

(Re)Examining the Doctrine of Emergency Arbitration

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(Re) Examining the Doctrine of Emergency Arbitration

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Abstract

The doctrine of emergency arbitration has emerged as one of the tools of enhancing the efficacy of international commercial arbitration. This paper critically examines the doctrine of emergency arbitration. It defines emergency arbitration. The paper further explores how the idea of emergency arbitration has been embraced in international commercial arbitration. It also discusses problems in emergency arbitration and suggests recommendations towards enhancing the efficiency of emergency arbitration.

1.0 Introduction

Arbitration is among processes that are commonly referred to as Alternative Dispute Resolution(ADR)¹. ADR refers to a set of mechanisms that are applied to manage disputes without resort to adversarial litigation². These mechanisms include negotiation, mediation, arbitration, conciliation, adjudication and Traditional Dispute Resolution

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¹ Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers, 4th Edition, 2022

² Ibid

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Mechanisms (TDRMs) among others³. ADR mechanisms are recognized at the global level under the *Charter of the United Nations* which stipulates that parties to a dispute shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice⁴. These mechanisms have also been upheld in Kenya under the Constitution, which mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms⁵. ADR mechanisms have been hailed as viable in enhancing access to justice due to their attributes that include privacy, confidentiality, flexibility, informality, promoting party autonomy and the ability to foster expeditious and cost effective management of disputes⁶.

Arbitration is a dispute management mechanism where parties through an agreement submit their dispute to one or more neutral third parties who make a binding decision on the dispute⁷. It has also been defined as a private consensual process where parties in dispute agree to present their grievances to a third party for resolution⁸. Arbitration has emerged as the preferred mode of management of disputes especially those that are transnational in nature⁹. In the face of globalization, the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions has not only become desirable but also invaluable¹⁰. At the international level, arbitration has a transnational applicability and guarantees neutrality in the determination of disputes by addressing differences that may arise because of multiple legal systems¹¹. It also guarantees enforcement of decisions through the *New York Convention* that provides a harmonized legal framework for the

³ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

⁴ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 33 (1)

⁵ Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi

⁶ Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-KenyaSTRATHMORE-CONFERENCE-PRESENTATION.pdf> (Accessed on 29/08/2023)

⁷ World Intellectual Property Organization., 'What is Arbitration' Available at <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> (Accessed on 29/08/2023)

⁸ Khan. F., 'Alternative Dispute Resolution.' A paper presented at the Chartered Institute of Arbitrators Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

⁹ Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIALARBITRATION-IN-AFRICA.pdf> (Accessed on 29/08/2023)

¹⁰ Ibid

¹¹ Moses, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

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recognition and enforcement of foreign awards in arbitration¹². International Commercial Arbitration has thus been widely embraced as the preferred mechanism of managing global commercial disputes.

In addition to the presence of an elaborate enforcement mechanism, various processes have been adopted towards enhancing the efficiency of international commercial arbitration¹³. Among them is the practice of emergency arbitration¹⁴. This paper critically examines the doctrine of emergency arbitration. It defines emergency arbitration. The paper further explores how the idea of emergency arbitration has been embraced in international commercial arbitration. It also discusses problems in emergency arbitration and suggests recommendation towards enhancing the efficiency of emergency arbitration.

2.0 Defining Emergency Arbitration

Emergency arbitration is a special procedure whereby an arbitrator is appointed to hear applications for urgent interim relief(s) prior to the constitution of the Tribunal¹⁵. Emergency arbitration or expedited measures of protection provide a framework for a party to an arbitration to request immediate though short-term reliefs before the process of appointment of an arbitral tribunal is completed¹⁶. Under this process, emergency reliefs are sought upon the filing of the arbitration demand and may be compared to motions for injunctive relief or a temporary restraining order in court proceedings¹⁷. Under emergency arbitration, an emergency arbitrator is appointed to hear and decide applications for emergency interim relief filed by parties before the constitution of the tribunal¹⁸. Under this process, the person appointed as emergency

¹² United Nations Commission on International Trade Law., 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards.' (New York, 1958)

¹³ Alnaber. R., 'Emergency Arbitration: Mere Innovation or Vast Improvement.' *Arbitration International*, Volume 35, Issue 4 (2019)

¹⁴ Ibid

¹⁵ Singapore International Arbitration Centre., 'Emergency Arbitration.' Available at <https://siac.org.sg/emergency-arbitration#:~:text=The%20Emergency%20Arbitrator%20procedure%20is,the%20constitution%20of%20the%20Tribunal> (Accessed on 29/08/2023)

¹⁶ American Arbitration Association., 'ADR: What's Your Emergency?' Available at <https://www.adr.org/blog/ADR-Whats-Your-Emergency> (Accessed on 29/08/2023)

¹⁷ Ibid

¹⁸ Norton Rose Fulbright., 'Emergency Arbitrators in Singapore.' Available at <https://www.nortonrosefulbright.com/en/knowledge/publications/0c310fce/emergency-arbitrators-in-singapore> (Accessed on 29/08/2023)

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arbitrator does not go on to become a member of the arbitral tribunal¹⁹. The powers of the emergency arbitrator lapse as soon as the tribunal is constituted²⁰.

Emergency arbitration has emerged as a very important doctrine in enhancing the efficacy of arbitration proceedings. It has been argued that in some cases, the nature of a dispute requires immediate action to avoid irreparable harm²¹. In traditional litigation, a party might seek a temporary restraining order or a preliminary injunction from a court to prevent another party from taking certain action²². Further, it has been observed that until recently, parties to international arbitration agreements had no recourse to arbitration to preserve the status quo, conserve assets or evidence, or seek other provisional relief until a tribunal had been established in a particular case—a process that in the best of circumstances, took weeks after submission of a ‘request for arbitration’ or ‘notice of arbitration²³.’ To obtain provisional measures in such circumstances, parties were required to resort to national courts²⁴. Emergency arbitration has therefore emerged in order to ensure that the grant of interim measures of protection is conducted within the confines of arbitration and not by national courts²⁵. It has been argued that some of the attributes of arbitration such as privacy, confidentiality and efficiency may be lost if a party is forced to pursue provisional reliefs in open court²⁶. Some parties therefore prefer to seek interim measures within the arbitral process²⁷. Emergency arbitration is therefore vital in realizing the agreement of parties’ to arbitrate disputes²⁸.

Emergency arbitration is important as parties (typically Claimants) may find themselves in a factual situation where they are in need of urgent interim relief, but the tribunal has not yet been appointed²⁹. Recourse to emergency arbitration is particularly important

¹⁹ Ibid

²⁰ Ibid

²¹ Thrasher. A., ‘Emergency Arbitration Proceedings and How they Relate to Construction Disputes.’ Available at <https://www.bradley.com/insights/publications/2023/05/emergency-arbitration-proceedings-and-how-they-relate-to-construction-disputes#:~:text=Rule%20R%2D39%20under%20the,the%20application%20for%20emergency%20relief> (Accessed on 29/08/2023)

²² Ibid

²³ Hanessian. G, & Dosman. A., ‘Songs of Innocence and Experience: Ten Years of Emergency Arbitration.’ Available at http://arbitrationlaw.com/sites/default/files/free_pdfs/aria_-_songs_of_access.pdf (Accessed on 29/08/2023)

²⁴ Ibid

²⁵ Ibid

²⁶ American Arbitration Association., ‘ADR: What’s Your Emergency?’ Op Cit

²⁷ Ibid

²⁸ Ibid

²⁹ Norton Rose Fulbright., ‘Emergency Arbitrators in Singapore.’ Op Cit

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when considering the amount of time the process of constituting a tribunal can take³⁰. This timeline may be substantially lengthened by an uncooperative Respondent who is determined to delay the proceedings to the Claimant's detriment³¹. Under emergency arbitration, any emergency measure granted takes the form of an order³². The order may be later revisited by the arbitral tribunal once constituted³³.

Emergency arbitration has been adopted by various arbitral institutions to address the need for emergency interim reliefs at the pre-arbitral stage³⁴. Under the *International Chamber of Commerce* (ICC) Arbitration Rules, 2021³⁵, a party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures³⁶. The Rules envisage the appointment of an emergency arbitrator within two days of receipt of the application³⁷. The rules further provide that the emergency arbitrator's decision shall take the form of an order and that parties shall comply with any order made by the emergency arbitrator³⁸. The emergency arbitrator is required to make the order not later than 15 days from the date on which the file was transmitted to him/her³⁹. In addition, the Rules provide that the emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order and that the arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator⁴⁰. The Rules also give powers to the arbitral tribunal to decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or noncompliance with the order⁴¹. The Rules also

³⁰ Ibid

³¹ Ibid

³² International Chamber of Commerce., 'Emergency Arbitrator.' Available at <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/emergency-arbitrator/> (Accessed on 29/08/2023)

³³ Ibid

³⁴ Burbeza. Z., 'LCIA Emergency Arbitrations: Brief Outline.' Available at <https://imdcorporate.co.uk/dispute-resolution/lcia-emergency-arbitrations-brief-outline/> (Accessed on 29/08/2023)

³⁵ International Chamber of Commerce., 'Arbitration Rules, 2021' Available at <https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf> (Accessed on 29/08/2023)

³⁶ Ibid, Article 29 (1)

³⁷ ICC Arbitration Rules, Appendix V, Emergency Arbitrator Rules, Article 2 (1)

³⁸ ICC Arbitration Rules 2021, Article 29 (2)

³⁹ ICC Arbitration Rules, Appendix V, Emergency Arbitrator Rules, Article 6 (4)

⁴⁰ ICC Arbitration Rules 2021, Article 29 (3)

⁴¹ Ibid, Article 29 (4)

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provide that an emergency arbitrator shall not act as an arbitrator in any arbitration relating to the dispute that gave rise to the application⁴².

Emergency arbitration is also provided for under the *London Court of International Arbitration (LCIA) Arbitration Rules*⁴³. The Rules provide that in the case of emergency at any time prior to the formation or expedited formation of the Arbitral Tribunal, any party may apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or expedited formation of the Arbitral Tribunal (the “Emergency Arbitrator”)⁴⁴. The rules envisage appointment of an emergency arbitrator within three days of receipt of the application⁴⁵. The rules require the emergency arbitrator to decide the claim for emergency relief as soon as possible, but no later than 14 days following the appointment⁴⁶. An emergency arbitrator is required to make an order in writing, with reasons⁴⁷. Such an order may be confirmed, varied, discharged or revoked, in whole or in part, by order or award made by the Arbitral Tribunal upon application by any party or upon its own initiative⁴⁸.

The *Chartered Institute of Arbitrators (CI Arb) Arbitration Rules*⁴⁹ also enshrine the doctrine of emergency arbitration. Under the Rules, any party in need of conservatory or urgent interim measures prior to the constitution of the arbitral tribunal may file an application with the CI Arb seeking the appointment of an emergency arbitrator⁵⁰. The Rules stipulate that an application for the appointment of an emergency arbitrator may seek orders, including, but not limited to: maintaining or restoring the status quo pending the determination of the dispute; taking action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself; providing a means of preserving assets out of which a subsequent award may be satisfied; or preserving evidence that may be relevant and material to the resolution of the dispute⁵¹. The Rules require an emergency arbitrator to be appointed within two days

⁴² ICC Arbitration Rules, Appendix V, Emergency Arbitrator Rules, Article 2 (6)

⁴³ London Court of International Arbitration., ‘Arbitration Rules.’ Available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx (Accessed on 29/08/2023)

⁴⁴ Ibid, Article 9.4

⁴⁵ Ibid, Article 9.6

⁴⁶ Ibid, Article 9.8

⁴⁷ Ibid, Article 9.9

⁴⁸ Ibid, Article 9.11

⁴⁹ Chartered Institute of Arbitrators Arbitration Rules, 2015., Available at <https://www.ciarb.org/media/2729/ciarb-arbitration-rules.pdf> (Accessed on 29/08/2023)

⁵⁰ Ibid, Article 26 (1)

⁵¹ Ibid, Appendix I, Emergency Arbitrator Rules, Article 1 (2)

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of receipt of the application⁵². Further, under the Rules, no emergency arbitrator may be appointed after the arbitral tribunal has been constituted⁵³. The Rules also require the emergency arbitrator to decide the issues raised in the application as soon as possible and preferably no later than 15 days following the appointment, taking due care to ensure that all parties are afforded notice and a reasonable opportunity to be heard⁵⁴. The Rules further state that any order or award issued by the emergency arbitrator, including an award of costs, may be modified or confirmed by the arbitral tribunal, and, in the absence of such a modification or confirmation, shall automatically expire and no longer be in effect 15 days following the constitution of the arbitral tribunal⁵⁵.

In addition, the *Arbitration Rules of the Common Market for Eastern and Southern Africa (COMESA) Court of Justice*⁵⁶ also provide for emergency arbitration. Under the rules, a party may apply for conservatory or urgent interim measures prior to the constitution of an arbitral tribunal by making a request to the Assigning Authority for the appointment of an emergency arbitrator⁵⁷. Under the emergency arbitration procedure, a request for the appointment of an emergency arbitrator may seek orders, including, but not limited to maintaining or restoring the status quo pending the determination of the dispute; taking action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself; providing a means of preserving assets out of which a subsequent award may be satisfied; or preserving evidence that may be relevant and material to the resolution of the dispute⁵⁸. The Rules require an emergency arbitrator to be appointed within two days of receipt of the application⁵⁹. Further, the rules provide that no emergency arbitrator shall be appointed after the arbitral tribunal has been constituted⁶⁰. In addition, they stipulate that the emergency arbitrator shall not serve as a member of the arbitral tribunal unless the parties otherwise agree⁶¹. The Rules further require the emergency arbitrator to decide the issues raised in the application no later than fifteen (15) days following the appointment, taking due care to ensure that all Parties are afforded notice and a reasonable opportunity to be

⁵² Ibid, Article 2 (2)

⁵³ Ibid, Article 2 (3)

⁵⁴ Ibid, Article 6 (1)

⁵⁵ Ibid, Article 6 (9)

⁵⁶ Arbitration Rules of the COMESA Court of Justice (2018)., Available at <https://comesacourt.org/wp-content/uploads/2019/11/COMESA-COURT-ARBITRATION-RULES-2018.pdf> (Accessed on 29/08/2023)

⁵⁷ Ibid, Rule 24 (1)

⁵⁸ Ibid, Schedule 1, Section 1 (3)

⁵⁹ Ibid, S 2 (2)

⁶⁰ Ibid, S 2 (3)

⁶¹ Ibid, S 2 (4)

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heard⁶². Further, under the rules, any order or award issued by the emergency arbitrator, including an award of costs may be modified or confirmed by the emergency arbitrator or the arbitral tribunal, and, in the absence of such a modification or confirmation, shall automatically expire and no longer be in effect fifteen (15) days following the constitution of the arbitral tribunal⁶³. In addition, the Rules also stipulate that the emergency arbitral order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order⁶⁴. The rules also give powers to the arbitral tribunal to modify, terminate or annul the order or any modification thereto made by the emergency arbitrator⁶⁵.

The doctrine of emergency arbitration is also upheld under the *Kigali International Arbitration Centre Arbitration Rules*⁶⁶. Under the Rules, a party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal (“Emergency Measures”) may make an application for such measures to the Secretariat⁶⁷. The Rules require the Centre to appoint an emergency arbitrator within two days of receipt of the application⁶⁸. The Rules further provide that the emergency arbitrator’s decision shall take the form of an order and parties are required to comply such an order⁶⁹. The Rules require the emergency arbitrator to make an order within fifteen days from the date on which the file was transmitted to him/her⁷⁰. Further, under the Rules, the emergency arbitrator’s order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order⁷¹. In addition, the arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator⁷².

⁶² Ibid, S 6 (1) (a)

⁶³ Ibid, S 6 (9) (a)

⁶⁴ Ibid, S 6 (10)

⁶⁵ Ibid, S 6 (11)

⁶⁶ Kigali International Arbitration Centre Arbitration Rules, 2012., Available at <https://africaarbitration.org/resources/rules/Kigali%20International%20Arbitration%20Centre%20Rules.pdf> (Accessed on 29/08/2023)

⁶⁷ Ibid, Article 34

⁶⁸ Ibid, Annex 2, Emergency Arbitration Rules, Article 2

⁶⁹ Ibid

⁷⁰ Ibid, Annex 2, Emergency Arbitration Rules, Article 6

⁷¹ Ibid

⁷² Ibid

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Finally, emergency arbitration has also been encapsulated under the *Arbitration Rules of the Nairobi Centre for International Arbitration*⁷³. Under the Rules, a party who intends to make an application for an emergency arbitration shall submit a written request to the Registrar⁷⁴. The Registrar is required to appoint an emergency arbitrator within two days of receipt of the application⁷⁵. The Rules further stipulate that an emergency arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless the parties consent⁷⁶. In addition, the Rules state that emergency arbitrator shall have the same powers vested in the Arbitral Tribunal under these Rules, including the power to rule on his own jurisdiction and any objection to the application⁷⁷. Further, the Rules provide that the emergency arbitrator shall make an order or award within fifteen days from the date of appointment, which period may be extended by agreement of the parties⁷⁸.

From the foregoing, it is evident that emergency arbitration has been adopted by various arbitral institutions to address the need for emergency interim reliefs before appointment of arbitral tribunals. The practice of emergency arbitration raises several prospects and problems.

3.0 Prospects and Problems in Emergency Arbitration

Emergency arbitration has been hailed for its efficacy in international commercial arbitration⁷⁹. It is very efficient in instances where parties may need an urgent interim relief even before the constitution of an arbitral tribunal so that the very purpose of parties opting for the arbitration does not get defeated⁸⁰. It is very vital in preserving the status quo pending the outcome of the parties' dispute⁸¹. Emergency arbitration can also cure the jurisdictional problems that may arise in international commercial arbitration in

⁷³ Nairobi Centre for International Arbitration., *Arbitration Rules*, 2015., Available at <https://ncia.or.ke/wp-content/uploads/2021/02/Final-NCIA-Revised-Rules-2019.pdf> (Accessed on 29/08/2023)

⁷⁴ *Ibid*, Second Schedule, *Emergency Arbitration Rules*, Rule 1

⁷⁵ *Ibid*, Rule 3

⁷⁶ *Ibid*, Rule 6

⁷⁷ *Ibid*, Rule 13

⁷⁸ *Ibid*, Rule 14

⁷⁹ Kumar. S., 'Emergency Arbitration-Its Advantages, Challenges and Legal Status in India.' Available at <https://www.scconline.com/blog/post/2022/03/26/emergency-arbitration/> (Accessed on 30/08/2023)

⁸⁰ *Ibid*

⁸¹ Hanessian. G, & Dosman. A., 'Songs of Innocence and Experience: Ten Years of Emergency Arbitration.' *Op Cit*

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instances where parties have to approach courts for interim reliefs⁸². In such cases, courts in different jurisdictions may pass varied orders in respect of the matter in question⁸³. Emergency arbitration ensures that grant of interim orders is made vide arbitral proceedings thus ensuring uniformity of decisions⁸⁴.

Emergency arbitration is also useful in preserving the essential attributes of arbitration such as privacy, confidentiality, efficiency and the ability to foster expeditious and cost effective management of disputes⁸⁵. These attributes may be lost if parties are forced to seek interim reliefs through courts due to the open nature of court proceedings and instances of delays and costs that are prevalent in court processes in many jurisdictions⁸⁶. Emergency arbitration is therefore important in promoting the features of arbitration.

Further, emergency arbitration helps parties to gain invaluable early insight into how an ensuing arbitral tribunal would perceive the merits of their dispute⁸⁷. Often, parties can use that insight to quickly resolve their entire dispute, either because the party seeking an emergency relief realized it had no realistic possibility to obtain an effective remedy should it ultimately prevail in the ensuing arbitration, or was persuaded that the tribunal would skeptically view its success of prevailing on the merits of its underlying claims⁸⁸. Such early resolution eliminates further arbitration, thus yielding considerable savings in both time and cost⁸⁹.

Emergency arbitration is therefore essential in enhancing the effectiveness and efficiency of arbitration proceedings. However, several problems may hinder the efficacy of emergency arbitration. Among the key concerns is the recognition and enforceability of emergency orders⁹⁰. Many jurisdictions require an award to be 'final and binding' on the substance of the dispute between the parties before it may be recognised and enforced⁹¹. However, an order by an emergency arbitrator is intended to deal only with the

⁸² Ghaffari. A, & Walters. E., 'The Emergency Arbitrator: The Dawn of a New Age?.' Available at <https://search.informit.org/doi/abs/10.3316/agispt.20210902052802> (Accessed on 30/08/2023)

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ American Arbitration Association., 'ADR: What's Your Emergency?' Op Cit

⁸⁶ Ibid

⁸⁷ Michaelson. P., 'Emergency Arbitration: Fast, Effective and Economical.' Available at <https://www.ccarbitrators.org/wp-content/uploads/2021/06/PLMichaelson-Emerg-ArbABA-JustResolutions-03-2016final-complete.pdf> (Accessed on 30/08/2023)

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ Alnaber. R., 'Emergency Arbitration: Mere Innovation or Vast Improvement.' Op Cit

⁹¹ Ibid

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application for interim relief thus not ‘final and binding’ as envisaged in most jurisdictions⁹². Indeed, most institutional arbitration rules provide that an order by an emergency arbitrator is not binding on the arbitral tribunal, which may modify, terminate or annul such an order⁹³. This has resulted in doubts as to whether an order by an emergency arbitrator is enforceable in most jurisdictions⁹⁴. It has been observed that while an emergency arbitrator order is legally enforceable in certain jurisdictions, it does not enjoy the status and near global enforceability of an arbitral award under the New York Convention⁹⁵.

In addition, it has been pointed out that emergency arbitration may not be appropriate or sufficient in all cases⁹⁶. The process is not efficient especially where ex parte action is required or assets or evidence are in the hands of third parties⁹⁷. Therefore, unlike the court process, emergency arbitration does not envisage ex parte processes and grant of orders against third parties to the arbitration agreement⁹⁸. This is a potential drawback to the efficacy of emergency arbitration⁹⁹. Consequently, many institutional arbitral rules allow parties to seek interim reliefs before courts in addition to emergency arbitration proceedings¹⁰⁰. This may result in the risk of concurrent jurisdiction between an emergency arbitrator and national courts in granting interim measures prior to the constitution of the arbitral tribunal¹⁰¹. It is therefore evident that while emergency arbitration is useful in granting interim reliefs and maintaining the status quo before commencement of the arbitration proceedings, its efficacy may be hindered by several problems including recognition and enforceability of orders and unsuitability in certain cases such as where ex parte processes are required. It is imperative to address these problems in order to enhance the viability of emergency arbitration.

⁹² Ibid

⁹³ See for example the International Chamber of Commerce., Arbitration Rules, 2021, Op Cit; the London Court of International Arbitration., Arbitration Rules, Op Cit and the Kigali International Arbitration Centre Arbitration Rules, 2012, Op Cit.

⁹⁴ Alnaber. R., ‘Emergency Arbitration: Mere Innovation or Vast Improvement.’ Op Cit

⁹⁵ Norton Rose Fulbright., ‘Emergency Arbitrators in Singapore.’ Op Cit

⁹⁶ Hanessian. G, & Dosman. A., ‘Songs of Innocence and Experience: Ten Years of Emergency Arbitration.’ Op Cit

⁹⁷ Ibid

⁹⁸ Norton Rose Fulbright., ‘Emergency Arbitrators in Singapore.’ Op Cit

⁹⁹ Ibid

¹⁰⁰ Such rules include the International Chamber of Commerce., Arbitration Rules, 2021, Op Cit; the London Court of International Arbitration., Arbitration Rules, Op Cit; Chartered Institute of Arbitrators Arbitration Rules, 2015 Op Cit and the Kigali International Arbitration Centre Arbitration Rules, 2012, Op Cit

¹⁰¹ Alnaber. R., ‘Emergency Arbitration: Mere Innovation or Vast Improvement.’ Op Cit

4.0 Way Forward

Emergency arbitration procedures are becoming increasingly popular in international commercial arbitration¹⁰². The effectiveness of emergency arbitration is however disputed, there being uncertainty as to both the proper status of the subject granting emergency relief--so called emergency arbitrator--and the enforceability of his/her decisions¹⁰³. To address this challenge, it has been suggested that there is need for an international instrument on recognition and enforcement of arbitral interim measures, including emergency decisions¹⁰⁴. Adopting an international instrument for enforcing emergency reliefs will be the best solution to the challenge of recognition and enforceability of orders in emergency arbitration by ensuring that such orders are recognized and enforced across jurisdictions¹⁰⁵. This will enhance the effectiveness of emergency arbitration.

Further, there is need for countries to consider amending their arbitration laws to provide for the recognition and enforcement of emergency arbitration orders¹⁰⁶. It has been observed that some jurisdictions including Singapore and Hong Kong have adopted legislative amendments to enforce emergency arbitral awards and orders¹⁰⁷. Other jurisdictions can follow this example in order to foster emergency arbitration.

In addition, in order to avoid any duplication of fora, courts are encouraged to respect emergency arbitrator's jurisdiction and only intervene in instances where an emergency arbitrator is not capable of granting a relief¹⁰⁸. Courts also have an important role to play in fostering emergency arbitration through recognition and enforcement of orders¹⁰⁹. It is thus imperative for courts to further this role in order to promote emergency arbitration.

Finally, there is need to encourage parties in international commercial arbitration to embrace emergency arbitration. Parties should adopt this practice in seeking urgent interim reliefs and only pursue the court process in exceptional cases such as ex parte

¹⁰² Santacroce. F., 'The Emergency Arbitrator: A Full-fledged Arbitrator Rendering an Enforceable Decision?' *Arbitration International.*, Volume 31, Issue 2 (2015)

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Alnaber. R., 'Emergency Arbitration: Mere Innovation or Vast Improvement.' Op Cit

¹⁰⁶ Umeh. O., 'The Emergence of Emergency Arbitration in International Arbitration.' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4512857 (Accessed on 30/08/2023)

¹⁰⁷ Hanessian. G, & Dosman. A., 'Songs of Innocence and Experience: Ten Years of Emergency Arbitration.' Op Cit

¹⁰⁸ Alnaber. R., 'Emergency Arbitration: Mere Innovation or Vast Improvement.' Op Cit

¹⁰⁹ Umeh. O., 'The Emergence of Emergency Arbitration in International Arbitration.' Op Cit

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proceedings or where assets or evidence are in the hands of third parties.¹¹⁰ Arbitral institutions can also streamline their rules on emergency arbitration and make the process more flexible, efficient, expeditious and cost effective with the ability to foster enforcement of outcomes¹¹¹. This will make emergency arbitration more popular than applying to the courts for interim reliefs¹¹².

Although certain amendments are needed to enhance the effectiveness of this relatively new mechanism, the future of emergency arbitrator is still optimistic. Emergency arbitration should therefore continue being embraced.

5.0 Conclusion

Emergency arbitration is very useful in accessing urgent interim relief(s) prior to the constitution of the Tribunal¹¹³. Emergency arbitration is important in enhancing the efficacy of arbitration proceedings by preserving the status quo pending the final outcome of the arbitration proceedings¹¹⁴. However, while emergency arbitration is useful in granting interim reliefs and maintaining the status quo before commencement of the arbitration proceedings, its efficacy may be hindered by several problems including challenges of recognition and enforceability of orders and unsuitability in certain cases such as where *ex parte* processes are required¹¹⁵. Measures that can be adopted towards enhancing emergency arbitration include adopting an international instrument for enforcing emergency arbitration orders, amending national arbitration laws to provide for the recognition and enforcement of emergency arbitration orders, encouraging national courts to uphold emergency arbitration, advising parties in international commercial arbitration to embrace emergency arbitration and streamlining rules by arbitral institutions on emergency arbitration in order to make the process more flexible, efficient, expeditious and cost effective with the ability to foster enforcement of outcomes¹¹⁶. Emergency arbitration is a viable mechanism that should be widely embraced in order to enhance the efficacy of arbitration proceedings especially in the context of international commercial arbitration.

¹¹⁰ Norton Rose Fulbright., 'Emergency Arbitrators in Singapore.' Op Cit

¹¹¹ Umeh. O., 'The Emergence of Emergency Arbitration in International Arbitration.' Op Cit

¹¹² Ibid

¹¹³ Singapore International Arbitration Centre., 'Emergency Arbitration.' Op Cit

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