

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

Citation for published version (APA):

Zhang, J. (2020). *The enforceability of interim measures granted by an emergency arbitrator in international commercial arbitration*. ProefschriftMaken. <https://doi.org/10.26481/dis.20201130jz>

Document status and date:

Published: 01/01/2020

DOI:

[10.26481/dis.20201130jz](https://doi.org/10.26481/dis.20201130jz)

Document Version:

Publisher's PDF, also known as Version of record

Please check the document version of this publication:

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VALORISATION ADDENDUM

An addendum on valorisation to the thesis is in accordance with Article 22.5 of Regulations for Obtaining the Doctoral Degree Maastricht University 2018. The valorisation addendum addresses relevance, target groups, products, innovation, and implementation of the doctoral thesis, revealing “the process of creating value from knowledge, by making knowledge suitable and/or available for social (and/or economic) use and by making it suitable for translation into competing products, services, processes and new activities”.¹

1. Relevance: What is the social and/ or economic relevance of the research results?

The emergency arbitrator mechanism makes interim measures possible for parties involved in international commercial arbitration before the constitution of arbitral tribunals. When facing urgent situations, parties will not always prefer to turn to state courts to seek interim measures.² Usually, they want to stay in arbitration and continue their proceedings with arbitral bodies as they agreed in the arbitration agreement. Before introducing the emergency arbitrator mechanism, parties do not have many choices,³ and those choices are always not ideal and not even satisfactory.⁴

However, with the development of the emergency arbitrator mechanism, the enforceability of interim measures made by an emergency arbitrator is questioned. This uncertainty leads to the hesitation of legal practitioners to apply the emergency arbitrator mechanism in practice.⁵ Interim measures are used to protect parties’ rights pending a final arbitral award and guarantee the final decision. If the enforceability of interim measures made by an emergency arbitrator cannot be ensured, it may also lead to a meaningless final award. The recognition and enforcement of foreign arbitral decisions are essential to the prosperity of modern international commercial arbitration. International commercial arbitration has contributed to the long-term development of cross-border transactions and trade. That is to say, to some extent, the enforceability of interim measures made by an emergency arbitrator will inevitably affect international trade.

The social and economic relevance can also be reflected by the discussion and proposals in this thesis regarding harmonizing the enforceability of interim measures

¹ Article 22 of Annex 4, Regulations for Obtaining the Doctoral Degree Maastricht University 2018.

² See Chapter 7.3.2.1.

³ See Chapter 2.7.

⁴ See Chapter 7.3.2.

⁵ See Chapter 1.1.3.

granted by an emergency arbitrator in Chapter 7. Under the current legal framework, there is no international convention regulating the enforceability of interim measures made by arbitrators despite different approaches taken by jurisdictions. Under the particular circumstances of international commercial arbitration, when multiple legal systems play a part in a dispute, legal conflicts are highly possible. Parties will have to face unpredictable results when seeking enforcement of interim measures in different jurisdictions. The mandatory and non-mandatory methods of harmonization proposed by the thesis took the interests of parties and various jurisdictions into account, filling the gap caused by different regulations regarding the enforceability of interim measures at the international level, and avoiding potential legal conflicts that may cause extra expenses.⁶

2. Target Groups: To who, in addition to the academic community, are the research results of interest and why?

For legal practitioners, especially lawyers in international commercial arbitration, the thesis provided a systematic analysis regarding the enforceability of interim measures granted by an emergency arbitrator thoroughly. The thesis provided clear guidance for arbitral proceedings involving the emergency arbitrator mechanism. Lawyers will have a better view of the current practices in different institutions and jurisdictions.

Legislators from different jurisdictions can understand and learn from the practice of the emergency arbitrator mechanism across the world. To attract business and build an arbitration-friendly environment, they will consider improving their current legislation to follow the development of international commercial arbitration in response to the demand of parties.

Arbitral institutions can not only learn from the comparison between different institutional rules conducted in Chapter 2, but they can also think of revising relevant provisions, for example, the ones concerning legal criteria for emergency arbitrators to render interim measures.⁷ Better institutional rules in arbitration are beneficial to parties, to the reputation of arbitral institutions, and in the end, to the sustainable development of the whole arbitration community.

International organizations, especially the UNCITRAL, have to consider leading the harmonization of the enforceability of interim measures granted by an emergency arbitrator. To promote international trade and free flow of arbitral decisions between jurisdictions, international organizations have been made sustaining efforts. Such efforts have not included the harmonization of the enforceability of interim measures. The thesis proposed several possibilities for a future international instrument to solve this long-lasting problem in international commercial arbitration.

⁶ See Chapter 7.4.

⁷ See Chapter 5.4.

3. Activities/ products: Into which concrete products, services, processes, activities or commercial activities will the research activities be translated or shaped?

The comparison and study related to the emergency arbitrator provisions help to revise and polish current institutional rules. Although the emergency arbitrator mechanism has been introduced by the ICDR over a decade,⁸ many aspects can be improved based on the changing needs of parties and previous experiences. The thesis is a valuable study for institutions. Arbitral institutions can make their rules clearer regarding the status of emergency arbitrators, the legal criteria applied in the issuance of interim measures, and the enforceability of interim measures made by an emergency arbitrator. Those aspects have been discussed as sub-research questions in this thesis.

For legislators in different jurisdictions, arbitration laws are another possible “products” arising from the thesis. Not all jurisdictions have precise regulations for interim measures in international commercial arbitration and the emergency arbitrator mechanism. Meanwhile, the enforceability of interim measures made by arbitrators is one of the critical issues that affect the efficiency of arbitral proceedings. Hence, the research can be used as guidance for jurisdictions to amend their existing arbitration laws.

As has been stated, there is not a single international instrument containing provisions of the emergency arbitrator mechanism. It leaves space for future efforts at the international level. The proposals of harmonization of the enforceability of interim measures rendered by emergency arbitrators made in the thesis gave international organizations inspirations to draft future international instruments, including international conventions, protocols, model laws, and rules.

4. Innovation: To which extent can the research results be considered as innovative compared to existing proposals?

The first main innovation is the two comparisons in Chapters 2 and 3 of arbitral institutional rules and practices in different chosen jurisdictions, respectively. In previous research concerning the emergency arbitrator mechanism, no one has conducted a detailed and systematic study regarding these two comparisons. Most of them only chose one aspect to discuss briefly. In this thesis, all versions of institutional rules with the emergency arbitrator mechanism of the ICC, the ICDR, the HKIAC, the LCIA, the SIAC, and the SCC have been discussed in depth. Three chosen jurisdictions, Singapore, Mainland China, and the United States, representing three categories of jurisdictions worldwide, have been examined with their arbitration laws and specific case law regarding the emergency arbitrator mechanism.

⁸ See Chapter 1.1.1.

Another main innovation is the proposed approach of harmonizing the enforceability of interim measures granted by an emergency arbitrator in international commercial arbitration. So far, the previous research did not cover the harmonization issue. After discussing all relevant issues regarding the enforceability of interim measures granted by an emergency arbitrator and evaluating the balance between diversity and harmonization in international commercial arbitration, mandatory and non-mandatory methods to harmonize the enforceability issue have been proposed.

5. Planning and Implementation: How will this valorization plan be shaped?

Institutional rules update regularly based on the changing needs of arbitral parties and the entire legal environment. Further research will be continued following the latest updates in international commercial arbitration, for example, the upcoming LCIA and the ICC arbitration rules.

The research of the enforceability of interim measures granted by emergency arbitrators will be combined and put into specific circumstances, for example, under the Belt and Road Initiative.⁹ The promotion of international collaboration is essential in resolving commercial disputes under the Belt and Road Initiative to protect the legal rights of parties. It also encourages the establishment of widely recognized dispute resolution mechanisms and dispute resolution institutions and the involvement of arbitral institutions in international commercial arbitration. State courts must provide judicial assistance and support, including actively recognizing and enforcing arbitral awards after necessary judicial review. In this case, the adaption of the emergency arbitrator mechanism in such a regional scope is interesting to look into.

Furthermore, future research may include the study of interim measures rendered by state courts in aid of international commercial arbitration. It will lead to a more complete study and a full picture regarding interim measures in international commercial arbitration. Arbitration involves many practical concerns. Hence, some empirical research may be included as well, such as surveys, interviews, and analysis of data concerning the issuance of interim measures by state courts and arbitrators.

⁹ Belt and Road Portal, available at <https://eng.yidaiyilu.gov.cn/> (1 November 2020).