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Running in the ICC Emergency Arbitrator Rules: The First Ten Cases

By Andrea Carlevaris and José Ricardo Feris*

ICC's Emergency Arbitrator Provisions came into force with the revised ICC Arbitration Rules on 1 January 2012. Between that date and 31 May 2014 they were applied in ten cases. After briefly describing the background to the Emergency Arbitrator Provisions, this article analyses the characteristics of those cases and the procedural and substantive issues raised by the ten Applications for Emergency Measures. It examines the conditions in which the Applications were filed, the decision of the President of the ICC International Court of Arbitration on the applicability of the Emergency Arbitrator Provisions in each case, the choice of the place and language of the proceedings, the process of appointing the emergency arbitrator and the conduct of the proceedings. The authors also consider substantive issues, such as challenges to the emergency arbitrator's jurisdiction based on the scope of the Emergency Arbitrator Provisions, the types of Emergency Measures requested, the fate of the emergency arbitrators' orders, the rules and standards governing the granting of Emergency Measures, and the determination and allocation of costs. The authors draw positive conclusions from ICC's early experience of emergency arbitrator proceedings. All stages of the proceedings have been conducted with the required rapidity and there has been an encouraging rate of compliance with emergency arbitrators' orders. This new procedure has not only fulfilled its promise but may even go further by helping to facilitate an amicable settlement of a dispute.

Les Dispositions relatives à l'arbitre d'urgence de la Chambre de commerce internationale (CCI) sont entrées en vigueur le 1er janvier 2012, en même temps que le Règlement d'arbitrage de la CCI. Entre cette date et le 31 mai 2014 elles ont été mises en application dans dix affaires. Le présent article, après un bref exposé de la genèse de ces Dispositions, analyse les caractéristiques de ces affaires et les questions de forme et de fond soulevées par les dix requêtes aux fins de mesures d'urgence. Sur le plan de la forme, les auteurs passent en revue les modalités de soumission de ces requêtes, la décision du président de la Cour internationale d'arbitrage sur la l'applicabilité à chaque cas des Dispositions relatives à l'arbitre d'urgence, le choix du lieu et de la langue de la procédure, la nomination de l'arbitre d'urgence et le déroulement de la procédure. Parmi les questions de fond examinées figurent les exceptions d'incompétence de l'arbitre d'urgence tirées du champ d'application des Dispositions relatives à l'arbitre d'urgence, la nature des mesures d'urgence demandées, le respect des ordonnances rendues, les normes régissant l'octroi de mesures d'urgence, ainsi que la détermination et la répartition des coûts. Les auteurs tirent un bilan positif des premiers résultats de la procédure de l'arbitre d'urgence de la CCI, constatant qu'elle a été conduite dans toutes ses phases avec la rapidité nécessaire et que les ordonnances des arbitres d'urgence ont été largement respectées. Non seulement la nouvelle procédure a répondu aux attentes, mais elle semble même capable de favoriser un règlement amiable du différend.

Las Disposiciones sobre el Árbitro de Emergencia de la CCI entraron en vigor el 1 de enero de 2012, al mismo tiempo que el Reglamento de Arbitraje de la CCI. Entre esta fecha y el 31 de mayo de 2014 las Disposiciones se aplicaron en diez casos. El presente artículo, que comienza con una breve descripción de los antecedentes de las Disposiciones, analiza las características de tales casos y las cuestiones de procedimiento y de fondo planteadas por las diez peticiones de medidas de emergencia. En lo que se refiere a la forma, examina las condiciones de presentación de las peticiones, la decisión del presidente de la Corte Internacional de Arbitraje de la CCI relativa a la aplicabilidad de las Disposiciones sobre el Árbitro de Emergencia en cada caso, la elección del lugar y del idioma del procedimiento, el nombramiento del árbitro de emergencia y el desarrollo del

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procedimiento. Asimismo, los autores consideran cuestiones de fondo como las impugnaciones de la competencia del árbitro de emergencia basadas en el ámbito de aplicación de las Disposiciones sobre el Árbitro de Emergencia, los tipos de medidas de emergencia solicitadas, el respeto de las órdenes de los árbitros de emergencia, las normas y criterios que rigen la concesión de medidas de emergencia y la determinación y repartición de los costos. Los autores extraen conclusiones positivas de las primeras experiencias de la CCI con el procedimiento del árbitro de emergencia al constatar que todas las etapas se han realizado con la rapidez necesaria y el índice de cumplimiento de las órdenes del árbitro de emergencia es alentador. Además de cumplir ampliamente sus promesas, este nuevo procedimiento hasta da la impresión de poder facilitar la solución amistosa de las controversias.

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1 See e.g. G. Born, *International Commercial Arbitration* (2014) at 2456 ('virtually all arbitration regimes contemplate concurrent authority of the arbitral tribunal and national courts to order provisional relief'). See also ICC Arbitration Rules, Article 28(2) ('Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.'). and similar provisions in other rules, e.g. those of the Australian Centre for International Commercial Arbitration (ACICA), Schedule 2, Article 7.1; the Administered Arbitration Rules of the Hong Kong International Arbitration Centre (HKIAC), Schedule 4, paragraph 22; Paris Arbitration Rules, Article 4.9.

2 In a number of countries, including the USA, the compatibility of arbitration agreements with state court jurisdiction over applications for interim relief is controversial and has given rise to conflicting decisions; for exclusion of state court jurisdiction: *McCreary Tire & Rubber Co.* v. *CEAT S.p.A.*, 501 F. 2d 1032 (3d Cir. 1974), (1976) I Y.B. Comm. Arb. 204; *Metropolitan World Tanker Corp.* v. *P. N. Pertambangan Minjakdangas Bumi Nasional*, 427 F. Supp. 2 (S.D.N.Y. 1975); *Cooper* v. *Atéliers de la Motobécane S.A.*, 442 N.E. 2d 1239 (N.Y. 1982); *contra: Carolina Power & Light Co.* v. *G.I.E. Uranex*, 451 F. Supp. 1044 (1977), (1979) IV Y.B. Comm. Arb. 336.

3 Appendix V consists of the Emergency Arbitrator Rules, which govern ICC emergency arbitrator proceedings.

4 See e.g. E. Castineira, 'The Emergency Arbitrator in the 2012 ICC Rules of Arbitration' [2012:1] *Les Cahiers de l'arbitrage/The Paris Journal of Arbitration* 65; for comments on the ICC Pre-Arbitral Referee Rules, see C. Hausmaninger, 'The ICC Rules for a Pre-Arbitral Referee Procedure: A Step towards Solving the Problem of Provisional Relief in International Commercial Arbitration?' (1992) 7 *ICSID Review* 82; J.-J. Arnaldez & E. Schäfer, 'Le Règlement de référé pré-arbitral de la Chambre de Commerce Internationale (en vigueur depuis 1er janvier 1990)', *Revue de l'arbitrage*, 1990, 835; J. Paulsson, 'A Better Mousetrap: 1990 ICC Rules for a Pre-Arbitral Referee Procedure', *International Business Lawyer*, May 1990, 214; P. Tercier, 'Le référé pré-arbitral' (2004) 22 *ASA Bulletin* 464.

5 The last two of these cases were registered after the 2012 ICC Arbitration Rules came into force.

6 See M. Bühler, 'ICC Pre-Arbitral Referee and Emergency Arbitrator Proceedings Compared' in *Interim, Conservatory and Emergency Measures in ICC Arbitration*, ICC ICArb. Bull., 2011 Special Supplement, 93. See also K.P. Berger, 'Pre-Arbitral Referees: Arbitrators, Quasi-Arbitrators, Hybrids or Creatures of Contract Law?' in G. Aksen *et al.*, eds., *Global Reflections on International Law, Commerce and Dispute Resolution*, Liber Amicorum in honour of Robert Briner (ICC Publishing, 2005) 73.

7 e.g. International Centre for Dispute Resolution (ICDR), 2006; International Institute for Conflict Prevention and Resolution, 2007; Arbitration Institute of the Stockholm Chamber of Commerce (SCC), 2010; Singapore International Arbitration Centre (SIAC), 2010; ACICA, 2011. Other institutions have opted for rules expediting the constitution of the arbitral tribunal (London Court of International Arbitration (LCIA), 1998) or providing for summary arbitral proceedings (Netherlands Arbitration Institute, 2010).

8 Since the introduction of the 2012 ICC Arbitration Rules, similar provisions have also been adopted elsewhere, e.g. PRIME Finance, 2012; Swiss Rules of International Arbitration, 2012; HKIAC, 2013; Paris Arbitration Rules, 2013; CEPANI, 2013. An emergency arbitration procedure is also foreseen in the latest draft of the new LCIA Rules.

9 ICC Emergency Arbitrator Rules, Article 6(1); cf. NAI Arbitration Rules, Article 42l(1) and (3); ICDR Arbitration Rules Article 37(5); CPR Arbitration Rule 14.10; SIAC Rules, Schedule 1, paragraph 6.

10 ICC Arbitration Rules, Article 29(6)(a); cf. SCC Arbitration Rules, Preamble; R. Bose & I. Meredith, 'Emergency Arbitration Procedures: A Comparative Analysis' (2012) *International Arbitration Law Review* 190 ('The SCC Rules go one step further, by applying the opt-out feature in respect of the EA provisions retroactively. This enables parties arbitrating under the SCC Rules to use the EA procedures even if their arbitration agreement was concluded prior to the commencement of the new procedures on January 1, 2010. The retroactivity of the new Rules has caused significant comment and debate amongst the arbitration community.').

11 ICC Arbitration Rules, Article 29(1) and Emergency Arbitrator Rules, Article 1(6); cf. SIAC Rules, Schedule 1, paragraph 1; ACICA Rules; Schedule 2, Article 1.2(b).

12 ICC Emergency Arbitrator Rules, Article 2(2); cf. ICDR Arbitration Rules, Article 37(6); SIAC Rules, Schedule 1, paragraph 7; ACICA Rules, Schedule 2, Article 5.1.

13 ICC Emergency Arbitrator Rules, Article 6(4); R. Bose & I. Meredith, *supra* note 10 at 193-194 (highlighting this difference and others).

14 ICC Arbitration Rules, Article 29(5); see also N. Voser & C. Boog, 'ICC Emergency Arbitrator Proceedings: An Overview' in *Interim, Conservatory and Emergency Measures in ICC Arbitration*, ICC ICArb. Bull., 2011 Special Supplement 81 at 83-84, 85. For a comprehensive discussion of the various rules and their implementation, see G. Hanessian, 'Emergency Arbitrators' in L. Newman & R. Hill, eds., *The Leading Arbitrators' Guide to International Arbitration* (Juris, 2014).

15 J. Lundstedt, *SCC Practice: Emergency Arbitrator Decisions* (9 applications between 1 Jan. 2010 and 31 Dec. 2013); ICDR, *ICDR International Arbitration Reporter* (Sept. 2013) 4 (28 cases from 1 May 2006 to Sept. 2013); SIAC, *Statistics*, http://www.siac.org.sg/why-siac/facts-figures/statistics (34 cases from July 2010 to 6 Mar. 2014).

16 e.g. N. Voser & C. Boog, *supra* note 14; J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration* (Paris: ICC, 2010) 294-310; E. Castineira, *supra* note 4; C. Aschauer, 'Use of the ICC Emergency Arbitrator to Protect the Arbitral Proceedings' (2012) 23:2 ICC ICArb. Bull. 5; B. Baigel, 'The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis' (2014) 31 *Journal of International Arbitration* 1; L. Fumagalli, 'Le *Emergency Arbitration Rules* nel nuovo Regolamento della Camera di Commercio Internazionale' (2013) *Rivista dell'arbitrato* 651.

1. Introduction

Obtaining interim measures at the outset of a dispute is a sensitive issue in international arbitration. Before the arbitral tribunal has been constituted, parties remain free to seek urgent measures from state courts on the basis of the widely accepted principle of the concurrent jurisdiction of judges and arbitrators with respect to interim measures.[1] However, this solution may be less than ideal for various reasons. First of all, the advantages the parties seek in choosing arbitration (e.g. a neutral forum, confidentiality, expertise of the decision-maker) should equally apply to their requests for related interim relief. Second, while there are numerous bilateral and regional instruments providing for the cross-border recognition and enforcement of court-ordered provisional and conservatory measures (e.g. the EU Regulation No. 44 of 22 December 2000 (Brussels I)), there is as yet no equivalent instrument at a universal level, which limits the extent to which such measures can be enforced. Third, while it is generally recognized that recourse to the courts for interim relief constitutes neither a breach nor a waiver of the arbitration agreement, the application of this principle remains hazardous and can even compromise the parties' decision to arbitrate the merits of the dispute.[2] Finally, identifying the competent judge may be problematic.

The above-mentioned considerations led the ICC Commission on Arbitration and ADR to include in the 2012 ICC Rules of Arbitration provisions that allow parties who have entered into an ICC arbitration agreement to obtain urgent relief prior to the constitution of the arbitral tribunal. The Emergency Arbitrator Provisions, which comprise Article 29 and Appendix V[3] of those Rules, were among the most noted of the 2012 innovations. Although they represent a new development in the context of the Rules, they are not ICC's first initiative with respect to pre-arbitral relief. In 1990, ICC was the first international arbitral institution to offer services in this field with its Rules for a Pre-Arbitral Referee Procedure ('Pre-Arbitral Referee Rules').[4]

However, the Pre-Arbitral Referee Rules have had remarkably little uptake: in 24 years only 14 pre-arbitral referee cases have been filed with ICC.[5] This may be due to two factors. First, the Pre-Arbitral Referee Rules are separate from the Arbitration Rules and the parties must specifically agree to their application. In other words, the parties must 'opt-in' to the Pre-Arbitral Referee Rules, whether before or after a dispute has arisen. Second, the Pre-Arbitral Referee Rules describe the decision-maker as a 'referee', not an arbitrator, which raises doubts as to the arbitral, as opposed to merely contractual, nature of this mechanism.[6] The introduction of the Emergency Arbitrator Provisions did not repeal the Pre-Arbitral Referee Rules, which are still available to any parties who wish to agree upon their use.

Several years after ICC introduced its Pre-Arbitral Referee Rules, other arbitral institutions began integrating provisions for obtaining emergency relief into their rules.[7] ICC's 2012 Arbitration Rules follow this more recent trend by making the Emergency Arbitrator Provisions part of the Arbitration Rules and therefore applicable unless the parties expressly opt out. While having much in common with analogous rules adopted by other institutions, the ICC provisions are different in several respects.[8] For instance they provide that: (i) the decision of the emergency arbitrator can be in the form of an order only, not an award;[9] (ii) they are applicable only to arbitration agreements entered into after the entry into force of the 2012 Arbitration Rules;[10] (iii) an Application for Emergency Measures can be filed even before the Request for Arbitration;[11] (iv) the emergency arbitrator may issue an order even after the arbitral tribunal has been constituted;[12] and (v) the emergency arbitrator must generally issue his or her order within 15 days of receiving the file.[13] Another key characteristic is that the ICC provisions apply only to parties that are signatories to the arbitration agreement (and to their successors).[14]

Despite the fact that the ICC Emergency Arbitrator Provisions can only apply to cases in which the arbitration agreement was made after 1 January 2012, ten applications had been filed under these provisions as of 31 May 2014. This is a respectable figure when compared with the number of applications filed during a longer period under similar institutional rules.[15]

The purpose of the present article is not to provide a detailed description of the ICC Emergency Arbitrator Provisions, which have already been the subject of several comprehensive commentaries,[16] but rather to discuss experience acquired during their initial application. After a general overview of the characteristics of the cases filed to date (2), the analysis will focus on the most salient procedural (3) and substantive (4) issues in those cases. The article ends with some conclusions on the effectiveness of the ICC emergency arbitrator process (5), which may be helpful to users who are contemplating whether or not to include an opt-out clause in their ICC arbitration agreement.

2. General characteristics

The ten Applications for Emergency Measures so far filed with ICC involved a total of 34 parties of 15 different nationalities and from five different continents. Six of the ten cases involved more than two parties. In three cases all parties were of the same nationality. The geographical diversity of the parties involved shows that ICC's Emergency Arbitrator Provisions have been widely accepted, as does the fact that they have been used not only in the private but also the public sector. One of the cases open at the time of writing involves a state and three state entities as responding parties.

Equally diverse are the transactions underlying the applications: four cases involved contracts relating to the production and distribution of oil and gas, two cases related to share purchase agreements, one application involved an equity interest purchase agreement, another the sale of agricultural and chemical products, one arose out of a commercial real estate transaction, and the last concerned a settlement agreement in the telecommunications sector.

The amount in dispute in these cases ranged from approximately USD 500,000 to USD 54 million, with the average lying at around USD 15 million. These figures show that emergency arbitrator proceedings are not limited to high-value cases and suggest that the additional costs caused by the proceedings have not been a deterrent to their use even in lower value cases.

Six of the ten applications were made in multiparty cases and one was made in a multicontract case involving four related contracts containing different but compatible arbitration agreements.

Finally, it is worth noting that of the ten arbitrations in which recourse was made to an emergency arbitrator three were terminated upon the parties' agreement before the constitution of the arbitral tribunal and one was terminated shortly after the constitution of the arbitral tribunal. Although ICC is not always told why parties terminate, it is not unreasonable to assume that the outcome of the emergency arbitration proceedings had some impact on their decision. The remaining six arbitrations were still ongoing at the time of writing.

3. Procedure

A. Filing of the Application

The ICC Emergency Arbitrator Rules provide that an Application for Emergency Measures ('Application') must be filed with the Secretariat of the ICC International Court of Arbitration in the required number of copies and that it must contain information on the parties, the circumstances giving rise to the Application, the relief sought, the urgency of the Application, the arbitration agreement and any other relevant agreements, and proof of payment. To facilitate the filing of Applications, the Secretariat has created a dedicated email address (emergencyarbitrator@iccwbo.org) and published a webpage that provides guidance on filing an Application (http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/emergency-arbitrator/).

Most of the ten Applications were initially filed through the above-mentioned email address and hard copies were sent at the same time. Two Applications were filed by express courier only. In most of the cases, the applicants contacted the Secretariat before filing the Application, as recommended on the dedicated webpage. But even without such warning the Secretariat reacts quickly to Applications, and use of the dedicated email address ensures that Applications are immediately notified to the management of the Secretariat and the President of the International Court of Arbitration.

B. Setting in motion of the procedure by the President of the Court

Once the Application has been filed, Article 1(5) of the Emergency Arbitrator Rules requires the President of the ICC International Court of Arbitration (the 'President') to decide whether the Emergency Arbitrator Provisions shall apply. Notification of the Application to the responding party depends upon this decision.

In all Applications filed to date, this decision was made within 48 hours and in most cases in less than 24 hours. With the aid of a report prepared by the Secretariat, the President makes the decision after verifying that: (i) all parties identified in the Application are signatories or successors to signatories of the relevant arbitration agreement; (ii) the arbitration agreement was concluded after the entry into force of the 2012 Arbitration Rules; (iii) the parties

have not opted out of the Emergency Arbitrator Provisions; and (iv) the parties have not agreed on another pre-arbitral procedure for obtaining conservatory, interim or similar measures.[17]

The only two requirements that have so far called into question the applicability of the Emergency Arbitrator Provisions are those related to (i) the signatories and (ii) the timing of the arbitration agreement.

(i) Signatories

The requirement that the parties to the Application be signatories or successors to signatories of the relevant arbitration agreement has led to the inadmissibility of an Application in only one case. Here, the applicant named two responding parties – the successor of a signatory and the successor's parent company. On the basis of Article 29(5) of the Arbitration Rules, the President decided that the Emergency Arbitrator Provisions did not apply to the parent company and allowed the matter to proceed between the applicant and the signatory's successor only. This type of decision is without prejudice to the identification of the parties to the subsequent arbitration proceedings and does not prevent the applicant from including other parties as respondents in the Request for Arbitration, as did the applicant in this particular case. If there is an issue of jurisdiction with respect to non-signatories it would be addressed in the context of Article 6(3) and, if need be, Article 6(4) of the Arbitration Rules rather than in the emergency arbitrator proceedings, where the intention has been to avoid the delay that would be caused by jurisdictional objections raised on the grounds of a party's failure to sign the arbitration agreement.[18]

The applicability of the Emergency Arbitrator Provisions to investor-State arbitrations based on a dispute resolution clause in an investment treaty has been excluded by the requirement that the parties named in the Application be signatories or successors to the signatories of the relevant arbitration agreement. Commentators consider that the investor's acceptance of the offer of arbitration contained in the relevant investment instrument (reflected in its signing a Request for Arbitration, the Application or other document) is not sufficient to fulfil this requirement.[19]

(ii) Timing

Three of the Applications involved an arbitration agreement originally made prior to 1 January 2012. In the first, as there was no evidence or claim that the parties had entered into an ICC arbitration agreement after 1 January 2012, the President decided that the Emergency Arbitrator Provisions did not apply and consequently the emergency arbitrator proceedings could not take place. A Request for Arbitration had been filed at the same time as the Application; the arbitration could proceed without emergency arbitration proceedings taking place.

In the second case, the arbitration agreement was contained in a contract signed before 1 January 2012 but amended after that date. The applicant contended that the post-2012 amendment applied also to the arbitration agreement and that the condition relating to the timing of the arbitration agreement was therefore satisfied. The President took note of this issue and, adopting an approach comparable to that of the Court under Article 6(4) of the Arbitration Rules, decided to set the emergency arbitrator proceedings in motion in order to allow the emergency arbitrator to rule on his/her own jurisdiction.

In the third case, the Application was based on an arbitration agreement contained in a contract signed before 1 January 2012, which referred to the ICC Rules in effect at the time of commencement of the arbitration. Although the Rules exclude the applicability of the Emergency Arbitrator Provisions in cases based on pre-2012 arbitration agreements, they do not specifically address the situation where the parties have expressly referred to the Rules in force at the time of commencement of the arbitration. The President decided that the Emergency Arbitrator Provisions applied and allowed the matter to proceed. In reaching this decision, he considered, *inter alia*, that the parties were aware that the Rules are subject to modification so, in referring to the version of the Rules applicable at the time of commencement of the arbitration, they could be considered to have accepted the applicability of future amendments, even if unknown at the time of the arbitration agreement. Hence, they could be regarded as having implicitly agreed to the 2012 amendments, including the Emergency Arbitrator Provisions, unless expressly stated otherwise. If they had not wished the Emergency Arbitrator Provisions to apply they could have amended their arbitration agreement by opting out when the revised Rules came into force in 2012, but they did not do so. Furthermore, the responding party did not raise any jurisdictional objection in this respect when it was notified of the Application.

17 ICC Arbitration Rules, Article 29(5) and (6); see also J. Fry, S. Greenberg, F. Mazza, *supra* note 16 at 307-309.

18 On practice with respect to non-signatories in ICC arbitration proceedings, see J. Fry, S. Greenberg, F. Mazza, *supra* note 16 at 69, 77-79; see also S. Greenberg, J. Feris, C. Albanesi, 'Consolidation, Joinder, Cross-Claims, Multiparty and Multicontract Arbitrations: Recent ICC Experience' in B. Hanotiau & E.A. Schwartz, eds., *Multiparty Arbitration* (Paris: ICC, 2010) 161 at 167-168, 173-176.

19 P. Mayer & E. Silva Romero, 'Le nouveau Règlement d'arbitrage de la Chambre de Commerce Internationale (CCI)', *Revue de l'arbitrage*, 2011, 919; N. Voser & C. Boog, *supra* note 14 at 83-84; N. Voser, 'Overview of the Most Important Changes in the Revised ICC Rules' (2011) 29 *ASA Bulletin* 783 at 817; E. Castineira, *supra* note 4 at 74; J. Fry, S. Greenberg, F. Mazza, *supra* note 16 at 308; C. Aschauer, *supra* 16 at 7. As stated in the report of the ICC Commission on Arbitration and ADR, States, *State Entities and ICC Arbitration*, at §§ 51-52: 'One of the purposes of Article 29(5) of the 2012 ICC Rules was to exclude investment arbitration from the scope of emergency arbitrator proceedings [...] When drafting this provision, the ICC considered that the investor and the host state are not signatories of the arbitration agreement formed by the state's offer contained in the BIT and the investor's acceptance contained in its notice of claim or request for arbitration.'

If the President decides that the Emergency Arbitrator Provisions apply, the Secretariat transmits a copy of the Application and its attachments to the responding party. Whenever and insofar as the President has decided they do not apply, the Secretariat has informed the parties that the emergency arbitrator proceedings will not take place, or will not take place among all the parties mentioned in the Application, and has transmitted a copy of the Application to them for their information as required by Article 1(5) of the Emergency Arbitrator Rules.

C. Place and language of the emergency arbitrator proceedings

The place of the emergency arbitrator proceedings may be significant in determining the standards applicable to emergency and preliminary measures, while the language of the proceedings may have an impact on other aspects of the proceedings, such as the choice of available candidates to act as emergency arbitrator.

Article 4(1) of the Emergency Arbitrator Rules provides that, if the parties have agreed on the place of the arbitration, this will also be the place of the emergency arbitrator proceedings. Otherwise, the President fixes the place of the emergency arbitrator proceedings.

Emergency arbitrator proceedings have so far been seated in Europe (Paris and London), North America (New York and Houston) and South America (São Paulo). In eight of the ten cases, the seat of the proceedings was the place of arbitration chosen in the arbitration agreement, so there was a need for a decision by the President in only two cases. This is consistent with the proportion of arbitration cases in which the Court fixes the place of arbitration, which averaged approximately 11.5% in the years 2009-2013. When fixing the place of emergency arbitration proceedings, the President followed criteria similar to those applied by the Court, i.e. the neutrality and accessibility of the place, the reliability of its legal and judicial system,[20] and relevant language(s),[21] the aim being to avoid any surprises for the parties. In one of the cases, the place fixed by the President for the emergency arbitrator proceedings was subsequently chosen as the place of the arbitration by the parties. In another case relating to four different contracts, only two of the contracts (including the main contract) contained an arbitration clause in which the place of arbitration was specified. The two contracts that contained no reference to the place of arbitration mentioned that in the event of a conflict between their provisions and those of the main contract the latter should prevail. Hence, the place fixed by the President for the emergency arbitrator proceedings was that indicated in the arbitration agreement in the main contract.

According to Article 1(4) of the Emergency Arbitrator Rules, the Application must be drafted in the language of the arbitration if this has been specified in the arbitration agreement or subsequently agreed by the parties. If not, it is to be drafted in the language of the arbitration agreement. The emergency arbitrator proceedings were held in English in all but two cases, these being in French and Portuguese respectively. In seven cases the language of the arbitration was determined in the arbitration agreement; in the remaining three cases, the issue was not controversial.

D. Appointment and challenge of the emergency arbitrator

Appointing the emergency arbitrator is a cornerstone of the proceedings. Nine emergency arbitrators have been appointed to date (no appointment was made in the case where the Application was declared inadmissible by the President). The appointments were made by the President following discussions with the Secretariat's management and the relevant case management team on the qualities required for the matter. Immediately upon receipt of the Application a shortlist of potential candidates was drawn up by the President in collaboration with the Secretariat. At the same time the candidates were contacted to check their availability and interest in the appointment. Those that were available and interested were then considered for appointment after completing a statement of acceptance, availability, impartiality and independence as required by Article 2(5) of the Emergency Arbitrator Rules and confirming that they had no conflicts of interest.

Five of the nine emergency arbitrators were appointed on the day following the Secretariat's receipt of the Application and the four others within two days, as mentioned in the Rules.

The Rules do not provide for a list-based procedure. The President is free to appoint whomever he regards as suitable to act as emergency arbitrator. In doing so, he considers above all the candidates' experience of international arbitration and the potentially applicable laws and fields of law, their proximity to

20 J. Fry, S. Greenberg, F. Mazza, *supra* note 16 at 202-203.

21 S.R. Bond, M. Paralika, M. Secomb, 'International Chamber of Commerce (ICC) Rules of Arbitration, 1998' in L.A. Mistelis, *Concise International Arbitration* (2010) 345.

the place of arbitration and their ability to conduct the proceedings in the required language.

Unlike sole arbitrators and presidents of arbitral tribunals acting under the ICC Arbitration Rules, emergency arbitrators can be nationals of the same country as any of the parties, even without the parties' consent. If the case has its centre of gravity in a country from which one, some or all of the parties originate, the President may consider it appropriate to appoint an emergency arbitrator who is a national of that country. This is indeed what he did in five cases.

When assessing a candidate's suitability, attention is paid to the candidate's availability and any potential conflicts of interest that have been disclosed. Prospective candidates provided a very complete overview of their engagements during the immediately following period. Those who had the most flexible schedule were preferred. As to potential conflicts of interest, almost all of the candidates appointed had submitted an unqualified statement of independence and impartiality. In one instance the President appointed a candidate who had submitted what was considered a *de minimis* disclosure. This is consistent with the approach taken by the Court in arbitration proceedings, where it may appoint arbitrators whose disclosures are considered of such a nature as not to call into question the candidate's independence and impartiality in the eyes of a reasonable and objective party. Such an approach encourages transparency without affecting the Court's power to appoint prospective arbitrators whose disclosures are negligible.[22] Given the short time limits in emergency arbitrator proceedings, there is no provision for circulating candidates' forms before the appointment, as happens under Article 11(2) of the Arbitration Rules when appointing arbitrators. In the emergency arbitrator proceedings in which the *de minimis* disclosure was made, there was every likelihood that the appointment would not give rise to a challenge under Article 3 of the Emergency Arbitrator Rules.

If a party wishes to challenge the appointment of an emergency arbitrator, the challenge must be filed within three days of the challenging party's receiving notification of the appointment (or becoming informed of the facts and circumstances on which the challenge is based, if that date is later).[23] There is no provision suspending the emergency arbitrator proceedings while a challenge is pending, and the challenge can be decided even after the emergency arbitrator's order has been made. One challenge has so far been made against an emergency arbitrator. It was filed one day before the expiry of the deadline for rendering the order. The order was rendered within that deadline and the challenge was decided by the Court later, after granting the emergency arbitrator and the other party a short time limit to submit comments.[24] The challenge was dismissed.

E. Filing of the Request for Arbitration

As indicated above, a notable feature of the Emergency Arbitrator Provisions is that an Application can be filed before the submission of the Request for Arbitration. In this case, the Request for Arbitration must be filed within ten days of the Secretariat's receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary. If no Request for Arbitration is submitted within the deadline set by the Rules or by the emergency arbitrator, the emergency arbitrator proceedings are terminated by the President (Article 1(6) of the Emergency Arbitrator Rules).

Seven of the ten Applications received to date were filed prior to the Request for Arbitration, which in all seven cases was then filed within the ten days set by the Rules, without any need for an extension by the emergency arbitrator. One of the three remaining Applications was filed together with the Request for Arbitration and another approximately one month after the submission of the Request for Arbitration but before the filing of the Answer to the Request and the constitution of the arbitral tribunal.

The remaining case deserves special mention as the Application was not filed by the claimant in a newly commenced or imminent arbitration, but rather by the respondent in an ongoing arbitration. Although the Emergency Arbitrator Provisions do not expressly contemplate such a situation, the Application was considered admissible and emergency arbitration proceedings were set in motion in the already existing arbitration. The Secretariat considered that by filing counterclaims the applicant had complied with the requirement of Article 1(6) of the Emergency Arbitrator Rules.

22 See J. Fry & S. Greenberg, 'The Arbitral Tribunal: Applications of Articles 7-12 of the ICC Rules in Recent Cases' (2009) 20:2 ICC ICArb. Bull. 12 at 23; see also A.M. Whitesell, 'Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge, and Replacement of Arbitrators' in *Independence of Arbitrators*, ICC ICArb. Bull., 2007 Special Supplement, 7.

23 ICC Emergency Arbitrator Rules, Article 3(1).

24 *Ibid*., Article 3(2).

F. Proceedings

Article 5 of the Emergency Arbitrator Rules requires the emergency arbitrator to act swiftly and to take into account the nature and the urgency of the Application while also ensuring that each party has a reasonable opportunity to present its case.

There is no provision for ex parte proceedings: the Secretariat is required to notify the responding party of the Application.[25] In one case, the applicant requested that the emergency arbitrator be appointed without giving notice to the responding party. Once the President had decided that the Proceedings should be set in motion pursuant to Article 1(5) of the Emergency Arbitrator Rules, the Secretariat notified the Application to the responding party after first informing the applicant that it would do so. In accordance with Article 5(2) of the Emergency Arbitrator Rules, the emergency arbitrator made sure that each party had an opportunity to present its case before issuing the order.

The responding parties participated actively in all of the eight cases in which an order was issued, and in no case was due process a subject of contention.[26] In all eight cases a procedural timetable was issued within an average of less than three days. The number of submissions exchanged ranged from two to five. There was no case management conference in any of the cases, but hearings were held in five cases (in two cases in person and in three cases by telephone). No witnesses or experts were called in the hearings, but written statements were filed in two cases. In the three cases in which no hearings were held, the emergency arbitrator decided on the basis of written submissions only.

Judging by the rapidity of the proceedings that have so far taken place, the Emergency Arbitrator Provisions have fulfilled their promise. All cases have been conducted within the prescribed time frame.

4. Substance

A. Jurisdiction

The limited scope of the Emergency Arbitrator Provisions, and in particular their inapplicability to parties other than the signatories of the arbitration agreement upon which the applicant relies, or their successors, is designed to limit the risk of jurisdictional challenges that would delay the proceedings. Although jurisdictional challenges were nonetheless raised in several cases, only one Application was dismissed on such grounds. In all the other proceedings such challenges did not prevent the emergency arbitrator proceedings from progressing with the required rapidity. The emergency arbitrator's case management skills are of paramount importance in ensuring that the proceedings are completed within the time set by the Emergency Arbitrator Provisions. Below we shall discuss jurisdictional objections that have been raised before the emergency arbitrator as distinct from those discussed in section 3.B above in connection with the President's screening powers under Article 1(5) of the Emergency Arbitrator Rules.

(i) Multi-tiered clauses

In one case, the responding party raised a jurisdictional objection based on a multi-tiered dispute resolution clause. The arbitration agreement in question provided that if a dispute was not settled pursuant to the ICC ADR Rules within 60 days of the Request for ADR, it was to be settled pursuant to the ICC Arbitration Rules. The applicant filed its Request for ADR and its Application for Emergency Measures on the same day. The responding party argued that as the 60-day interval had not elapsed, the parties could not yet be considered to have committed themselves to arbitration. Hence the emergency arbitrator was not entitled to take jurisdiction. The responding party also pointed out that the Application was premature as a Request for Arbitration could not be filed within the mandatory ten days without breaching the 60-day interval set by the multi-tiered clause. The emergency arbitrator dismissed the objection and upheld his jurisdiction. He observed, *inter alia*, that to hold otherwise would deprive the parties of the possibility of obtaining interim relief when it was most needed (after the dispute had arisen but before the arbitral tribunal was constituted). He also noted that the emergency arbitrator proceedings constitute a largely separate process which should be able to take place notwithstanding the requirement to wait 60 days before commencing arbitration proceedings. However, he added that no Request for Arbitration could be filed during those 60 days, which led him to point out the tension between the waiting period of 60 days between the Request for ADR and the Request for Arbitration laid down in the parties' contract and the need to submit a Request for Arbitration within ten days of the Application laid down in the Rules. In the end, the emergency arbitrator concluded that the tension could be resolved pursuant to Article 1(6) of the Emergency Arbitrator Rules, which enables the emergency arbitrator to extend the 10-day

25 *Ibid.*, Article 1(5).

26 In one case, a responding party initially refused to take delivery of certain correspondence from ICC and the emergency arbitrator, but after the emergency arbitrator noted that the proceedings would continue and encouraged the responding parties to participate, both responding parties ultimately filed their statement of defence within the deadline set in the timetable.

time limit for filing a Request for Arbitration.[27] Ultimately, the emergency arbitrator left the question of the timing of the Request for Arbitration for the arbitral tribunal to determine in the ensuing arbitration proceedings.

The above case shows the importance of taking into account the Emergency Arbitrator Provisions when drafting multi-tiered dispute resolution clauses. To assist users, ICC published new model clauses when its 2014 Mediation Rules were introduced. Parties wishing to provide for ICC mediation followed by ICC arbitration are invited to consider whether or not they wish the Emergency Arbitrator Provisions to apply during an agreed period following the filing of a Request for Mediation. If they do wish to have the possibility of recourse to an emergency arbitrator during the time set aside for mediation, it is suggested that they add the following provision to the multi-tiered clause:

> The requirement to wait [45] days, or any other agreed period, following the filing of a Request for Mediation, before referring a dispute to arbitration shall not prevent the parties from making an application, prior to expiry of those [45] days or other agreed period, for Emergency Measures under the Emergency Arbitrator Provisions in the Rules of Arbitration of the International Chamber of Commerce.

If they prefer recourse to the emergency arbitrator to be possible only after the expiry of the period set aside for mediation, it is suggested that they add the following provision instead:

> The parties shall not have the right to make an application for Emergency Measures under the Emergency Arbitrator Provisions in the Rules of Arbitration of the International Chamber of Commerce prior to expiry of the [45] days or other agreed period following the filing of a Request for Mediation.

(ii) Non-retroactivity

A number of jurisdictional objections were based on the non-retroactivity of the Emergency Arbitrator Provisions, laid down in Article 29(6)(a) of the Arbitration Rules. The purpose of this provision is to protect parties who made an ICC arbitration agreement before the entry into force of the Emergency Arbitrator Provisions against the unexpected application of a mechanism they could not have foreseen. This is an exception to the general rule expressed in Article 6(1) of the Arbitration Rules that the parties are deemed to have submitted to the Rules in effect on the date of commencement of the arbitration unless they make express reference to the Rules in effect on the date of the arbitration agreement. The exception is justified by the innovatory nature of the Emergency Arbitrator Provisions, which have incorporated an entirely new procedure into the arbitration process. As mentioned in section 3.B(ii) above, it was not considered to be an obstacle to the admissibility of an Application based on an arbitration agreement that referred to the Rules in force at the time of the arbitration. However, the emergency arbitrator did not need to rule on the question as the Application was withdrawn before an order was issued.

In another case also discussed above in section 3.B(ii), in which the applicant relied on two post-2012 amendments to a 2011 contract containing an arbitration agreement to argue that its Application escaped the non-retroactivity exception, the emergency arbitrator found that under the applicable law the amendments did not renew the contractual relationship in its entirety, as argued by the applicant, and declined jurisdiction. Interestingly, the applicant requested the same substantive relief from a national court and from the arbitral tribunal, both of which rejected its claim.

Another case in which the non-retroactivity provision gave rise to a jurisdictional challenge involved contracts signed in 2012 as a result of an earlier call for tenders. The responding party argued that the contracts' origins predated 2012 and hence the Emergency Arbitrator Provisions could not apply. As in the previous case, the emergency arbitrator referred to national law and here found that the parties' agreement had been formed in 2012, so the Emergency Arbitrator Provisions did apply.

(iii) Concurrent state court and emergency arbitrator proceedings

There have been a handful of cases in which jurisdictional challenges were made on the basis of clauses providing for the jurisdiction of national courts or concurrent proceedings in national courts. The emergency arbitrators have so far rejected such challenges, often citing Article 29(7) of the Arbitration Rules, which provides that emergency arbitrator proceedings and court proceedings for interim measures are not mutually exclusive.

One such challenge was based on a contractual clause stipulating that the parties accepted the jurisdiction of two national courts for the purpose of provisional and conservatory measures. The responding party argued that this clause deprived the emergency arbitrator of his/her jurisdiction. Dismissing the objection, the emergency

27 In the case in question the applicant filed the Request for Arbitration without a request for an extension.

arbitrator explained that any agreement to opt out of the Emergency Arbitrator Provisions must be explicit and suggested that any agreement upon another pre-arbitral procedure must be unambiguous. He also relied on Article 29(7) to assert his jurisdiction, pointing out that the parties' agreement did not attribute exclusive jurisdiction to the national courts.[28]

In another case, the responding party argued that the contract required requests for interim measures to be submitted to a particular national court. The emergency arbitrator ruled that this did not exclude the parties' right to have recourse to an emergency arbitrator as well. The responding party also argued that the applicant lacked a legal interest in the emergency arbitrator proceedings as it had requested relief from a national court, but this argument was rejected too as the applicant withdrew its request in the national court.

(iv) Standing to apply for emergency arbitrator proceedings

Finally, a further jurisdictional challenge made on different grounds concerned an allegation that the applicant had assigned its rights to a third party and therefore lacked standing to request emergency measures. The emergency arbitrator found that the applicant remained a party to the arbitration agreement and retained standing.

B. Types of measures requested

The type of measure sought is a decisive factor in deciding whether to file for emergency measures before an emergency arbitrator or in a state court.[29]

Like the contracts underlying the disputes in which the ten Applications were filed, the remedies sought in those Applications were wide-ranging. They fall into four categories of interim relief: (i) measures aimed at securing enforcement of the award, (ii) measures aimed at preserving the status quo, (iii) anti-suit injunctions and (iv) orders for interim payment.[30]

(i) Securing enforcement of award

As an example of the first category, in one case the applicant requested that the emergency arbitrator order the responding party not to jeopardize, during the course of the arbitration, funds necessary to fulfil payment obligations under the parties' contract. To support its request, the applicant referred to the responding party's failure to make payments, evidence suggesting that the responding party was attempting to dispose of its assets, and ongoing bankruptcy proceedings involving the responding party's parent company. Other examples of this category of measures include two requests for sums to be placed in an escrow account pending the outcome of the arbitration proceedings.

(ii) Preserving status quo

The second category of measures is illustrated by a case relating to the applicant's purchase of the responding party's equity interest in a third company. The applicant requested the emergency arbitrator to order the responding party to refrain from transferring its equity interest and selling the company's assets to third parties until such time as the dispute over the responding party's right to terminate the purchase agreement had been resolved. In another matter falling into the same category, the relief requested was an order preventing a responding party from calling a bank guarantee pending the resolution of the dispute.

(iii) Anti-suit injunctions

These Applications requested the emergency arbitrator to order the responding parties to refrain from initiating legal action in state courts or to discontinue such action. In two cases, the applicants alleged that the responding parties had commenced court proceedings in breach of an arbitration agreement and sought orders enjoining them from pursuing their actions. In a third case, the applicant sought an order preventing the responding party from commencing proceedings in the state courts.

(iv) Interim payments

This category included an Application requesting the emergency arbitrator to order the responding party to make an immediate payment, subject to its right to seek reimbursement following the arbitration.

C. Orders

The ten Applications filed to date have led to eight orders, of which seven addressed the merits and one dismissed the Application for lack of jurisdiction. Below we consider these orders from four perspectives: their content, compliance with the orders, the issuing process, and any subsequent changes to the orders.

Of the eight orders, four rejected the Application while four granted the relief requested at least in part.[31]

28 The responding party also argued that the subject matter of the dispute was outside the jurisdiction of the emergency arbitrator, This argument was rejected as the relief requested by the applicant did not relate to that subject matter.

29 See S. Besson, *Arbitrage international et mesures provisoires* (Zurich: Schulthess Polygraphischer Verlag, 1998) at 57 ff.; J. Fry, S. Greenberg, F. Mazza, *supra* note 16 at 293-294 (explaining that it is often appropriate for parties to seek relief from state courts 'where third parties are involved, where the measures will be effective only if granted *ex parte*, or where court enforcement is required and is more easily obtained directly from the relevant court', and noting also that an 'arbitral tribunal may even lack the authority to grant the requested relief under the rules of law governing the merits'); N. Voser & C. Boog, *supra* note 14 at 87 ; P. Chalkias, 'Emergency Arbitrator: A Mere "À La Mode" Feature of Modern Arbitration Rules?' Blog Arbitration (2 Feb. 2012) ('[P]arties should bear in mind that the scope of interim measures ordered by national courts is more restricted than the one ordered by arbitral tribunals. Where arbitrators can apply both civil and common law tools in arbitration proceedings, national courts can issue the interim measures prescribed exclusively by their national legislation.'). See also J. Grierson & S. Mechelli, 'The new Emergency Arbitrator Provisions in the 2012 ICC Arbitration Rules' in *McDermott Will & Emery Int'l News* (2012); J. D'Agostino, 'First Aid in Arbitration: Emergency Arbitrators to the Rescue', Kluwer Arbitration Blog (15 Nov. 2011).

In two of the four cases where some form of relief was granted, the parties complied with the terms of the order and the authors are not aware of any attempts to vacate or enforce it in a national court. In another case, the applicant informed the Secretariat that the responding party had not complied with the anti-suit injunction issued in the order, but the suit was ultimately stayed by the court in which it was introduced. In the fourth case, the applicant had informed the Secretariat at the time of writing of its intention to enforce the terms of emergency arbitrator's order in the national courts as the responding party had refused to comply.

Unlike ICC arbitral awards, the orders made by emergency arbitrators are not subject to scrutiny and approval by the ICC Court before being issued. The urgency of emergency arbitrator proceedings does not allow time for formal scrutiny. However, the Secretariat informally scrutinizes orders upon receiving the draft, in order to correct any errors or inconsistencies they may contain and improve their overall quality. In all cases in which an order was rendered, the Secretariat conveyed its comments on the draft within hours of receiving it. The Secretariat has drawn up a checklist which emergency arbitrators are invited to follow to ensure that their orders satisfy minimum formal requirements and contain all necessary information. The checklist has been used for all of the eight orders issued to date.[32]

In two cases modifications to the emergency arbitrator's order were requested pursuant to Article 6(8) of the Emergency Arbitrator Rules. In one of the cases, the emergency arbitrator had ordered the applicant to pay the responding party's legal and other costs, but had not set a date for doing so. As the payment was still outstanding over a month later, the responding party requested that the emergency arbitrator modify the order by setting a date for payment and providing that interest would accrue after that date. In the other case, the responding party claimed a change of circumstances, alleging that the matter was no longer urgent as the applicant had begun to receive the goods to which it related. Both requests were rejected: the first on the grounds that the request was not urgent and could be dealt with by the arbitral tribunal pursuant to Article 29(4) of the Arbitration Rules (the emergency arbitrator considered that, unless there was an error in the order that needed correcting, a request for modification should be subject to a requirement of urgency, like the original Application, and he found such urgency to be lacking; and the second on the grounds that there was in fact no material change in the circumstances.

In none of the arbitrations that have followed any of the ten Applications filed to date has the arbitral tribunal been required to modify, terminate or annul an order, so no order has been modified pursuant to Article 29(3) of the Arbitration Rules.

D. Applicable law and standards

One of the most important and controversial issues in relation to conservatory and interim measures is what law or standards govern the granting of such measures. In the context of ICC emergency arbitrator proceedings, three questions arise: (i) Do the ICC Arbitration Rules in general and the Emergency Arbitrator Provisions in particular establish any substantive standards for the granting of conservatory and interim measures? (ii) Is the emergency arbitrator bound by standards set by national law or any other relevant rules of law? (iii) What requirements are generally applied and do they differ from one country or culture to another?

(i) Standards set by the ICC Rules

The Emergency Arbitrator Provisions do not lay down any substantive standards other than the urgency of the measures requested, which 'cannot await the constitution of an arbitral tribunal' (Article 29(1) of the Arbitration Rules). This is consistent with the approach taken in relation to interim and conservatory measures in the preceding Article 28, which likewise does not set any substantive conditions but simply allows arbitral tribunals, when requested, to grant measures they consider 'appropriate'.[33]

In some cases emergency arbitrators addressed the requirement of urgency when discussing both jurisdiction/admissibility and the merits, while in others they addressed the issue only when dealing with the merits. They have generally avoided defining what is meant by this requirement and referred instead to the particular circumstances of the case. One emergency arbitrator enquired whether applications for emergency measures required an even greater showing of urgency than applications for ordinary interim relief, but did not reach a conclusion as the Application failed for want of another requirement (irreparable harm). This case demonstrates that urgency does not always determine the outcome of the Application, which can be dismissed on other grounds.

30 K.-P. Berger, *International Economic Arbitration* (1993) 339ff; A. Reiner, 'Les mesures provisoires et conservatoires et l'arbitrage international, notamment l'arbitrage CCI' (1998) *Journal du droit international* 859 ff.; J. Fry, S. Greenberg, F. Mazza, *supra* note 16 at 289, 299 and G. Born, *supra* note 1 at 2482-2502 (both listing common types of interim and conservatory relief).

31 This would appear to correspond to a general average. According to the 2012 International Arbitration Survey, *Current and Preferred Practices in the Arbitral Process*, of the School of International Arbitration, Queen Mary, University of London, at 16-17, an average of 35% of applications for measures are granted by arbitral tribunals.

32 The checklist is intended to provide guidance to emergency arbitrators and facilitate their work. It reminds them of the need to identify all persons involved, recount the history of the proceedings, address all issues of admissibility, jurisdiction and costs, and include the decision reached.

33 cf. ACICA Arbitration Rules, Schedule 2, Article 3.5 which lists three conditions: that irreparable harm is likely if the measure is not ordered, that such harm outweighs any possible harm the measure could cause the party it affects, that there is a reasonable possibility the requesting party will succeed on the merits. However, institutional rules generally refer to urgency without listing other criteria; see e.g. ICDR Arbitration Rules, Article 37(2) and (5); SIAC Rules, Schedule 1, paragraphs 1 and 6; NAI Arbitration Rules, Article 42a(1)).

(ii) Standards set by national law or other rules

The relevance of substantive standards and requirements laid down in national laws was undisputed in some of the cases, with the parties agreeing on the criteria to be applied. In other cases, where the issue has been controversial, emergency arbitrators have taken various approaches. One emergency arbitrator found that the relevant national law standards were not meaningfully different from those of international arbitral practice, and relied on both. In at least three other cases, the emergency arbitrators relied more heavily on international arbitral practice. In one case, the emergency arbitrator held that the law governing the contract did not apply, and turned instead for guidance to practice generally followed by international arbitrators, mentioning also the procedural law at the place of arbitration. Another emergency arbitrator found that neither the law governing the contract nor the law governing court procedure at the place of the emergency arbitrator proceedings was applicable and, after finding that the law governing arbitral proceedings at the place of the emergency arbitrator proceedings was silent on standards applicable to the granting of interim relief, he ultimately found guidance in international sources such as arbitral awards grounded in common principles of law in developed states.[34] In another case, the emergency arbitrator similarly disregarded the law governing the contract, noted that the parties had not chosen a law applicable to the arbitral procedure, and concluded that the law of the seat did not require him to take into account any national law; he consequently turned to scholarship and arbitral precedents and emphasized the importance of the factual circumstances of the case.[35]

An interesting issue related to the impact of national laws on the emergency arbitrator proceedings is the relevance of any decision made by a state court. This question has not yet been squarely addressed by an ICC emergency arbitrator. In one case, an applicant's earlier request for interim relief in a national court had been denied, but the emergency arbitrator declined jurisdiction under Article 29(6)(a), so did not have to examine the relevance of the court's decision to the merits of the Application before him. In another case, the emergency arbitrator noted only that the applicant that had filed parallel requests for relief withdrew its application in the national court and did not discuss the relevance of the court decision to the Application before him, which he rejected on the basis of his own analysis of the merits. Given the frequency with which parties seek interim relief in the courts, the question can be expected to arise in the future.[36] Indeed, in over half of the ICC emergency arbitrations to date there have been related proceedings of some sort in state courts.

(iii) General requirements

Irrespective of whether they apply international principles, national law or criteria proposed by the parties, emergency arbitrators have usually considered whether there was a prima facie case for the measures requested and whether there was a risk of irreparable harm. Failure to meet either of these requirements has generally been considered sufficient to reject the applications. It is worth noting that there is a lack of consensus on the characteristics of the irreparable harm necessary for granting interim relief in international arbitration.[37]

Significantly, emergency arbitrators have not felt strictly bound by criteria commonly relied on in international arbitral practice. In one case, the emergency arbitrator identified a minimum number of criteria which all needed to be satisfied in order to grant the requested relief, but he suggested that other criteria could also be relevant. Other emergency arbitrators have taken an even more flexible approach. For instance, one emergency arbitrator decided that while international arbitration practice normally requires there to be a risk of irreparable harm, the applicant was entitled to relief despite the absence of such a risk, as the dispute would otherwise have worsened and granting the request would not cause irreparable harm to the responding party.

E. Costs

The costs system for emergency arbitrator proceedings differs in some respects from that applied to arbitration. Article 7(1) of the Emergency Arbitrator Rules requires an applicant to pay USD 40,000 (comprising USD 10,000 for ICC administrative expenses and USD 30,000 for the emergency arbitrator's fees and expenses) when filing its Application. Article 7(2) empowers the President to increase this amount if necessary, but that power is intended to be used only in exceptional cases and has not so far been used.

The payment of a fixed advance by the applicant alone distinguishes this system from arbitration, where various advance payments, divided between the parties, are payable at different stages of the proceedings (an initial filing fee and a provisional advance on costs by the

34 The emergency arbitrator cited G. Born, 2 *International Commercial Arbitration* (2009) 1978.

35 For examples of orders on interim measures, see *Interim, Conservatory and Emergency Measures in ICC Arbitration*, ICC ICArb. Bull., 2011 Special Supplement.

36 For literature discussing the interaction between national courts and arbitral tribunals with respect to interim measures, see, e.g., C. Price, 'Conflict with State Courts' in Association for International Arbitration, ed., *Interim Measures in International Commercial Arbitration* (2007) 39; A. Yeşilırmak, *Provisional Measures in International Commercial Arbitration* (2005) 107-108; H. Stutzer, 'Interim Measures in Arbitration' in A. Alibekova & R. Carrow, eds., *International Arbitration and Mediation – From the Professional's Perspective* (2007) 146-147; M. Burkhardt, 'Interim Relief in International Arbitration: Switzerland' [2003] *The European Lawyer* 61-63; see generally International Bar Association, Arbitration – country guides, http://www.ibanet.org/Article/Detail.aspx?ArticleUid=a646cf32-0ad8-4666-876b-c3d045028e64, which includes answers to the question of whether court-ordered provisional relief will remain in force following constitution of the arbitral tribunal.

37 G. Born, *supra* note 1 at 2468-2473.

claimant, then the full advance on costs and, where necessary, separate advances on costs by all parties[38]). Also, the advances on costs in arbitration are fixed on an *ad valorem* basis in accordance with the scales provided in Appendix III to the Arbitration Rules.

A further distinction is that the emergency arbitrator fixes the costs of the emergency arbitrator proceedings in his or her order, whereas it is the ICC Court that fixes the costs in arbitration proceedings.[39] There may be times when the modest amount of work done causes the emergency arbitrator to fix his or her fees at a figure lower than the advance in light of the work done, as in a case where the emergency arbitrator declined jurisdiction. On the other hand, the emergency arbitrator cannot increase his or her fees, as this power is reserved to the President pursuant to Article 7(2) of the Emergency Arbitrator Rules.

If no order is made in the emergency arbitrator proceedings, the President determines the costs pursuant to Article 7(5) of the Emergency Arbitrator Rules. This has happened twice so far. In one case, the President had decided that the Emergency Arbitrator Provisions did not apply and fixed the costs at USD 5,000, which is equivalent to the non-refundable portion of the deposit. The remaining USD 35,000 was refunded to the applicant. In the other case, the parties settled and the Application was withdrawn. The President fixed the costs at a figure that reflected the amount of work done by the emergency arbitrator and ICC.

In addition to fixing the costs of the proceedings, the emergency arbitrator's order also determines how those costs should be allocated between the parties. In this regard, emergency arbitrators enjoy wide discretion.[40] They have tended to follow the principle that the costs follow the event. Hence, when an Application has been rejected, the applicant has generally been held responsible for the costs. In cases where the Application has been granted in part and denied in part, they have generally split the costs between the parties in varying proportions.

If a party objects to the allocation of costs ordered by the emergency arbitrator, it is for the arbitral tribunal in ensuing arbitration proceedings to decide on the matter pursuant to Article 29(4) of the Arbitration Rules. In one case, as already mentioned, a request was made for the emergency arbitrator's decision on costs to be modified. The emergency arbitrator had denied the applicant's request for emergency relief and ordered the applicant to pay the responding party's costs. As the applicant failed to pay, the responding party requested the addition of a payment deadline and the accrual of interest after that date. The emergency arbitrator denied the responding party's request, citing Article 29(4) of the Arbitration Rules and ruling that the arbitral tribunal would have the power to deal with such claims.

5. Conclusions

The early implementation of the ICC Emergency Arbitrator Provisions seems to confirm that their inclusion in the Arbitration Rules responded to a need among users of ICC arbitration. They have filled what was perceived as a gap in earlier versions of the Rules, which left parties with little choice but turn to state courts for interim relief before the constitution of the arbitral tribunal.

The effectiveness of an order ultimately depends on its enforceability, which in turn depends on its nature. In a well-known and much-reported case of 2003, the Paris Court of Appeal held that the order made by the 'referee' under the ICC Pre-Arbitral Referee Rules was of a purely contractual nature and could not be equated with an arbitral decision.[41] The Emergency Arbitrator Provisions differ from the Pre-Arbitral Referee Rules in at least three important respects: first, they are an integral part of the Arbitration Rules, automatically applicable unless expressly excluded; second, they refer explicitly to 'arbitrators'; third, their ties with arbitration proceedings are strengthened by the requirement that the applicant file for arbitration within a short time limit.[42] These characteristics may lead courts seized of a request to enforce an emergency arbitrator order to come to a different conclusion from that of the Paris Court of Appeal in 2003,[43] allowing the legal regime applicable to the enforcement of interim measures in numerous jurisdictions to be applied to the enforcement of emergency arbitrators' orders.[44] At the time of writing, the Secretariat is aware of at least one national court that has enforced an emergency arbitrator order.

However, it is important not to exaggerate the importance of enforceability on the effectiveness of orders made by emergency arbitrators. Experience shows that interim measures ordered by arbitrators are often complied with without coercion,[45] and that parties do not readily disregard an interim decision while a decision on the merits is pending. This is all the more true of emergency arbitrator orders, whose effectiveness

38 See ICC Arbitration Rules, Articles 36 and 37.

39 ICC Emergency Arbitrator Rules, Article 7(3)-(4); ICC Arbitration Rules, Article 37(1).

40 ICC Emergency Arbitrator Rules, Article 7(3). The rules of other institutions often provide for the costs to be apportioned by the emergency arbitrator subject to final determination by the arbitral tribunal; see ICDR International Arbitration Rules, Article 37(9); SIAC Rules, Schedule 1, paragraph 10; ACICA Arbitration Rules, Schedule 2, Article 6.3.

41 *Société nationale des pétroles du Congo et République du Congo* v. *Total Fina Elf E&P*, Revue de l'arbitrage, 2003, 1296 (Annot. C. Jarrosson); see also A. Mourre, 'Référé pré-arbitral de la CCI : to be or not to be a judge...', Gaz. Pal., Les Cahiers de l'arbitrage, 2003, No. 1, 8.

42 For arguments in favour of enforcing emergency arbitrator orders, see J. Fry, 'The Emergency Arbitrator – Flawed Fashion or Sensible Solution?' (2013) 7:2 *Dispute Resolution International* 179.

43 G. Hanessian, *supra* note 14 at 360-364 describes US court cases and finds that emergency arbitrator orders and awards are generally enforceable or at least will not be set aside.

44 See A. Carlevaris, 'The Recognition and Enforcement of Interim Measures Ordered by International Arbitrators' (2007) IX *Yearbook of Private International Law* 503.

45 See J. Fry, *supra* note 42.

is strengthened by the fact that arbitral tribunals are empowered to decide on any question determined in the order, including any claims 'arising out of or in connection with the compliance or non-compliance with the order'.[46]

Finally, experience suggests also that an emergency arbitrator's order can be a powerful incentive for the parties to settle. Not just the content of the order, but also the mere availability of emergency arbitrator proceedings may contribute to, and even facilitate, the amicable resolution of the dispute.

46 ICC Arbitration Rules, Article 29(4).