ENSURING EMERGENCY ARBITRATION IS "ALWAYS" AVAILABLE IN EMERGENCIES: THE INTERACTION BETWEEN MULTI-TIER DISPUTE RESOLUTION CLAUSES AND EMERGENCY ARBITRATION

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Abstract

Emergency arbitration is an increasingly popular method of securing interim relief prior to the constitution of arbitration tribunals. However, multi-tier dispute resolution causes can create situations where the right to seek emergency interim relief is impeded due to certain procedural requirements in institutional rules. This essay attempts to identify the procedural requirements that may cause this unintended problem and advises practitioners (and institutions) on efforts that can be undertaken to ensure that the right to seek emergency relief, as stipulated in institutional rules, is not impeded.

Keywords: interim relief, emergency arbitration, institutional arbitration, multi-tier clauses, procedural requirements.

INTRODUCTION

Emergency is arguably the most successful procedural innovation in international commercial arbitration over the last two decades: practitioners and users have moved from a situation where there was academic debate whether interim relief could be provided by arbitral tribunals thirty years ago to almost every major arbitral institution in the world (ICC, SIAC, HKIAC, IAMC, CIETAC, KCAB, AAA among others) now providing for emergency interim relief prior to the constitution of the tribunal. There can be no doubt to the success and popularity of emergency arbitration. All publicly available data

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suggests that the number of cases referred to emergency arbitration has been rising yearly.[2]

Despite its popularity, emergency arbitration, as a concept, is in one way at odds with a central tenet of international arbitration: the parties' ability to nominate the arbitrator who will adjudicate their dispute. Across all major institutional rules, the provisions dealing with emergency arbitration provide that the **institution** and **not the parties** will nominate and appoint the emergency arbitrator. To the author's knowledge, there is not a single institution that even contemplates the possibility of the parties being involved in the process of the appointment of an emergency arbitrator.[3]

The author does argue that party participation in the nomination of the emergency arbitration is essential for the process to have legitimacy or be considered "arbitration". In fact, the extremely short time periods in which the emergency arbitration process is to be completed renders such participation more or less impossible. At the same time, the fact that, across all institutional rules, the decision of the emergency arbitrator is subject to review from the arbitration tribunal (once constituted) means that decisions by the emergency arbitrator (not nominated by the parties), once delivered, are only applicable in the long term, if confirmed by arbitrators nominated by the parties. Irrespective, this distinction must be given appropriate consideration to truly place the emergency arbitration process in the appropriate context, which is often missing in the relevant academic literature.

This essay is not an attempt to navigate questions relating to the legitimacy of the provision of emergency arbitration but instead deals with a simpler question: is there something that could preclude (or at least complicate) a party's right to obtain emergency relief (assuming that the party in question wishes to obtain emergency interim relief **prior** to the constitution of the arbitral tribunal, and the arbitration agreement in question refers the dispute to institutional rules that provide for emergency arbitration).

There is, unfortunately, an obvious (potential) answer to the open-ended question discussed above: the presence of multi-tier dispute resolution clauses. In the 2000s and even early 2010s, multi-tier dispute resolution clauses had taken the international dispute resolution community by storm (much like emergency arbitration has, more recently). The idea that parties in the dispute at least attempt to mediate or negotiate their dispute before they proceed to the (more expensive and adversarial) arbitral process was seen as reasonable by

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[2] Nancy M. Thevenin, *Use of ICC's Emergency Arbitrator Provisions*, American Bar Association, Dispute Resolution Magazine (Apr. 2022); Aditya Singh Chauhan, *Pushing Arbitral Boundaries to Pave Way for Emergency Arbitration*, 11(1) INDIAN J. ARB. LAW 9, 9-16 (2023); Grant Hanessian & E. Alexandra Dosman, *Songs of Innocence and Experience: Ten Years of Emergency Arbitration*, AMERICAN REV. OF ITL. ARB. 215, 215-237 (2018).

[3] SHASHANK GARG, ARBITRATOR'S HANDBOOK 23-24 (LexisNexis 2022).

both users and practitioners, and therefore multi-tier dispute resolution clauses were adopted widely across industry sectors and jurisdictions.[4] This essay aims to guide practitioners and academicians on procedural roadblocks that either complicate or prohibit parties from accessing emergency relief despite having intended access to it.

EMERGENCY ARBITRATION AND MULTI-TIER DISPUTE RESOLUTION CLAUSES: HOW DO THEY INTERACT

The fundamental question that arises from the interaction of multi-tier dispute resolution clauses and emergency arbitration is: if the right to arbitration under the multi-tier dispute resolution clause arises **after** the other tiers (mediation/negotiation etc.) have been completed, and the right to emergency arbitration is a subset of/consequence of the right to arbitration, then, is access to emergency arbitration only available **after** those tiers (mediation/negotiation etc.) have been completed? Put simply, can a party seek emergency arbitration **before** the requirements of the other tiers that precede arbitration in the multi-tier arbitration clause have been completed.

Much of this discussion would then necessarily be shaped by the legal nature of the "other tiers": are those prior tiers condition precedent to the right to arbitration, and if so, what is the consequence of non-compliance? For instance, if the position in a particular jurisdiction/the correct interpretation of a particular contract is that the "other tiers" are not mandatory/do not require to be fulfilled before arbitration can be initiated, then there is no scope or need for a debate: if arbitration can be initiated, then there can be no dispute that emergency arbitration can also be initiated.

As other commentators have noted: "*uncertainty exists as to whether such clauses are binding, whether they constitute jurisdictional conditions precedent to the commencement of arbitrations, and what the consequences of a party's failure to comply are. Indeed, there remain differing opinions among national courts with respect to the effects of non-compliance on an arbitral tribunal's jurisdiction*"[5]

The approach that most jurisdictions now seem to be arriving at is that, (i) not all multi-tier dispute resolution clauses impose **mandatory requirements**/**condition precedents** (with varying requirements of specificity/or other metrics being used to determine whether or not a particular clause imposes a condition

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[4] Vasilis F.L. Pappas & Artem N. Barsukov, *Multi-Tier Dispute Resolution Clauses as Jurisdictional Conditions Precedent to Arbitration*, GLOBAL ARBITRATION REVIEW (Oct. 11, 2022, 12:30 PM), https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/fifth-edition/article/five-years-later-update-multi-tier-dispute-resolution-clauses-jurisdictional-conditions-precedent-arbitration.

[5] *Id.*

precedent) and (ii) irrespective of whether or not there is a condition precedent, the question of whether or not there has been compliance with the "other tiers" (and what the consequence of any potential non-compliance is) is for the arbitral tribunal to determine, not the national courts. This implies, in some manner, that the existence of other tiers in a multi-tier dispute resolution clause does not mean that the parties' consent to arbitration can be seen as conditional on the fulfilment of those tiers.

However, even before one wades into that trickly legal quagmire, there is a more direct, procedural question that would be in front of a party that has a multi-tier dispute resolution clause and intends to seek emergency interim relief: most institutional rules require the concurrent or immediate filing of a request of emergency interim relief and notice for arbitration.[6]

For instance:

(i) The ICC Rules 2021 require that a notice of arbitration must be filed within 10 days of the receipt of the application for the emergency relief.[7]

(ii) The SIAC Rules 2016 require that a party seeking emergency relief can do so by filing an application for interim relief concurrent with or following the filing of a notice of arbitration. As such, a party may not seek interim relief prior to filing the notice of arbitration under the SIAC Rules.[8]

(iii) The HKIAC Rules 2018 require that a party make a request for interim relief either *concurrently* with a notice of arbitration or *following* it—that is, in no situation can a request for interim relief be filed **prior** to the notice of arbitration.[9]

(iv) Similarly, the IAMC Rules require that any request for emergency relief be filed concurrent to or following the filing of the notice of arbitration.[10]

REQUIREMENT THAT REQUEST FOR EMERGENCY ARBITRAL RELIEF BE MADE FOLLOWING OR CONCURRENT WITH THE NOTICE OF ARBITRATION: AN UNNECESSARY BARRIER

The simple issue with requiring a party's request for interim relief be filed concurrently with or following a notice of arbitration is that:

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6 SHASHANK GARG, ARBITRATOR'S HANDBOOK 23-24 (LexisNexis 2022).
7 Article 29 and Appendix V, ICC Rules, 2021.
8 Sch. 1, SIAC Rules, 2016.
9 Art. 23 and Sch. 4, HKIAC Rules, 2018.
10 Sch. 1, IAMC Rules, 2021.

(i) Emergency interim relief is, by its definition, relief that is required **urgently** (there is a risk of dissipation of assets, for instance).

(ii) However, if the multi-tier dispute resolution clause in place requires, for example, that the parties' executives meet and try and resolve the dispute for 30 days, after which, if no breakthrough can be made, an arbitration may be initiated (or possesses any other requirement, whose fulfillment is not possible instantaneously).

(iii) Then, the party seeking emergency interim relief is technically entitled to it, but will not be able to access it, if there is a requirement that the request for interim relief be filled alongside or within a few days of the filing of a notice of arbitration, as the party is **not entitled to file the notice of arbitration**, until the other tiers (mediation/negotiation) have been fulfilled. For instance, if the minimum time required to fulfil the conditions of the other tier is more than 10 days, then, even if the right to initiate emergency arbitration is available to a party, it cannot access it, if under the ICC Rules, it must file the Request for Arbitration within 10 days of the filing of the request for emergency relief; or under the SIAC Rules, where it is required to file such a request concurrently with the Notice of Arbitration.

(iv) However, if a party is seeking emergency interim relief (meaning that it believes that it requires interim relief **even before the tribunal's constitution**), likely, it would not be tenable for the party to wait for that amount of time. The question of whether the right to initiate arbitration (in a specific jurisdiction) is contingent on the fulfilment of the "other tiers" and if those tiers need to be treated as condition precedents will have to be evaluated based on the particular rules of that jurisdiction (as well as the text of that contract); but the requirement of filing a notice of arbitration concurrently or within a fixed period of 10 days after the filing of the request for emergency interim relief under institutional rules can be analyzed on a universal basis: the focus of this essay is to provide analysis of the situation under major institutional rules, while providing comments on issues that practitioners can keep in mind (and suggesting certain amendments to institutional rules).

It is important to understand what the point of such a requirement is in the first place. As was discussed in the introduction, an emergency arbitrator providing interim relief is an arbitrator that the parties have not nominated. As such, it is reasonable for an institution to aim for having such interim relief being in place for the minimum amount of time, that is, providing for expedient constitution of the arbitral tribunal so that arbitrators that the parties have appointed can evaluate whether the interim relief provided by the emergency arbitrator should continue to be in place. To that extent, requiring that a notice of arbitration be filed alongside the request for emergency interim relief serves

the simple purpose of kickstarting the process of the constitution of the arbitral tribunal at the same time, so that the Tribunal can be constituted, and can then review the decision of the emergency arbitrator is a reasonable position.

However, suppose the nature of this requirement is absolute. In that case, it does not account for situations discussed above (cases with multi-tier clauses), leaving a party that has opted for a multi-tier clause containing an institutional regime with emergency arbitration without access to emergency interim relief. What possible solutions exist?

THE WAY OUT: AMENDMENT OF INSTITUTIONAL RULES OR UTILIZATION OF ALREADY EXISTING PROVISIONS

One solution is for institutional rules to recognize this as an issue and provide the necessary flexibility; have sufficient protection to ensure that the arbitration tribunal is constituted expediently, while recognizing that in some situations, allowing emergency relief prior to the filing of the notice of arbitration is necessary. The ICC Rules are an example of this approach:

(i) The ICC rules do not require that a request for emergency interim relief be filed concurrently with or following the filing of the notice of arbitration. This means that a party is free to pursue emergency relief without filing the notice of arbitration.

(ii) The ICC Rules, then go on to provide additional flexibility (and preserve the purpose of the requirement being discussed in this section) by allowing the emergency arbitration to proceed without any requirement to file a notice of arbitration but requiring that it be filed within 10 days of the filing of the request for emergency interim relief, "*unless the emergency arbitrator determines that a longer period of time is necessary.*"[11]

(iii) This means that a party cannot abuse the emergency arbitration provision by filing frivolous applications, and that an arbitral tribunal appointed by the parties will be able to review any decision passed by the emergency arbitrator soon (as the notice for arbitration must generally be filed within 10 days of the filing of the request for emergency interim relief.)

(iv) However, at the same time, if the situation in that particular case is one where the existence of a pre-arbitral condition (or the "other tiers") requires that a party undertake certain negotiations/mediation processes which are longer than the 10-day period, then the party seeking emergency interim relief can make an application to the emergency arbitrator to extend that 10-day period.

[11] Appendix V, ICC Rules, 2021.

Unfortunately, as far as the author is aware, the ICC Rules are the only set of institutional rules, that provide for this kind of flexibility explicitly. SIAC, which is currently in the process of revising the 2016 Rules, will be amending the SIAC Rules to achieve a similar result. In fact, the current draft of the revised Rules, as available on the SIAC website, explicitly recognizes that an application for emergency interim relief may be filed prior to the filing of the notice of the arbitration, instead of the concurrent filing requirement in the 2016 SIAC Rules.

So, what options are available to a party seeking emergency interim relief, in a situation where the institutional rules governing the arbitration provide for a notice of arbitration to be filed concurrently or prior to the request for emergency interim relief? The solution for practitioners may lie in general empowering provisions in most institutional rules, which provide the secretariat of the institution (or the Registrar) power to extend deadlines stipulated in the institutional rules. That is, instead of filing the notice of arbitration alongside the request for emergency interim relief, what should be filed is an application for the secretariat or the registrar to extend the deadline for filing a notice of arbitration till the time it would take the party to comply with the requirements stipulated in the "other tiers".

The basis of this approach is that the stipulation in institutional rules that a notice of arbitration be filed concurrently with or prior to a request for interim relief is fundamentally like a deadline or a time limit: the rule in question, just instead of fixing a time period, as is common with deadlines/time limits, fixes an event (filing of the emergency interim relief application) by which the notice of arbitration must be filed. To that end, considering that the institutional rules empower their secretariats to extend any "deadlines", or "time-limits" stipulated by the rules, that power should be sufficient to extend the requirement that a notice of arbitration be filed concurrently with or prior to a request for interim relief

In the author's view, such an application would be possible under most major rules:

(i) Under the SIAC Rules 2016, Rule 2.6 empowers the Registrar to "*at any time extend or abbreviate any time limits prescribed under these Rules.*"[12]

(ii) Under the HKIAC Rules 2018, Article 3.6 empowers the HKIAC to "*if the circumstances of the case so justify*" amend any time limits "*provided for in the rules.*"[13]

[12] R. 2.6, SIAC Rules, 2016.
[13] Art. 3.6, HKIAC Rules, 2018.

(iv) The IAMC Rules are similar to the HKIAC Rules 2018, and Rule 4.4 states that: "*If the circumstances of the case so justify, the Registrar may amend the time limits provided for in these Rules, as well as any time limits that the Registrar has set, whether any such time limits have expired.*"[14]

(v) As such, any application for emergency interim relief (in a situation where the notice of arbitration cannot be filed, as the "other tiers" have not been completed) could be accompanied with an application to the Registrar to extend the time limit by which the notice of arbitration needs to be filed.

To that extent, while the author is of the opinion, that certain general provisions in the rules of most major institutions could possibly be used to ensure that a party is not denied access to emergency interim relief simply because the dispute resolution clause in question is a multi-tier one. However, the better solution is for institutions to revise their rules to explicitly clarify that a request for emergency interim relief can be filed **prior** to the filing of the notice of arbitration, as the ICC Rules already do, and the SIAC Rules have proposed to do in their next edition.

[14] R. 4.4., IAMC Rules, 2021.