeking interim measures from a court.[34]

It is likely that, on many occasions, we will see courts grappling with the principle of concurrent jurisdiction arising in different scenarios. These include whether they should exercise their jurisdiction to issue interim measures in support of arbitration where emergency arbitration is an available option, where an emergency arbitration is already underway, or where the claimant has already been unsuccessful in an emergency arbitration. Whilst emergency arbitration rules are intended to preserve the principle of concurrent jurisdiction, there has already been some judicial reluctance to act where the principle is engaged. Equally, emergency arbitrators will likewise grapple with the question as to whether they should issue interim measures in circumstances where a like application is being pursued simultaneously or has already failed in the courts.

[B] The Decision in Gerald Metals

In *Gerald Metals SA v. Timis*, the High Court of England and Wales considered the principle of concurrent jurisdiction in the context of the LCIA Rules and their interaction with the *Arbitration Act 1996* (UK).[35] Section 44(3) of the Act empowers the court 'on the application of a party or proposed party to the arbitral proceedings, [to]

30. Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2020) p. 2639.
31. *See, e.g.*, AAA Rules, R-38(h); ICDR Rules, Art. 7(7); Swiss Rules, Art. 43(8).
32. *See, e.g.*, ICC Rules, Art. 29(7); SCC Rules, App. II, Art. 1(2); SIAC Rules, Rule 30.3.
33. *See, e.g.*, ACICA Rules, Schedule 1, para. 7.1; CIETAC Rules, App. III, Art. 5(4).
34. *See, e.g.*, ICC Rules, Art. 29(7).
35. *Gerald Metals SA v. Timis* [2016] EWHC 2237 (Ch).

make such orders as it thinks necessary for the purpose of preserving evidence or assets', but provided that 'the case is one of urgency'.[36] This power is limited by section 44(5) of the Act, which provides that 'the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.'[37] Article 9B of the LCIA Rules contains an emergency arbitration procedure. This permits a party 'in the case of emergency at any time prior to the formation or expedited formation of the Arbitral Tribunal' to apply for the appointment of an emergency arbitrator.[38]

The claimant in *Gerald Metals* applied pursuant to the LCIA Rules for the appointment of an emergency arbitrator to seek an order to prevent a trustee from disposing of a Cayman trust's assets. The trustee provided various undertakings aimed at obviating the need for urgent relief. The LCIA rejected the application for the appointment of an emergency arbitrator. The claimant then approached the High Court for relief pursuant to section 44.

The Court dismissed the claimant's application. This was on the basis that courts are only empowered to act pursuant to section 44 if the expedited tribunal formation or emergency arbitration provisions are 'inadequate' to address the situation[39] or 'where the practical ability is lacking to exercise those powers'.[40] The Court acknowledged that there may be instances where emergency arbitration is 'insufficient' for a claimant, and court assistance may be required.[41] Nonetheless, the Court rejected the claimant's contention that the LCIA 'ha[d] taken a narrower view of the extent of its own powers' in declining to appoint an emergency arbitrator, and dismissed the notion that this led to 'a gap in the practical ability of a party in the position of [the claimant] to obtain relief'.[42] Instead, the Court considered there was no gap in these circumstances on the basis that the LCIA must have deemed that the claimant had not met the requisite urgency thresholds to justify expedited tribunal formation or the appointment of an emergency arbitrator.[43]

The Court also stated that the 'obvious purpose' of the expedited tribunal formation procedure and emergency arbitration provisions contained in the LCIA rules was 'to reduce the need to invoke the assistance of the court in cases of urgency by enabling an arbitral tribunal to act quickly in an appropriate case'.[44] Similarly, the Court held that whilst the emergency arbitration rules were 'not intended to prevent a party from exercising a right to apply to the court' for interim measures,[45] their

36. Arbitration Act 1996 (UK) section 44(3).
37. Arbitration Act 1996 (UK) section 44(5).
38. LCIA Rules, Art. 9B.
39. *Gerald Metals SA v. Timis* [2016] EWHC 2237 (Ch), para. 8.
40. *Ibid*.
41. *Ibid*., para. 6.
42. *Ibid*., para. 9.
43. *Ibid*.
44. *Ibid*., para. 7.
45. *Ibid*., para. 10.

availability does 'not prevent the power of the court on such an application from being limited as a result of the[ir] existence'.[46]

In *Gerald Metals*, the claimant had applied for the appointment of an emergency arbitrator pursuant to the 2014 version of the LCIA Rules. These provide that the availability of emergency arbitration 'shall not prejudice any party's right to apply to a state court or other legal authority for any interim or conservatory measures before the formation of the Arbitration Tribunal; and it shall not be treated as an alternative to or substitute for the exercise of such right'.[47] Whilst one may have been forgiven for considering this to be a clear embrace of the principle of concurrent jurisdiction, the High Court appeared to consider otherwise. Notably, following the decision in *Gerald Metals*, the next iteration of the LCIA Rules (2020) now provides that notwithstanding the availability of emergency arbitration, 'a party may apply to a competent state court or other legal authority for any interim or conservatory measures before the formation of the Arbitral Tribunal; and Article 9B shall not be treated as an alternative to or substitute for the exercise of such right.'[48] This amended language reinforces the principle of concurrent jurisdiction and should be interpreted as a clear expression of the maintenance of the principle, even where emergency arbitration is an available option.

[C] The Decision in *Ashwani Minda*

In *Gerald Metals*, the claimant had not failed in an application before an emergency arbitrator but instead had failed to persuade the LCIA to appoint one. The case of *Ashwani Minda* before the Delhi High Court concerned the scenario where a claimant approaches the court for relief after an emergency arbitrator has rejected an application for interim measures.[49] Initially, in an emergency arbitration seated in Japan pursuant to the JCAA rules, the claimant had sought interim measures aimed at restraining the respondent's conduct in respect of a joint venture or alternatively requiring the respondent to transfer the shares in the joint venture to the claimant. The emergency arbitrator declined to grant the requested relief.

The claimant turned to the Indian courts for assistance and sought substantially the same relief as had been rejected by the emergency arbitrator. Section 9(1) of the Arbitration and Conciliation Act 1996 permits the grant of interim measures 'before or during arbitral proceedings'.[50] The Delhi High Court declined to assist the claimant. The Court held that in agreeing to arbitration under the JCAA rules, which include 'a detailed mechanism for interim and emergency measures', the parties had clearly evinced their intention to exclude the section 9(1) route to relief.[51] Relevant to this

46. *Ibid*.
47. LCIA Rules (2014), Art. 9B, para. 9.12.
48. LCIA Rules (2020), Art. 9B, para. 9.13.
49. *Ashwani Minda v. U-Shin Ltd*, OMP (I) Comm 90/2020 (Delhi High Court, 12 May 2020).
50. Arbitration and Conciliation Act 1996 (India) section 9(1).
51. *Ashwani Minda v. U-Shin Ltd*, OMP (I) Comm 90/2020 (Delhi High Court, 12 May 2020), para. 54.

determination is that the JCAA rules do not expressly recognize the principle of concurrent jurisdiction, and even stipulate that interim measures issued by an emergency arbitrator are 'deemed to be Interim Measures granted by the arbitral tribunal when it is constituted'.[52] However, the Court also considered that the claimant had 'consciously chosen to tread on a path and cannot turn around only because [it was] unsuccessful'.[53] On one reading, this may be taken as an indication that if the claimant had not already sought and failed to obtain interim measures from an emergency arbitrator, it may have been more sympathetic to an application brought before the court in the first instance.

In addition, the Delhi High Court criticized the claimant for seeking to 'take a second bite of the cherry' by seeking interim measures from the Court which the emergency arbitrator had already deemed were not required.[54] As an expression of comity, it is striking that the Court also ventured that the Court could not 'sit as a Court of Appeal to examine the order of the Emergency Arbitrator'.[55]

[D] Other Decisions on Concurrent Jurisdiction

In *Airbus v. Asian Sky Group*, the Toulouse Court of Appeal also had the opportunity to consider the principle of concurrent jurisdiction in the emergency arbitration context. The Court identified that the ICC Rules enable parties to seek relief from an emergency arbitrator. Article 29(7) of the ICC Rules provides that the availability of emergency arbitration is 'not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter'.[56] The Court noted that emergency arbitration 'was only one of the options available' to obtain interim relief prior to the constitution of the arbitral tribunal, and accepted that this option 'did not prevent [a party] from applying to the competent judicial authority' for relief whilst awaiting tribunal formation.[57]

In *Mer Telecom Ltd. v. Sint Maarten Telephone Company N.V.*, the Tel Aviv District Court considered the principle of concurrent jurisdiction also in the context of the ICC emergency arbitration rules.[58] The applicant applied to the Tel Aviv District Court for an interim injunction, but, in so doing, informed the Court that it intended to apply for the appointment of an emergency arbitrator pursuant to the ICC Rules. The applicant stated that it was seeking relief from the court pending such time as either the emergency arbitrator or arbitral tribunal could reconsider whether the injunction

52. Japan Commercial Arbitration Association Commercial Arbitration Rules (2015) (JCAA Rules), Art. 72(5).
53. *Ashwani Minda v. U-Shin Ltd*, OMP (I) Comm 90/2020 (Delhi High Court, 12 May 2020), para. 56.
54. *Ibid*.
55. *Ibid*.
56. ICC Rules, Art. 29(7).
57. *Airbus v. Asian Sky Group*, Case. No. 17/3754, 30 April 2018 (Toulouse Court of Appeal).
58. O.M. (Tel-Aviv) 56844-10-19 *Mer Telecom Ltd. v. Sint Maarten Telephone Company N.V.* (Nevo, 17.3.2020).

should remain in place. The Court issued a temporary injunction (an available remedy under Israeli law) but subsequently rejected the application for an interim injunction on jurisdictional grounds, namely on the basis that once an arbitration had been commenced, the Israeli court could not continue proceedings. In reaching this conclusion, the Court did not refer to Article 29(7) of the ICC Rules and the principle of concurrent jurisdiction it expressly preserves.

The principle of concurrent jurisdiction has not, however, been universally accepted. In Romania, the Bucharest Court of Appeal held that the Romanian Civil Procedure Code confers exclusive jurisdiction on Romanian courts to determine applications for interim measures made prior to the constitution of the arbitral tribunal and that an emergency arbitration order issued in a Romanian-seated emergency arbitration would violate mandatory laws and public policy under Romanian law. On this basis, the Court annulled an emergency arbitration order that had been issued under the 2018 version of the Arbitration Rules of the Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania.[59] The decision has been criticized on several bases, including that there is simply no valid reason under Romanian law for the courts to enjoy exclusive jurisdiction to determine applications for interim measures filed before tribunal formation.[60] In focusing on the primacy of the courts, and riding roughshod over the autonomy of the parties to consent to emergency arbitration, the approach of the Bucharest Court of Appeal appears to be an outlier.

Overall, the manner in which courts have approached the application of the principle of concurrent jurisdiction in the emergency arbitration context is a slightly mixed bag. Courts have both respected the operation of the principle, but some courts have also seen the availability of emergency arbitration as limiting the rights of parties to access the courts for assistance pending tribunal formation. However, it is particularly striking that where concurrent jurisdiction has arisen for consideration, courts have not been seeking to sidestep emergency arbitration provisions and compel or encourage parties instead to apply to courts for relief. Instead, courts have been seeking to respect the autonomy of the arbitral process and have not cast doubt on emergency arbitration as an inferior procedure which parties should strive to avoid. On the contrary, courts have evinced a reluctance to act where parties have the option of seeking the appointment of an emergency arbitrator, or where an emergency arbitrator has already rejected an application for interim measures, or an arbitral institute has rejected the application for the appointment of an emergency arbitrator.

If the principle of concurrent jurisdiction is to be upheld, this overcautious approach, whilst understandable, is unwarranted. Courts will not be riding roughshod over parties' rights by entertaining applications for interim measures where emergency arbitration is available, as emergency arbitration rules are not intended to confine parties to that forum. However, where emergency arbitration has been attempted, and a party has failed to obtain the desired interim measures, there is scope for that failure

59. *Civil Decision No. 76 of 25 July 2019* (Bucharest Court of Appeal).
60. Cristina Ioana Florescu, 'Emerging Tools to Attract and Increase the Use of International Arbitration', 10(2) Juridical Tribune 255, 268-270 (2020).

to impact a court's subsequent determination of an application for like or similar interim measures, subject to the applicable law and the reasons the emergency arbitrator rejected the application for relief.

§7.05 APPLICATION OF DUE PROCESS NORMS

Due process is a fundamental concept firmly embedded in the framework of international arbitration. Due process ensures procedural fairness by mandating that parties must be notified of proceedings and permitted to respond to claims raised and for determination of those claims to be made by an impartial and independent arbitral tribunal.[61]

[A] Due Process in Emergency Arbitration

In arbitral proceedings, all parties must be given an opportunity to be heard. The contours of what this requires can be difficult to define. Article 18 of the UNCITRAL Model Law provides that '[t]he parties are to be treated with equality and each party shall be given a full opportunity of presenting his case'.[62] However, a 'full opportunity' does not entail that arbitral tribunals must accommodate even unreasonable demands made by parties.[63] The Hong Kong Court of Appeal has observed that having the opportunity to present a case 'cannot mean that a party is entitled to present any case it pleases, at any time it pleases, no matter how long the presentation should take'.[64] Instead, as noted by the Singapore Court of Appeal, the parties must be treated with fairness and equality in having the opportunity to present their cases.[65]

Emergency arbitration rules require parties to have a reasonable opportunity to be heard, albeit this is expressed differently across leading rules. No rules stipulate that parties to an emergency arbitration must be afforded a full opportunity to present their cases. Instead, the opportunity to be heard is qualified by reference to reasonableness,[66] fairness,[67] or equality.[68] The urgent nature of an emergency arbitration does not entail that due process norms are suspended.

61. Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2020) section 15.04[B].
62. UNCITRAL Model Law on International Commercial Arbitration (2006) Art. 18.
63. Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer 1995) 550.
64. *Pacific China Holdings Ltd (In Liquidation) v. Grand Pacific Holdings Ltd* [2012] 4 HKLRD 1, para. 68.
65. *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC* [2020] SGCA 12, paras 1,97.
66. *See, e.g.*, AAA Rules, R-38(d); HKIAC Rules, Schedule 4, para. 10; ICDR Rules, Art. 7(3); Swiss Rules, Art. 43(6); SIAC Rules, Schedule 1, para. 7.
67. *See, e.g.*, Korean Commercial Arbitration Board International Arbitration Rules (2016) (KCAB Rules), App. 3, Art. 5.
68. *See, e.g.*, SCC Rules, Art. 23(2).

[B] The Decision in *CVG v. CVH*

In *CVG v. CVH*,[69] the Singapore High Court considered an application to set aside an emergency arbitration award issued by an ICDR emergency arbitrator in proceedings seated in Pennsylvania, United States. The dispute concerned a Singapore franchisee's termination of agreements governing its franchise operations.[70] After the franchisor filed for bankruptcy protection in the United States, another company acquired it and installed new executives. After disputes arose, the franchisor provided the franchisee with a notice of default under the agreements, following which the franchisee terminated the agreements on the basis of material breach and/or anticipatory repudiation. The franchisee took steps to de-identify the franchise stores (as post-termination, it was no longer entitled to use the franchisor's proprietary trademarks), and the franchisor removed the franchisee's access to its worldwide ordering system, cancelled various pending orders, and started selling its products directly in Singapore. Subsequently, the franchisor commenced arbitration pursuant to the ICDR rules to seek relief pertaining to post-termination provisions in the agreements. At the same time as filing its demand for arbitration, the franchisor also sought emergency measures of protection pursuant to the ICDR rules.

The emergency arbitration proceeded swiftly. On 27 May 2022, the ICDR appointed the emergency arbitrator. On the same day, the emergency arbitrator issued a procedural order setting out a schedule for submissions and a hearing. After the respondent filed its response submission and the applicant its reply submission, an oral hearing took place on 6 June 2022, i.e., ten days after the appointment of the emergency arbitrator.[71] On the day after the hearing, the emergency arbitrator emailed the parties a list of issues and requested post-hearing submissions to be filed by the following day.

One of the issues raised by the emergency arbitrator was whether the claimant considered the franchise agreements to have been terminated. At the time of the hearing, the claimant's position was that the agreements had been terminated, albeit allegedly without cause, and the claimant was seeking to enforce post-termination provisions in the agreements. In its post-hearing submission, the respondent based its defence on the claimant's case that the agreements had been terminated, as presented in the claimant's application and at the hearing. In the claimant's post-hearing submission, the claimant put forward an alternative position that it did not consider the agreements to have been terminated. The emergency arbitrator issued an award on the basis that the claimant's case was that the agreements had not been terminated and imposed relief aimed at restoring the status quo of the parties to the position they had been in pre-termination. In short, the emergency arbitrator granted relief on the basis of a new case that only emerged in the claimant's post-hearing submission.

Section 31(2)(c) of the Singapore International Arbitration Act 1994 permits a court to refuse enforcement where there has been a breach of the rules of natural

69. *CVG v. CVH* [2022] SGHC 249.
70. *Ibid.*, paras 4-11.
71. *Ibid.*, paras 11-14.

justice, including if the party against whom enforcement is sought demonstrates that it 'was otherwise unable to present [its] case in the arbitration proceedings'.[72] Here, the High Court concluded that was precisely what had occurred.[73] The respondent had been denied the opportunity to make submissions that the claimant was precluded from adopting the position that the agreements were not terminated, to adduce factual evidence in support, and to address the question of relief on the basis of the claimant's new case.[74]

It is unclear from the judgment as to whether, following the filing of post-hearing submissions, the respondent had requested to have the opportunity to respond to the claimant's new case. If the respondent had made such a request and it had been denied, this would clearly have amounted to a violation of the respondent's due process rights, as the emergency arbitrator would be determining the application based on a case in respect of which the respondent had not had a reasonable opportunity to be heard. If the respondent had not made such a request, then the position may be less clear-cut, depending on the speed at which the emergency arbitrator issued the decision following receipt of the post-hearing submissions. If a respondent has sufficient time to identify that a claimant has put forward a new case and chooses to remain idle and not raise this issue with the emergency arbitrator, then in some circumstances, it may be possible to conclude that the respondent was not denied a reasonable opportunity to be heard, as it did not seek to have such an opportunity. However, in this scenario, the prudent course for the emergency arbitrator would always be to ensure the respondent had been offered a reasonable opportunity to be heard prior to issuing a decision.

The emergency arbitrator also has another procedural tool which may be deployed to seek to narrow the issues in the case and ensure that all parties have been heard as to their expectations for the conduct of the emergency arbitration. It is open to an emergency arbitrator to hold a brief case management conference prior to the issuing of the timetable for the proceedings or even thereafter. Holding such a conference may also assist the emergency arbitrator in identifying what the key contentious issues in the proceedings are likely to be. This may help to concentrate both the emergency arbitrator's and also the parties' minds on the key issues on which submissions need to be made and ultimately determinations reached.

Unlike the majority of emergency arbitration rules, the ICDR rules do not stipulate a timeframe within which the emergency arbitrator must issue a decision. In an analysis of the first eighty-seven emergency arbitrations conducted pursuant to the ICDR rules, the average length of emergency arbitration proceedings was approximately three weeks.[75] The speed at which the emergency arbitrator acted in this case, despite the absence of a stipulated timeframe for the conduct of proceedings, is impressive. However, it is conceivable that an early case management conference may have assisted in identifying and narrowing the issues in dispute, potentially even

72. International Arbitration Act 1994 (Singapore) section 31(2)(c).
73. *CVG v. CVH* [2022] SGHC 249, paras 52-56.
74. *Ibid.*, para. 54.
75. Martin F. Gusy and James M. Hosking, A Commentary to the ICDR International Arbitration Rules (2nd edition, Oxford University Press 2019) para. 6.04.

avoiding the need for post-hearing submissions and ultimately avoiding the due process error.

In any event, the Singapore High Court's decision does not undermine the autonomy of emergency arbitration. If anything, the Court's decision provides reassurance to parties that where, as will happen on occasion, due process violations are committed by emergency arbitrators, they will not be overlooked and that parties' rights will be protected. Ultimately, this should be seen as supportive of emergency arbitration by ensuring the procedure does not fall into disrepute. Equally, though, courts should be mindful not to second-guess emergency arbitrators on each and every procedural decision and to pay due regard to the wide procedural discretion under which emergency arbitrators operate. The Court's judgment also sounds like a warning to claimants that they should not seek to take advantage of potential due process violations, as this might create difficulties if it becomes necessary to seek enforcement of an emergency arbitration decision.

§7.06 ENFORCEMENT OF EMERGENCY ARBITRATION DECISIONS

Whilst the enforcement debate in emergency arbitration may have already garnered significant attention, it would be remiss not to explore how courts have reacted to the question of enforcement of emergency arbitration decisions.

[A] Enforcement in India

The question of the enforceability of emergency arbitration decisions has made its way to the Supreme Court of India.[76] This occurred in a protracted dispute between Amazon and the Future Group. In 2019, Amazon had invested in the Future Group subject to several conditions. These included that Future Group would not transfer its retail assets without Amazon's consent or transfer its assets to a list of restricted parties, including the Reliance Group. In 2020, following Future Group's announcement that it had agreed to sell assets amounting to USD 3.4 billion to the Reliance Group, Amazon commenced SIAC arbitration seated in New Delhi against Future Group pursuant to an arbitration agreement contained in the underlying shareholders' agreement.

At the outset, Amazon applied for emergency relief from an SIAC emergency arbitrator to seek to restrain Future Group's sale of assets to the Reliance Group. The emergency arbitrator issued various relief in support of Amazon's application. This included injunctive relief aimed at preventing Future Group from taking any steps in furtherance of the sale or taking any steps in respect of its retail assets without Amazon's prior written consent.

Despite the emergency arbitrator's orders, the Future Group decided to proceed with the sale to Reliance Group and, in so doing, described the award as a nullity, even

76. *Future Coupons Private Ltd. v. Amazon.com NV Investment Holdings LLC*, Civil Appeals Nos. 4492-4493 of 2021.

venturing that the emergency arbitrator was *coram non judice*.[77] The Future Group filed a civil suit before the Delhi High Court and requested an interim injunction to restrain Amazon from placing reliance on the emergency arbitrator's order before statutory authorities, alleging this would amount to tortious interference with its civil rights.[78] The Court declined to grant the requested interim relief.

Amazon filed a petition in the Delhi High Court to seek to enforce the emergency arbitrator's order. Amazon did so pursuant to section 17(2) of the Indian Arbitration Act 1996. The Court held that an emergency arbitration award constitutes an award under section 17(1) of the Act and that such an award is enforceable as an order pursuant to section 17(2). The Court stated in clear terms that '[t]he Emergency Arbitrator is an Arbitrator for all intents and purposes'.[79] Future Group appealed the decision to the Supreme Court of India.

The Supreme Court upheld the High Court's decision. The Supreme Court referred to the principle of party autonomy 'as being one of the pillars of arbitration in the Arbitration Act'.[80] The Supreme Court noted that '[t]here is nothing in the Arbitration Act that prohibits contracting parties from agreeing to a provision providing for an award being made by an Emergency Arbitrator.'[81] The Court further noted that the words 'arbitral proceedings' in the Arbitration Act 'are not limited by any definition and thus encompass proceedings before an Emergency Arbitrator'.[82] The Court also stated that an emergency arbitrator's order 'is exactly like an order of an arbitral tribunal once properly constituted'.[83]

To be sure, the Supreme Court's observations constitute robust support for emergency arbitration. The Supreme Court did not cast a shred of doubt on the viability and legitimacy of the procedure. Instead, in concluding that an emergency arbitrator's order is 'exactly like' an arbitral tribunal's order, the Supreme Court made clear that emergency arbitrators do not constitute a second-class tribunal within the arbitral process. These observations from a court at the highest appellate level once again constitute evidence of courts displaying comity towards emergency arbitrators and strengthening the foundations of emergency arbitration.

The Supreme Court also suggested, once again in strong terms, that it is not open to a party after agreeing to arbitrate under rules that permit emergency arbitration and then participating in an emergency arbitration, that it is then not bound by the emergency arbitrator's decision; in other words, that an estoppel arises. In the Supreme Court's words, 'it cannot lie in the mouth of a party to ignore an Emergency Arbitrator's award by stating that it is a nullity when such party expressly agrees to the binding nature of such award from the date it is made and further undertakes to carry out the

77. *Ibid*., para. 2.6.
78. *Ibid*.
79. *Future Coupons Private Ltd. v. Amazon.com NV Investment Holdings LLC*, Delhi High Court (18 March 2021), para. 188.
80. *Future Coupons Private Ltd. v. Amazon.com NV Investment Holdings LLC*, Civil Appeals Nos. 4492-4493 of 2021, para. 14.
81. *Ibid*., para. 17.
82. *Ibid*., para. 19.
83. *Ibid*., para. 35.

said interim order immediately and without delay'.[84] The Court referred in this regard to paragraph 12 of Schedule 1 of the SIAC Rules, which provides that '[t]he parties agree that an order or Award by an Emergency Arbitrator […] shall be binding on the parties from the date it is made, and undertake to carry out the interim order or Award immediately and without delay.' This is a typical provision which appears along similar lines in most emergency arbitration rules.

The Supreme Court's judgment also paid heed to the public policy reasons for supporting emergency arbitration. The Court noted that the Arbitration Act 1996 is 'a statute which favours the remedy of arbitration so as to de-clog civil courts'.[85] The Court saw emergency arbitration orders as 'an important step in aid of decongesting the civil courts and affording expeditious interim relief to the parties'.[86] This may be so, although ultimately, the vindication of parties' rights in private law should not depend on whether the courts obtain some collateral benefit. If parties have consented to emergency arbitration, they should not be permitted to avoid the consequences of doing so, irrespective of whether that benefits the courts in the respective jurisdiction where proceedings may otherwise have been pursued.

Whilst the Court identified that several other jurisdictions have adopted provisions to provide expressly for the enforceability of emergency arbitration decisions, this did not take matters any further. This was because, on a proper interpretation of the Arbitration Act, the Court concluded that an award or order issued by an emergency arbitrator would be covered by section 17.[87]

[B] Enforcement in Singapore

Singapore is one of the jurisdictions that has amended its arbitration law to recognize the development of emergency arbitration. Section 2(1) of the International Arbitration Act now provides that the term 'arbitral tribunal' includes 'an emergency arbitrator'.[88] In the context of enforcement, it was already clear that emergency arbitration awards or orders issued in Singapore-seated emergency arbitrations were enforceable, as this definition applied to Part 2 of the International Arbitration Act which concerns domestic awards. However, this definition did not expressly apply to Part 3 of the Act, which governs foreign awards.

In the case of *CVG v. CVH*, the Singapore High Court confirmed that the reference in Part 3 of the Act to arbitral awards includes emergency arbitration awards and that Singapore courts are empowered to enforce foreign awards issued by emergency arbitrators.[89] The respondent submitted that the lack of an express reference in Part 3 of the Act to emergency arbitrators or emergency arbitration evidenced the legislature's

84. *Ibid.*, para. 36.
85. *Ibid.*, para. 38.
86. *Ibid.*, para. 41.
87. *Ibid.*, para. 62.
88. International Arbitration Act 1994 (Singapore), section 2(1).
89. *CVG v. CVH* [2022] SGHC 249.

intention to exclude emergency arbitration awards from enforcement (with the consequence that an emergency arbitration award issued by a foreign-seated tribunal could not be enforced in Singapore). According to the respondent, if the legislature had intended for emergency arbitration awards issued by foreign-seated tribunals to be enforceable, it would also have amended Part 3 of the Act to expressly refer to emergency arbitration awards. The Court disagreed and held that on a purposive interpretation of the Act, the term '*arbitral award*' in section 27(1) of the Act applies to foreign awards by emergency arbitrators.[90] In so doing, the Court avoided creating an artificial distinction between awards issued by Singapore-seated emergency arbitrators, and awards issued outside of Singapore.

[C] Enforcement in the United States of America

In the United States, the Federal Arbitration Act confers United States district courts with original jurisdiction over 'action[s] or proceeding[s] falling under the [New York] Convention'.[91] US district courts have both ordered and refused enforcement of emergency arbitration decisions.

In *Al Raha Group v. PKL Services*, the District Court for the Northern District of Georgia declined to enforce an award issued by an ICDR emergency arbitrator. The respondent had announced its intention to terminate a contract with the claimant, and the claimant obtained an injunction to prevent the respondent from doing so. The emergency arbitrator noted that in accordance with the ICDR Rules, the award could be subject to reconsideration, modification, or vacatur of parts or in its entirety by the arbitral tribunal once constituted. The Court deemed the award was not sufficiently final to be capable of enforcement and held that it was 'a placeholder that did not purport to resolve finally any of the issues submitted to arbitration'.[92] The Court also pointed to the emergency arbitrator's acknowledgement that the award had been granted pending the constitution of the arbitral tribunal to justify its conclusion.

Along similar lines, in *Chinmax Medical Systems Inc v. Alere San Diego, Inc.*, the District Court for the Southern District of California declined to enforce an award issued by an ICDR emergency arbitrator. The parties had entered into a distribution agreement for various products and had failed to reach an agreement on the process for product registration renewals despite confirming that it was in their mutual interests to ensure that these renewals were made. The emergency arbitrator ordered the respondent to provide various documents into an escrow and to provide relevant registration documents to the claimant in order to enable the claimant to respond to inquiries raised by authorities regarding the renewals. The emergency arbitrator also identified that the order would remain in effect pending its review by the arbitral tribunal once constituted. The Court dismissed the enforcement petition on the basis that the emergency arbitrator had not intended the interim order issued to be final because the emergency

90. *Ibid.*, paras 28-35.
91. Federal Arbitration Act, 9 U.S.C. para. 203.
92. *Al Raha Group v. PKL Services* [2019] WL 4267765.

arbitrator 'stated that the interim order was issued to facilitate a conservancy order by the full arbitration panel'.[93] The Court concluded that the power of the arbitral tribunal, following its formation, to modify or vacate the emergency arbitrator's decision meant that it lacked sufficient finality to be enforceable.

The Court's observations in *Al Raha* and *Chinmax* do not demonstrate that the respective emergency arbitrators had erred in identifying that, once the respective arbitral tribunals had been constituted, their decisions could be revisited. The point of emergency arbitration is not to circumvent the powers of arbitral tribunals once they have been formed but simply to provide a mechanism for parties to obtain pre-tribunal relief to protect their rights on an interim basis until the arbitral tribunal has had the opportunity to consider matters further. These decisions overlook the self-evident point that the emergency arbitrator's decision on whether relief is required before the arbitral tribunal is in place is a decision in itself and resolves the time-sensitive issue as to whether immediate and urgent relief is required to preserve the claimant's position.

In contrast to these judgments, other US district courts have held that emergency arbitration decisions entail sufficient finality to be capable of enforcement because they resolve the issue as to whether interim measures are required before the arbitral tribunal has been formed.[94]

In *Blue Cross Blue Shield of Michigan v. Medimpact Healthcare Systems*, the District Court for the Eastern District of Michigan confirmed an emergency arbitration award issued under the AAA rules on the basis that interim awards can resolve 'separate independent' claims as regards the need for interim relief.[95] The emergency arbitrator had ordered the respondent to continue to perform its obligations under an agreement for pharmacy benefit managing services. As occurred in *Al Raha* and *Chinmax*, the emergency arbitrator expressly identified that the relief was only intended to remain in place until an arbitral tribunal was in place and considered the need for the relief to continue. The Court did not see this acknowledgement as preventing enforcement of the emergency arbitrator's award because it resolved the separate and independent issue as to whether the respondent in the interim should continue to perform its contractual obligations.

In *Draeger Safety Diagnostics v. New Horizon Interlock*, the District Court for the Eastern District of Michigan observed that an interim award, such as an emergency arbitration award, which 'finally and definitely disposes of a separate and independent claim [i.e., a claim that interim measures are required before the constitution of the arbitral tribunal] may be confirmed notwithstanding the absence of an award that finally disposes of all the claims that were submitted to arbitration'.[96] In that case, the Court confirmed an emergency arbitration award issued under the AAA rules. The emergency arbitrator ordered the respondent to return to the claimant various records, data and reports that it had retained after the termination of a manufacturing

93. *Chinmax Medical Systems Inc. v. Alere San Diego Inci* [2011] WL 2135350.
94. *See, e.g., Air Center Helicopters, Inc. v. Starline Investments Ireland Limited*, Case No. 4:18-cv-00599; *Sharp Corp v. Hisense USA Corp*, 292 F Supp 3d 157 (2017).
95. *Blue Cross Blue Shield of Michigan v. Medimpact Healthcare Systems* [2010] WL 2595450.
96. *Draeger Safety Diagnostics v. New Horizon Interlock* [2011] WL 653651.

agreement, which provided for such return within five days of termination. The claimant had alleged that the respondent's failure to comply with this obligation was preventing it from complying with statutory monitoring and reporting requirements, which risked revocation of its business licence. The Court, however, declined to enforce the emergency arbitrator's award of costs of the proceedings on the basis that the arbitral tribunal had the power to determine the final apportionment of the costs of the emergency arbitration.

In *Vita Pharmaceuticals v. PepsiCo Inc*, the District Court for the Southern District of Florida likewise deemed an emergency arbitration award issued under the AAA Rules to be sufficiently final to be capable of enforcement. The emergency arbitrator issued an order for the respondent to abide by the terms of a distribution agreement and to stop selling products to customers for whom the claimant had exclusive distribution rights. The Court held that the emergency arbitrator's order 'resolve[d] the issue of whether the parties [were] required to maintain the status quo and continue to perform their contractual obligations during the pendency of the arbitration'[97] and that confirmation of the order preserved the claimant's right to seek relief from the arbitral tribunal without rendering the emergency relief 'meaningless'.[98] The Court also deemed that a provision in the underlying contract permitting appeals against the arbitral tribunal's decision did not apply in respect of a decision issued by an emergency arbitrator.[99]

Along similar lines, in *Yahoo! v. Microsoft*, the District Court for the Southern District of New York identified that 'if an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made'.[100] The AAA emergency arbitrator had ordered the respondent to complete a migration of search and search ad services. The Court declined the respondent's application to vacate and instead confirmed the award, noting that the relief granted was sufficiently final.

Evidently, there is no uniform approach to the enforcement of emergency arbitration decisions in US district courts. The form of relief granted does not appear to have influenced courts' decisions to either grant or refuse enforcement. Instead, the debate has focused on the nature of the relief granted and whether it is sufficiently final to be capable of enforcement.

§7.07 ANTICIPATED DEVELOPMENTS

Whilst courts have already encountered several key issues concerning emergency arbitration, there are two key issues relating to emergency arbitration which are yet to make their way before the courts.

First, whether the courts of the seat of emergency arbitration have any role to play in respect of challenges to the emergency arbitrator. Emergency arbitration rules

97. *Vital Pharmaceuticals v. PepsiCo Inc*, Case No. 20-Civ-62415-Rar (2021).
98. *Ibid*., at 1310.
99. *Ibid*., at 1309.
100. *Yahoo! v. Microsoft*, 983 F Supp 2d 310 (2013).

typically contain procedures for challenging the emergency arbitrator before the respective arbitral institute. These mirror the procedure for challenging an arbitrator, although the timeframes are often narrowed to reflect the fast-track nature of an emergency arbitration. Arbitration laws often permit parties to petition the courts of the seat of arbitration to remove an arbitrator (usually only after a party has exhausted all available avenues with the respective arbitral institute). It is possible that a party whose challenge to an emergency arbitrator fails before the arbitral institute may attempt to take that challenge to the courts of the seat of emergency arbitration.

Second, whether the courts of the seat of emergency arbitration are empowered to annul emergency arbitration decisions. Emergency arbitration rules typically permit the arbitral tribunal, once constituted, to modify or terminate the emergency arbitration decision. As such, a party may prefer to await tribunal formation before seeking annulment of the decision before the courts of the seat of arbitration. This is particularly the case in circumstances where it may be unclear whether the courts of the seat have the power to annul emergency arbitration decisions. Currently, there are no specific annulment procedures available with respect to emergency arbitration decisions issued in the seat of emergency arbitration. If an emergency arbitration decision is seen to constitute an arbitral award under the law of the seat of emergency arbitration, and there is an available annulment procedure in respect of arbitral awards, then it is possible that a court may conclude that it is empowered to annul an emergency arbitration decision.

§7.08 CONCLUSION

Broadly, the first encounters of emergency arbitration with the courts have been positive. Increasingly, trepidation regarding the use of the procedure is becoming less warranted and eventually should become unnecessary. Over time, the development and application of legal norms in emergency arbitration will create greater certainty for all parties concerned. While, as is always the case in the law, exceptions may exist, for the most part, courts have been, and will continue to be, receptive to the procedure.

As several cases to date demonstrate, courts have sought to give efficacy to parties' consent to and use of emergency arbitration. At the same time, courts have acted to prevent the infringement of parties' rights where emergency arbitrators have committed errors impugning the integrity of the emergency arbitration decision. It will be of immeasurable benefit to international arbitration users if this respectful and constructive approach continues in future encounters between emergency arbitration and the courts.