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TEENAGE KICKS – HAVE EMERGENCY ARBITRATOR PROCEEDINGS LOST THEIR ATTRACTION?

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The Emergency Arbitrator is officially a teenager.

More than 13 years ago, in May 2006, the International Centre for Dispute Resolution (ICDR) introduced a new procedure into its arbitration rules whereby parties could seek emergency interim relief from an emergency arbitrator before the constitution of the arbitral tribunal. Since then, most of the major arbitral institutions - including SCC (2010), SIAC (2010), ICC (2012), HKIAC (2013) and the LCIA (2014) – have incorporated emergency arbitrator procedures into their arbitration rules. Most of regional centres and recently created arbitral institutions have adopted similar provisions (including CIETAC (2015) and KLRCA (2013)).

To quote from last year's ICC Commission Report on Emergency Arbitrator Proceedings, *"… many institutions seem to have determined that EA proceedings fill a perceived void and satisfy a demand from users."* This article looks at the numbers and asks – is there a real demand for emergency arbitrator proceedings, or have emergency arbitrators lost their attraction?

The ability to obtain urgent interim relief - be it to preserve evidence, protect assets or otherwise preserve the status quo – is an important tool in any arbitration and it is a tool that often has to be deployed at an early stage of the process – prior to the constitution of the arbitral tribunal.

In some cases, state courts may be the only viable option for parties requiring urgent interim relief – notably in cases where ex parte relief is required or where the measures sought will affect third parties. However, applications to the courts have their disadvantages. There is the loss of confidentiality – one of the key reasons why parties often choose to arbitrate. There is also time, local court processes may slow and, in some jurisdictions, courts may be unable to grant interim relief in support of arbitration.

The emergency arbitrator was created to address those issues and to provide an alternative avenue for relief. Before emergency arbitrators other options were trialled.

In 1990, the ICC introduced a Pre- Arbitral Referee procedure as a way of seeking urgent provisional measures before the constitution of an arbitral tribunal. It is a procedure that remains available today and with an application fee of US$5,000 it is considerably cheaper than an EA application. However, the procedure failed to gain much traction with users, probably because it is an "opt-in" procedure which requires both parties to agree to the appointment of a referee – a big ask once a dispute has arisen. This is borne out in the case statistics. It took 3 years for the first case to be filed and between 1990-2008 only 9 requests were made.

On 1 January 2012, the ICC introduced emergency arbitrator provisions as part of the ICC Rules on the basis that they would apply automatically to all arbitration agreements concluded after that date unless the parties agreed to opt out. These provisions have proved to be more popular with the ICC's users, which is borne out in a recent ICC Commission report which notes that 95 Emergency Arbitrator applications have been made since its introduction in 2012.

But how popular are emergency arbitrators in practice? The table below shows the number of emergency arbitrator (EA) applications made over a 3 year period [2016-2018] across 4 major arbitral institutions.

Arbitral Institution	LCIA	ICC	HKIAC	SIAC
Total number of cases [2016-2018]	935	2,618	1,513	1,197
Emergency Arbitrator Applications [2016-2018]	5	70	9	37
Percentage of total number of cases	0.5%	2.6%	0.5%	3%
Cost of EA Application	£28,000 [US$36,500]	US$40,000	HKD 250,000 [US$32,000]	SD 35,000 [US$25,000]
Local legislation on enforceability of EA decisions	No	No	Yes	Yes

The relatively low percentage of EA applications by reference to the total number of cases is perhaps not surprising. As the ICC Commission Report recognises, the nature of interim relief is such that it only in exceptional circumstances that urgent relief is justified. However, a key finding of the ICC Commission Report, based on an analysis of the first 80 ICC EA cases, was that relief was granted only in a minority of applications – 23 out of 80 applications or 28.75%. This suggests that, not only are a relatively small number of applications made each year, but relief is only likely to be granted in a small minority of those cases.

It's also interesting to note that a significantly lower percentage number of EA applications have been made in LCIA arbitrations [0.5%] as compared with EA applications made in ICC arbitrations [2.6%] and SIAC arbitrations [3%].

One possible explanation for this is that a significant proportion of LCIA arbitrations have London as a seat of arbitration. This may mean that parties do not feel the need to resort to an EA as they are happy with the speed with which pre-arbitral interim relief can be obtained from the English courts.

Another possible explanation could lie in the concern that the availability of EA procedures in arbitrations with a London seat may restrict the jurisdiction of the English court to grant interim or conservatory measures.

This was certainly not the rationale for the introduction of EA proceedings – which was to make an additional avenue available to parties to obtain interim measures prior to constitution of tribunal, not to limit their options. Most institutional rules include an express provision to the effect that the existence of EA provisions shall not prejudice a party's right to apply to a state court for interim relief before the constitution of the tribunal. However, the issue for English seated arbitrations is that s44(5) Arbitration Act 1996 only allows to court to act if or to the extent that the tribunal or any arbitral institution has no power or is unable for the time being to act effectively. The effect of this provision is that, where relief is sought against a party to arbitration clause – and concerns about time it would take to constitute the tribunal are the basis of the application – the fact that the parties have adopted arbitration rules that offer EA proceedings are likely to result in the English court having no jurisdiction to act. This issue was highlighted in Gerald Metals SA v Timis [2016] EWHC 2327 and the decision in that case has resulted parties opting out of EA provisions for London seated arbitrations.

Another possible explanation is the availability of an alternative option under the LCIA Rules. Article 9A – which has been present in the LCIA Rules since 1998 – allows parties, in cases of exceptional urgency, to apply for the expedited formation of tribunal. The Article 9A procedure allows for the speedy appointment of a tribunal which will remain in place until the end of the proceedings and the figures show that this provision is significantly more popular with the users of LCIA than the EA procedure.

Number of cases (2016-2018)	935	Percentage
EA Applications (Article 9B)	5	0.5%
Applications for Expedited Formation of the Tribunal (Article 9A)	54	5.7%

One major problem with EA proceedings is that most arbitral rules don't allow ex parte applications on the basis of due process concerns, that both parties should be given an equal opportunity to present its case. This means that it is not possible to obtain an order from an emergency arbitrator without the respondent being made aware of the application. This is a very real problem as in some forms of interim relief (notably freezing orders) can only be effective if they are obtained without the respondent's prior knowledge.

At present only the Swiss Rules (Articles 26(3) and 43) allow ex parte relief in exceptional circumstances provided that the order, once made, is communicated to the other party immediately and the other party is given an opportunity to be heard. Arguably, the introduction of similar provisions by other arbitral institutions may make the EA applications more popular, but for the time being, an application to courts remains a preferred avenue for ex parte relief in the event a party anticipates that the commencement of arbitration may trigger dissipation of assets by a respondent.

Another problem is the form of the EA decision and its interim nature, given that a number of jurisdiction do not permit the enforcement of interim orders. In England, the decision of an EA will be enforceable only if it is issued in the form of an award, whereas in Singapore and Hong Kong SAR arbitral laws provide for the enforceability of both awards and orders issued by an EA. Interestingly, the LCIA and SIAC Rules permit the EA to issue an award, whereas under the ICC Rules the EA can render a decision in the form of an order. Arguably, a decision issued in the form of an award stands a better chance of enforcement in the majority of jurisdictions, however, a question remains whether state courts consider the interim nature of the EA decision to be a major factor when deciding on whether or not to grant enforcement.

In practice, parties may choose to comply with the decision of an EA – not least because of the effect of non-compliance in the eyes of the full tribunal, once appointed. Nevertheless, the question mark over enforceability remains a major issue. 79% of respondents to the *2015 Queen Mary/White & Case International Arbitration Survey* considered the enforceability of the EA's decisions to be the most important factor influencing their choice between recourse to state courts and the EA.

So whilst the introduction the EA procedure has been a welcome additions to the arbitral process – it looks as if the teenage EA still has some growing up to do.

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