The enforceability of interim measures granted by an emergency arbitrator in international commercial arbitration

8. Summary and conclusion

International commercial arbitration has continued to be a preferred method of resolving cross-border disputes in international commerce.[1] The guaranteed enforceability of arbitral awards is considered the "most valuable characteristic".[2] With the growing complexity and globalization of international commerce, parties expect not only a final resolution of disputes but they also expect that their rights can be protected pending final arbitral awards. Before the introduction of the emergency arbitrator mechanism by the ICDR in 2006, parties faced difficulties in seeking interim measures in urgent situations before the constitution of an arbitral tribunal. The emergency arbitrator mechanism fills this gap effectively. However, one of the challenging areas of international commercial arbitration is the enforceability of interim measures, which is also a vital concern with the emergency arbitrator mechanism.

This thesis researched whether the interim measures granted by an emergency arbitrator are and should be enforceable. To answer this main research question, seven sub-questions were addressed in the thesis.[3]

8.1. Research findings

8.1.1. The applicable procedural framework of the emergency arbitrator mechanism

In Chapter 2, the thesis compared different emergency arbitrator provisions in six chosen arbitral institutions. They were the ICC, the ICDR, the HKIAC, the LCIA, the SIAC, and the SCC. As the leading and preferred arbitral centers, the six chosen arbitral institutions represent the current majority of the emergency arbitrator provisions. From the statistics provided by the institutions, the number of emergency arbitrations has increased steadily since the adoption of the mechanism in 2006.

From the comparison, it can be seen that the emergency arbitration procedures all share "a common, general procedural framework",[4] despite having various unique characteristics depending on each arbitral institution. The common features of

[1] See Chapter 1.1.
[2] Queen Mary University of London and White & Case LLP, 2018 International Arbitration Survey: The Evolution of International Arbitration, p. 7, available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (16 June 2020).
[3] See Chapter 1.2.
[4] See Chapter 2.8.

emergency arbitration include the following aspects. Firstly, an application for the emergency arbitrator mechanism commences before the constitution of an arbitral tribunal. If parties do not exclude the emergency arbitrator mechanism expressly, it applies automatically due to the opt-out approach. Secondly, the emergency arbitrator mechanism is a fast-track procedure. The appointment of an emergency arbitrator by arbitral institutions is extremely efficient. The decision-making proceedings are also speedy. Thirdly, the emergency arbitrator mechanism guarantees procedural fairness. Parties have opportunities to challenge the appointment of an emergency arbitrator. Emergency arbitrators have to conduct the proceedings impartially and independently. Fourthly, all emergency arbitrators enjoy a wide range of discretion. They can determine their own jurisdictions and issue interim measures if necessary and appropriate. Lastly, the decisions issued by an emergency arbitrator are binding upon the parties. An arbitral tribunal can modify, suspend or terminate the decisions made by an emergency arbitrator in the same dispute. The research of this thesis was built on the basis of this common framework adopted by arbitral institutions.

8.1.2. Attitudes of state courts regarding the emergency arbitrator mechanism

Chapter 3 discussed the different attitudes of state courts regarding the emergency arbitrator mechanism. There are three groups of jurisdictions having distinctive attitudes towards the emergency arbitrator mechanism. Some jurisdictions adopt a positive view of the emergency arbitrator mechanism. Those jurisdictions include Hong Kong SAR, New Zealand, the Netherlands, and Singapore. The legislation in these jurisdictions acknowledges the application of interim measures granted by an emergency arbitrator implicitly or explicitly.

Some jurisdictions have a conservative attitude to the emergency arbitrator mechanism. This category of jurisdictions includes the Czech Republic, Finland, Italy, Mainland China, and Thailand. Due to the historical limitation of the power to grant interim measures in arbitral proceedings, only state courts are empowered exclusively to grant interim measures in arbitration proceedings in these jurisdictions. As a result, the enforceability of interim measures issued by an emergency arbitrator is unlikely.

The rest of the jurisdictions do not have a definitive answer regarding the doubts of the enforceability of interim measures provided by an emergency arbitrator. A typical example is the United States. Generally, arbitrators have the authority to issue interim measures as state courts do. However, the approach is undetermined regarding the emergency arbitrator mechanism. The legislation of the United States, on both federal and state levels, is silent on this issue. Although most of the case law recognized the enforceability of the interim measures granted by an emergency arbitrator, there were exceptions, for example, *Chinmax Medical Systems Inc., v. Alere San Diego, Inc.*[5]

[5] See Chapter 3.4.1.2.10.

Considering the different views of the jurisdictions, the tendency is that more and more jurisdictions allow for the power of arbitrators to issue interim measures and support the enforceability of interim measures granted by arbitrators including emergency arbitrators. However, the conflicts between different jurisdictions regarding the enforceability of interim measures granted by an emergency arbitrator still exist. When multiple legal systems are involved in a dispute, there will be potential legal risks that certain interim measures issued by an emergency arbitrator cannot be enforced in some jurisdictions where enforcement is sought.

8.1.3. The legal status and source of the power of an emergency arbitrator

Chapter 4 explored the legal status and source of the power of an emergency arbitrator and answered the question of whether an emergency arbitrator is an arbitrator. Currently, there is no universally agreed definition regarding the legal status of an arbitrator. Several theories have been examined to address the issue: the jurisdictional theory, the contractual theory, the hybrid theory, and the autonomous theory. Nevertheless, an arbitrator is both of a jurisdictional and contractual nature. The authority of an arbitrator comes not only from party autonomy but also the governing law of the arbitration.

An emergency arbitrator plays the same role as a regular arbitrator in issuing interim measures. The foundation of the emergency arbitrator mechanism is the agreement between the parties, which reflects the contractual nature of an emergency arbitrator. At the same time, the jurisdictional nature can be found in the principle of competence-competence in the emergency arbitration, the requirement of impartiality and independence of the emergency arbitrator proceedings and the binding nature of an emergency arbitrator's decision.

Therefore, with respect to issuing interim measures pending the constitution of a tribunal, an emergency arbitrator acts as a proper arbitrator, and the emergency arbitrator's decision needs to be seen as an arbitrator's decision.

8.1.4. The criteria followed by an emergency arbitrator to render interim measures

Since there are no universal standards applied to the issuance of interim measures, Chapter 5 analyzed the criteria followed by an emergency arbitrator to grant interim measures in international commercial arbitration. After examining the law governing arbitration, the law governing the substance of disputes, the law of the place where the enforcement is sought, and international standards, the thesis suggests applying international standards as guidance for emergency arbitrators to grant interim measures.

With the help of the existing available emergency arbitration cases published by arbitral institutions, mainly the SCC and the ICC, as well as available interim measures granted by arbitral tribunals, Chapter 5 proposed the following legal criteria. In order to obtain an interim measure under the emergency arbitrator mechanism, an emergency arbitrator has to establish *prima facie* jurisdiction over a dispute. The claiming party for the interim measure has to present a good arguable case or, in other words, a likelihood of success in the merits. Moreover, in the emergency arbitrator mechanism, it is necessary to prove urgency in the case, *i.e.*, the requested interim measure is urgently needed to prevent substantial harm before the constitution of an arbitral tribunal. Lastly, an emergency arbitrator has to consider the proportionality of the claim, requiring that "the possible injury caused by the requested measure must not be out of proportion with the advantage which the applicant hopes to derive from".[6]

8.1.5. Essential elements for the interim measures granted by an emergency arbitrator to be enforced

In order to enforce the interim measures granted by an emergency arbitrator, state courts have to rely either on international conventions or on local arbitration laws. In Chapter 6, essential elements for the enforcement of interim measures granted by an emergency arbitrator were examined.

By looking into international conventions and arbitration laws, and taking into account the legal status of an emergency arbitrator (Chapter 4) and procedural fairness guaranteed by the emergency arbitrator mechanism (Chapter 2.4.3.), it was clear that some barriers block the enforceability of interim measures granted by an emergency arbitrator. These barriers are, namely, the arbitrability of the claims related to interim measures, the jurisdiction of an emergency arbitrator, the binding nature of interim measures, and public policy concerns.

For the arbitrability issue, the current trend is to minimize the application of inarbitrability, especially in the context of international commercial arbitration.[7] The arbitrability of claims regarding interim measures should not be a barrier to enforceability. Furthermore, regarding jurisdiction, as long as an emergency arbitrator does not violate the mandatory law applicable to arbitration, he or she has jurisdiction to issue interim measures in accordance with the agreement between the parties.

Another crucial concern relates to the finality test from the New York Convention 1958. However, in the determination of whether the interim measures issued by an emergency arbitrator are final or not, the doctrine of "substance over form" shall be adopted. An interim measure is "an end in itself, for its very purpose to clarify the

[6] See Chapter 5.4.4.
[7] See Chapter 6.2.1.3.

parties' rights in the 'interim' period pending a final decision on the merits".[8] Lastly, public policy concerns can be a potential risk for the enforceability of interim measures granted by an emergency arbitrator since different jurisdictions adopt different standards regarding what constitutes public policy. It is worth noting that most jurisdictions exercise the public policy exception with extreme caution, because it is the last resort to refuse the recognition and enforcement of arbitral decisions.[9]

Although the interim measures granted by an emergency arbitrator should be enforced despite those potential barriers indicated in Chapter 6, a better way to guarantee the enforceability is to harmonize on an international level.

8.1.6. The possibility of the harmonization of the emergency arbitrator mechanism

Chapter 7 explored the possibility of harmonization under the emergency arbitrator mechanism in order to avoid conflicts between different practices in jurisdictions and guarantee the enforceability of interim measures granted by an emergency arbitrator as discussed in previous chapters. Harmonization is always an on-going controversial topic in legal research. In the scenario of international commercial arbitration, harmonization is beneficial, because it can provide a neutral interface for dispute resolution, a predictable legal system, and modernization and a reform of arbitration laws in different jurisdictions. Harmonization does not have to compromise the benefits of legal diversity. With a minimum harmonization of the emergency arbitrator mechanism, regulatory competition and innovation can be retained within the legal systems in various jurisdictions. Hence, harmonization is preferred especially in the field of international commercial arbitration.

Additionally, the emergency arbitrator mechanism excels in issuing interim measures before the constitution of an arbitral tribunal. Compared to state courts, the emergency arbitrator mechanism maintains the advantages of arbitration, while providing a more accessible approach based on a time-saving procedure. Compared to the ICC Pre-Arbitral Referee Procedure, parties do not need to agree separately on the adoption of the emergency arbitrator mechanism. Parties can also obtain an efficient and binding decision from an emergency arbitrator. Compared to expedited arbitration, the emergency arbitrator mechanism has fewer limits, but it offers more certainty and predictability.

Therefore, given the importance of interim measures before the establishment of arbitral tribunals in urgent situations, it is desirable to provide a harmonized system to guarantee the enforceability of interim measures granted by an emergency arbitrator in international commercial arbitration.

[8] See Chapter 6.2.3.3.2.
[9] See Chapter 6.2.4.