COMMISSION ON ARBITRATION AND ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

ICC COMMISSION REPORT

EMERGENCY ARBITRATOR PROCEEDINGS

INTERNATIONAL CHAMBER OF COMMERCE

International Chamber of Commerce (ICC)
33-43 avenue du Président Wilson
75116 Paris, France
www.iccwbo.org

The views and recommendations contained in this publication originate from a Task Force created within ICC's Commission on Arbitration and ADR. They should not be thought to represent views and recommendations of the ICC International Court of Arbitration or the ICC International Centre for ADR, nor are they in any way binding on either body.

Publication date: April 2019

Contents

Emergency Arbitrator Proceedings

Report of the ICC Commission on Arbitration and ADR Task Force on Emergency Arbitrator Proceedings

NOTE TO READERS

The views expressed and statements made in this Report are those of their authors, Task Force and Commission members. The Report, including its Annexes, should not be construed as creating any duty, liability or obligation on the part of ICC and its constituent bodies, including the International Court of Arbitration, the International Centre for ADR and the ICC Commission on Arbitration and ADR. The material in the table in Annex II was largely provided by ICC National Committees and is meant as a general overview only; ICC and its constituent bodies should not be held responsible for the accuracy of its information. This Report does not endorse any particular approach on how to conduct emergency arbitrations and does not impose any binding obligations on emergency arbitrators.

I. INTRODUCTION

A. Introductory remarks

1. The Task Force on Emergency Arbitrator ("EA") Proceedings (the "Task Force") was set up to study the experience with EA proceedings and to analyse all aspects, including procedural and substantive issues, that may arise in EA proceedings in order to identify and examine any emerging trends.

2. Over the last decade, EA proceedings have rapidly been adopted by several institutions. ICC adopted its own version - Article 29 and Appendix V (together, the "EA Provisions") - as part of the 2012 revision of the ICC Arbitration Rules. However, the 2012 revision was not the ICC's first attempt to address pre-arbitral relief: in 1990, ICC introduced a Pre-Arbitral Referee Procedure still in force today. While the Pre-Arbitral Referee Procedure is one that can be opted into and presumably for that reason was quite rarely applied in practice, following the 2012 revision, the EA Provisions are part of the ICC Rules themselves and apply to arbitration agreements under the Rules concluded after 1 January 2012, unless the parties have affirmatively opted out.[1]

3. Although the procedure and conditions for obtaining emergency interim relief may vary somewhat between different rules, many institutions seem to have determined that EA proceedings fill a perceived void and satisfy a demand from users. This is borne out by the ICC experience. By 30 April 2018, six years after the EA Provisions were implemented, 80 ICC Applications for Emergency Measures ("Application") had been filed.

4. Absent EA Provisions, or agreement on any Pre-Arbitral Referee Procedure, users requiring urgent interim relief had either to turn to state courts with jurisdiction or wait until the arbitral tribunal is constituted. For some forms of urgent interim relief, state courts are the only viable option regardless of the existence of EA Provisions, e.g. where *ex parte* relief is required and available in state courts or where measures sought concern or affect third parties. However, for other more common types of interim relief the state courts have the inherent downsides of loss of confidentiality and dependency on the local procedural rules that the parties had sought to avoid by selecting arbitration. Absent EA Provisions, the remaining option of awaiting constitution of the tribunal may take too much time in urgent cases and thereby undermine the very utility of seeking emergency relief.

5. Institutions, such as ICC, which have adopted the EA mechanism to fill this lacuna, now have sufficient practical exposure to EA proceedings to have developed a body of learning on how to increase predictability of EA proceedings, improve the process to best suit users' needs, protect due process and avoid abuses, stimulate efficiency and facilitate enforcement of – and compliance with – EA Orders. The Task Force Report seeks to contribute to this goal.

6. The Report is intended to be descriptive rather than prescriptive. The Task Force has sought to collate and analyse practical experience with the ICC EA process, to place such experience in the context of EA proceedings under other rules, and to offer possible solutions to some of the problems identified by the Task Force and ICC Commission members. This Report thus seeks to offer guidance to users, counsel and EAs and to facilitate the use of EA proceedings through increased transparency and predictability. Such guidance does not however impose any binding obligations on EAs.

1 Article 29(6) of the ICC Arbitration Rules. The EA Provisions remain unchanged in the ICC Arbitration Rules in force as from 1 March 2017 (hereinafter the "ICC Rules").

B. Summary of key conclusions

7. The Task Force analysis of the first 80 ICC EA cases and 45 National Reports reveals that there is no universal approach to EA proceedings. This variety is apparent with respect to threshold issues, procedural matters, substantive standards and post-emergency arbitration considerations, and is first and foremost the consequence of the choice made in the ICC Rules to leave to the EA a considerable degree of discretion and flexibility. Acknowledging this advantage, the Report intends to contribute to the predictability of EA proceedings while leaving the EA's flexibility intact.

8. A key finding based on the cases analysed in this Report is that relief has been granted only in a minority of ICC EA Applications. But this may not, of itself, be surprising: the nature of interim relief is such that it is only in exceptional cases that urgent relief is justified. Indeed, this appears to have been the experience with EA mechanisms under most other arbitral rules. It appears from the analysed cases that EAs are minded to strictly apply particular threshold requirements set by the EA Provisions, such as the key requirement that relief "cannot await the constitution of an arbitral tribunal" (Article 29(1)). Yet, EAs have in multiple cases been persuaded to grant interim relief and the EA Provisions are thus an important addition to the ICC Rules, filling a previously existing void.

1) Threshold issues

9. Issues of applicability, jurisdiction and/or admissibility have proven important as they were involved in 56 of the first 80 ICC EA cases studied, with 21 EA Applications rejected in whole or in part on these grounds. Of these 21 EA Applications, three were rejected in whole or in part by the President of the ICC International Court of Arbitration (the "President of the ICC Court" or "President") as part of the President's "applicability" test pursuant to Appendix V, Article 1(5) of the ICC Rules.

10. There is no general consensus on the exact definitions of what constitutes "applicability", "jurisdiction" or "admissibility". For example, some EAs have reviewed the criteria set forth in Articles 29(5) and 29(6) as part of their analysis of the "admissibility" of the Application (pursuant to Article 6(2) of Appendix V) along with the criterion of Article 29(1), while others consider "admissibility" an issue of "jurisdiction". Likewise, many of the topics raised as jurisdictional may also be considered as affecting admissibility and applicability.

11. In order to give guidance to parties and EAs on how to address those preliminary and procedural issues, a summary of the Task Force's findings is set out below.

12. **As to the applicability of the ICC Rules.** Under the ICC Rules (Article 1(5) of Appendix V), the President of the ICC Court "considers" on the basis of "the information contained in the Application" whether the EA Provisions apply with reference to Articles 29(5) and 29(6). These criteria have to be understood as an "applicability test" of the EA Provisions. Arguably, this applicability test does not bind the EA if the Application does proceed, as the test is performed only on the basis of the Application as such and without having the benefit of the respondent's views. Thus, jurisdictional and admissibility issues remain to be decided by the EA, after the President's decision on the applicability of the EA Provisions.

13. Importantly, while the President has on very rare occasions used his power to decide that the EA Provisions do not apply and thus rejected the Application, the President has in some cases allowed the EA Application to go forward subject to the EA's final determination on threshold issues under Article 29(5) or 29(6). Even in the absence of a specific request, the EA will have to decide on such threshold issues if – as this has rather frequently been the case – the respondent invokes the EA's lack of jurisdiction based on Article 29(5) or 29(6).

14. **As to the jurisdiction of the EA.** Under the ICC Rules (Appendix V, Article 6(2)) the EA "shall determine … whether the emergency arbitrator has jurisdiction to order Emergency Measures". No explicit test is set forth in the ICC Rules to assess such jurisdiction however. EAs have often considered elements of Articles 29(5) and 29(6) as part of their threshold analysis on jurisdiction or even considered elements of Article 29(1). The Task Force considers the jurisdictional test to be performed by the EA to include whether an arbitration agreement concluded under the 2012 ICC Rules exists and to additionally require an analysis of the elements of Articles 29(5) and 29(6) of the ICC Rules where the respondent raises issues related to these elements. Whether or not the latter is part of a jurisdictional test or to be qualified as a separate threshold issue may depend on the specific national law or laws relevant to the Application. It is arguable that applicability overlaps with jurisdiction issues. As such, the same issues analysed by the President of the ICC Court when determining applicability may fall to the EA to be determined when analysing jurisdiction. The Task Force does not consider the urgency test of Article 29(1) to be a jurisdictional test, since this test focuses on the measure sought in the particular circumstances rather than on the more general question of the existence and scope of the arbitration agreement.

15. Many jurisdiction challenges have been raised in the context of one or more objections based on multi-tiered dispute resolution clauses, date of the agreement, concurrent jurisdiction, non-signatory/ standing, or questions of the scope of relief/authority of the EA. Each of these objections turns on its own particular facts and application of relevant legal principles.

16. While there is no specific deadline in the EA Provisions for making jurisdictional objections, parties and EAs are encouraged to raise jurisdictional issues as early as possible to allow them to be considered to the fullest possible extent despite the time constraints inherent to EA proceedings.

17. **As to the admissibility of the Application.** Under the ICC Rules (Article 29(1)), a party may make an Application for emergency measures when it "needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal", and thus this criterion is to be understood as an admissibility test. After undertaking a *prima facie* assessment of whether the requested measure could await the constitution of the arbitral tribunal at the admissibility stage, EAs would subsequently further consider urgency when ruling on the merits of the Application.

18. The Task Force considered that "urgency", as a test to be met on the merits of the Application, is not to be measured only by reference to the test of whether the measures requested "cannot await the constitution of an arbitral tribunal" as set forth in Article 29(1) of the ICC Rules. Rather, the reference to the relief not being able to await the constitution of the tribunal provides temporal guidance on one aspect of what may constitute the necessary "urgent interim or conservatory measures".

19. The Task Force also supported treating urgency separately, first as part of the admissibility requirement of Article 29(1), and second, as part of the merits. In this way, the parties can consider arguing urgency afresh to the fully constituted arbitral tribunal (the admissibility requirement of Article 29(1) by definition does not apply in that context) and such approach may also limit any potentially preclusive effect an EA finding of urgency (or lack of urgency) may have on any judicial remedy.

20. The EA's determination of threshold issues is not binding upon the arbitral tribunal once constituted pursuant to Article 29(3) of the ICC Rules. Indeed, given the absence of the time constraints inherent in EA proceedings, the tribunal deciding on the merits may decide to re-examine any objections, consider different evidence, or otherwise approach the issue in any way it wants irrespective of the EA's Order.

21. The EA Provisions do not specify the law applicable to threshold issues. Most EAs consider that they are not bound by the *lex contractus*, yet, in a significant number of cases, EAs found that their determination was to be guided by, but not bound by, relevant national law and/or the *lex arbitri*.

2) Procedural matters

22. Subject to any agreement of the parties and any applicable mandatory law, Appendix V provides limited guidelines and encourages flexibility. The EA's wide discretion has been embraced by most EAs who, eschewing any explicit reliance upon national procedural laws, choose instead to adopt procedures that best serve the needs of a particular case and to resolve the practical and procedural challenges created by the nature and urgency of the Application. In that context, prior consultation with the parties on procedural decisions may not be practically feasible, although parties are invited to identify to the EA as early as possible any mandatory provisions of relevant national laws. Soft law norms, albeit less relevant, might inspire EAs in their procedural discretion.

23. Acknowledging that EA proceedings are demanding on EAs and parties alike, the Task Force has included examples of case management techniques that the EA and the parties can use to promote efficiency of the EA proceedings. Parties and emergency arbitrators are encouraged to consult the *ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (see Section V on "Emergency Arbitrator") and the *ICC Emergency Arbitrator Order Checklist*.[2] The Order Checklist is a tool that fosters uniformity as to form and hence facilitates the Secretariat's informal review of the Order when time is of the essence. An initial telephone case management conference was also highly recommended, and such conference was held in a substantial number of cases. The case management conference can be used not only to address purely procedural issues but also to identify any temporary orders needed pending the final EA Order, decide how evidence will be presented and discuss the substantive standard to be applied in determining the Application.

24. Although permitted by some other institutional rules, the conclusion of the Task Force is that true *ex parte* Orders - where the Order itself is issued prior to the respondent being notified of the Application - are incompatible with Article 1(5) of Appendix V of the ICC Rules. There was some support for a less onerous form of *ex parte* procedure in which the EA might issue an initial Order to preserve the *status quo* for the duration of the EA proceedings before the responding party has filed its response. Due process concerns have been voiced to which procedural solutions have been proposed including granting the respondent a very short deadline to object to the temporary measure and/or limiting the duration of the temporary measure (unless extended after the respondent has been granted an opportunity to be heard on it).

25. Given the time constraints and limited effect of the EA proceedings, the EA should at a minimum consider adopting some of the typical procedural innovations in arbitrations under the ICC Expedited Procedures Provisions of Appendix VI to the ICC Rules. Consequently, EAs could in appropriate circumstances decide the case on documents only, with no hearing and no examination of witnesses, and limit the number, scope and length of submissions. The only limit to the EA's discretion is to ensure that each party has a reasonable opportunity to present its case.

26. In most cases however, EAs have adopted a more classical approach, with a hearing and without witness evidence.

---

2 All ICC Notes and Checklists are available at https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists/ and in the ICC Digital Library (http://library.iccwbo.org/dr-practicenotes.htm).

27. It is the applicant's burden to establish a *prima facie* compelling case that the requested measures are justified and required. Because many Applications have focused on merely preserving the status quo pending appointment of the tribunal deciding on the merits, extensive factual allegations are not always required.

28. As in any other ICC procedure, if a respondent fails to participate, it should still be notified of all communications in the emergency arbitration.

29. The ICC EA proceedings are almost invariably concluded within, or very shortly after, the 15-day deadline foreseen in the ICC Rules.

3) Substantive standards

30. As to the norms governing consideration of EA Applications, and in the absence of prescriptive norms applicable to EAs, most EAs have applied substantive criteria developed in connection with the granting of interim measures by arbitral tribunals and by reference to standards distilled from international arbitration practice rather than in accordance with any specific domestic laws. This is not to say that the *lex contractus* or the *lex arbitri* have not sometimes been considered. An approach based on international practice is consistent with the parties' expectations and will encourage predictability and uniformity of results. Since the criteria governing the granting of interim relief are arguably best qualified as procedural rather than substantive law norms, reliance on any domestic norms might also be considered less appropriate.

31. As mentioned, the requested urgent measures are admissible when they "cannot await the constitution of an arbitral tribunal" (Article 29(1) of the ICC Rules). In practice, the interpretation and scope of said requirement has been far from uniform and EAs have also considered additional criteria stemming from international practice of arbitral tribunals with interim measures.

32. The urgency criterion is a high standard. The lack of sufficient urgency is a very common basis for denial of an emergency measure. In addition to the urgency, in the sense of a relief which "cannot await the constitution of an arbitral tribunal" (Article 29(1)), EAs have also considered other urgency factors such as, inter alia, the applicant's contribution to the urgency or whether the applicant has demonstrated that the relief requested avoids imminent or irreparable harm. The application of the latter criterion as a decisive element in itself arguably increases the standard of urgency required. The Task Force notes that while the criterion of the risk of irreparable harm has regularly been considered, it has not been applied as a relevant factor consistently, let alone as a self-standing condition, whether as part of the urgency test or otherwise as part of the substantive test.

33. In addition to the urgency requirement, EAs routinely consider a mix of substantive criteria applicable in deciding applications for interim measures outside the EA context. These criteria include i) the likelihood of success on the merits (*fumus boni iuris*), ii) the risk of irreparable harm (*periculum in mora*), iii) the risk of aggravation of the dispute, iv) the absence of prejudgment on the merits, and v) proportionality/balance of equities.[3] EAs tend to assess which elements are relevant in light of the particular circumstances of the case, and similarly which weight is to be afforded to each of them.

34. EAs have also taken into account secondary considerations such as the provision of security from the requesting party in accordance with Article 28 of the ICC Rules and whether the relief requested is appropriate. Orders granting security remain rare in EA practice. There is no uniform approach as to the limits of what could be appropriate relief, although it seems understood that the requested measure must be of a preliminary nature independent of the final relief sought. It is unsettled whether or to what extent, declaratory relief is available in EA proceedings.

4) Post-emergency arbitration considerations

35. As EA proceedings have become more prevalent, concerns about the enforceability of EA decisions have given rise to numerous debates. Enforceability concerns have principally arisen from the status of the EA, the interim nature of the EA decision and the specific form of the EA decision. The report considers these hurdles to enforceability based on an analysis of 45 National Reports, keeping in mind that they should not be overstated as the data suggests that, in the vast majority of cases, parties comply voluntarily with EA decisions. In practice, the responding parties may be inclined to comply voluntarily with EA decisions in order to avoid the negative consequences non-compliance may have in the arbitration on the merits.

36. Given the relatively recent nature of EA proceedings, and with the exception of Hong Kong, New Zealand and Singapore, there is at present no provision in national laws expressly providing for enforcement of EA orders and, similarly, there is limited case law. Consequently, the analysis set forth in the Report is only based on the views of National Committees and Task Force members and should be taken with caution.

37. From the analysis of the National Reports, no uniform interpretation but only trends emerge:

(i) Most reports from countries that have incorporated the UNCITRAL Model Law tend to favour enforceability of EA decisions.

(ii) In those countries where the UNCITRAL Model Law has only inspired the local arbitration law, the position as to enforceability varies widely.

(iii) In the USA, where the UNCITRAL Model Law plays little or no role, there is a growing body of case law on EA decisions, in which such decisions are treated just as interim arbitral awards.

(iv) In countries where statutory provisions allow arbitral tribunals to grant interim measures,

3 See infra paras. 151 et seq. of the Report.

national laws and practice often draw distinctions between domestically seated and foreign seated arbitration.

(v) Where arbitral tribunals do not have general powers to grant provisional and conservatory measures either by express provision of the law or because the silence of the law is interpreted as a prohibition, the direct enforceability of EA decisions is unlikely.

38. The characterisation of the EA decision as an "order" or an "award" under the relevant national law is of concern in some jurisdictions when it comes to enforceability, while in most jurisdictions this distinction as such is not decisive. It is clear to most commentators of the New York Convention that interim measures differ from final awards due to the provisional nature of interim measures as opposed to the final nature of an award. Hence, except in few jurisdictions, enforceability of orders is unsettled.

39. Notwithstanding such uncertainty, the increasing use of EA proceedings worldwide suggests that users are not discouraged by enforceability concerns. This is so because EA proceedings benefit from high levels of compliance by the parties, from the support of local courts and from the tribunal on the merits.

40. Compliance issues related to the ordered emergency measures, excluding costs, were encountered in only three cases out of the 23 ICC EA proceedings where an emergency measure was ordered.

41. In the event of non-compliance, the successful applicant can attempt to seek support from local courts in an enforcement action, particularly in UNCITRAL Model Law inspired countries, or potentially in a breach of contract claim. Interestingly, EA decisions, even if not complied with, could influence local courts to support the decision of the EA.

C. Structure of the Report

42. After this Introduction, Section II addresses the work undertaken by the Task Force and, in particular, the sources of information considered in preparing this Report. This includes an explanation of the Task Force's analysis of the ICC EA decisions, which are referred to throughout the Report and summarised in Annexes I and II.

43. Section III provides the Task Force's analysis of selected contentious areas in the practice and procedure associated with EA proceedings, and identifies emerging common practices (or divergences) on a number of key issues. The Report primarily draws on the experience of the Task Force and Commission Members as well as the Secretariat in identifying these conventions. Section II also provides a statistical commentary based on an analysis of the first 80 ICC EA proceedings.

44. Section IV provides commentary on post-EA proceedings considerations such as enforcement of the EA's decision, modification of the EA's decision and the impact of the EA process on settlement. While this last Section draws heavily on the feedback received from the Secretariat, it is not intended to be exhaustive. This is because the Secretariat is not systematically informed of whether the parties have settled or simply withdrawn the case. More often than not, parties do not share such information. Furthermore, Section IV also draws heavily on the input received from ICC National Committees.

45. Annex I provides an overview of the first 80 ICC EA cases conducted under the ICC Rules.[4]

46. Annex II is a summary table of the material predominantly provided by ICC National Committees on the topic of post-EA proceedings enforcement and related issues.[5]

II. THE TASK FORCE WORK UNDERLYING THIS REPORT

A. Scope of the Task Force work

47. In line with its mandate, the Task Force collected and evaluated experience with EA proceedings under the ICC Rules and other major sets of arbitration rules. Further, the Task Force collected information from individual jurisdictions on mandatory rules impacting the EA proceedings and on the enforceability of EA Orders.[6]

48. Emergency arbitration is defined as a procedure through which a party unable to await the constitution of the arbitral tribunal can seek to obtain urgent interim or provisional relief prior to, or independent from, an arbitration procedure on the merits. The Task Force has not independently studied the availability of interim relief within arbitration proceedings on the merits, or considered expedited arbitration on the merits, or the availability of interim relief in state courts prior to or pending an arbitration on the merits. As interim relief in arbitration on the merits or in state courts are alternatives to EA proceedings and thus comparable by nature, the Task Force work has touched upon the practical advantages and disadvantages of EA proceedings over these alternatives.

49. One particular area of contention specific to emergency arbitration under the ICC Rules has been its non-applicability to treaty-based investor-state arbitration. Under Article 29(5) of the ICC Rules, EA proceedings do not apply to non-signatories of the arbitration agreement. The ICC Commission Report on Arbitration Involving States and State Entities under the ICC Rules of Arbitration, which was issued in light of the 2012 Rules revision, considered that the purpose

4 Where appropriate, the analysis is incorporated into Sections II and III of the Report.

5 See supra "Note to readers" p. 3 of the Report.

6 See Annex II of the Report.

of the signatory requirement under Article 29(5) was, among other things, to exclude investment arbitration from the EA Provisions.[7] Although this view had been criticised, the ICC Court's policy has since the entry into force of the 2012 Rules been not to apply the EA Provisions in treaty-based arbitrations.[8]

B. Sources for the Task Force study

50. This Report is based on evaluation and input from the following main sources:

(i) An empirical study of the first 80 ICC Applications for Emergency Measures; the 80th Application being filed end of April 2018, based on criteria and questions discussed in the Report.[9]

(ii) Questionnaire addressed to the Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC), London Court of International Arbitration (LCIA), Stockholm Chamber of Commerce (SCC) and the Swiss Chambers' Arbitration Institution (SCAI) regarding those institutions' experiences with their respective EA mechanisms (or purported equivalents).

(iii) Questionnaire addressed to ICC National Committees to determine questions regarding the status of EA proceedings under local laws, addressing in particular, the enforceability of EA decisions, the availability of specific statutory rules or regulations facilitating enforcement of such decisions, any laws impeding the use of EA proceedings, the availability and standard for obtaining interim relief at state courts in the respective jurisdictions, and any other issues that may be of relevance to the Task Force work.[10]

(iv) Input and feedback from the Task Force members (most of whom have been involved in EA actions as counsel, EAs or as representatives of parties) on the separate topics addressed in the Report based on their experience and know-how,[11] as well as on available scholarly writings and precedents in their corresponding jurisdictions.

III. SELECTED TOPICS - PRACTICE ON KEY ISSUES

51. The relatively recent introduction of EA proceedings in most major international arbitration rules, the users' limited experience with this mechanism and the inherent context of urgency around such Applications, all combine to create an increased need for a better understanding of the way EA proceedings have been and can be used.

52. The ultimate objective of the Task Force is to provide international arbitration users with the means to ensure that EA proceedings meet their potential and provide an avenue for urgent interim measures before the constitution of the arbitral tribunal. In addition, the Task Force wishes to assist in creating fair, well-managed and cost-efficient EA procedures. The Task Force believes that the present Report will help achieve this objective. It is intended primarily to illustrate past experience so as to let users know what to expect from the proceedings, how to best prepare for them and how to avoid pitfalls. Given that party autonomy and flexibility are central to international arbitration, there is no universal approach to any aspect of EA proceedings.

53. With this objective in mind, the Task Force considered the following: General Issues (Section III.A), Threshold issues (Section III.B), Procedural matters (Section III.C), Substantive standards (Section III.D).

A. General issues

1) ICC Note and ICC EA Order Checklist

54. Emergency arbitrations are demanding on the EA who, as required by the ICC Rules, must be available during the entire duration of the proceedings - from 15 to 30 days - and able to act promptly in the management of the proceedings. Because EA proceedings are aimed at addressing urgent issues, the ICC Secretariat issued a *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (the "Note"), which addresses EA proceedings in Section V, and an *Emergency*

7 ICC Commission Reports are available at https://iccwbo.org/commission-arbitration-ADR and in the ICC Digital Library (http://library.iccwbo.org/dr-commissionreports.htm).

8 See P. Pinsolle, "A call to Open the ICC Emergency Arbitrator Procedure to Investment Treaty Cases" in *International Arbitration Under Review: Essays in Honour of John Beechey* (2015), p. 307.

9 Some important caveats should be noted with respect to the Task Force analysis of the 80 EA Applications. First, understandably, ICC has been vigilant to ensure that confidentiality has been maintained; and 38 of the 80 Applications were subject to such heightened sensitivity. Second, because many of the cases are in fact on-going in the merits phase, there is considerably less information available on post-EA issues for the most recent EA Applications. Third, while citations have been made to specific EA Applications where appropriate and possible, specific citations to all relevant EA Applications have not appeared feasible or appropriate. Accordingly, while the data points have been vetted as closely as possible, readers should focus on the identified trends rather than specific numbers of cases cited.

10 The following three questions were asked: (1) The Task Force is particularly interested in learning whether the national laws of your jurisdiction prevents or limits an EA from rendering an Order granting interim relief or to the contrary allows an EA to render an Order subject to penalties for non-compliance. (2)The Task Force is also interested in the impact of your national laws on the enforcement of EA decision or decisions by arbitrators granting interim relief, notably the relevant criteria and limitations commonly applied in your jurisdiction, as well as practical issues to be taken into consideration. (3) Finally, since enforcement of EA Orders is not always possible in law or practice in relevant jurisdictions, the Task Force is seeking to understand the experience under your jurisdiction with alternatives available under the law and in practice to address non-compliance with an EA´s Order. Are damages available as a remedy in the arbitration on the merits? Can state courts order penalties for non-compliance with an EA´s Order? Is interim relief available in the arbitration on the merits securing relief? Will non-compliance with an EA´s Order impact the findings of the Arbitral Tribunal on the merits on substance or on costs?

11 The Task Force consists of 139 members and has held five plenary Task Force meetings at ICC headquarters in Paris.

Arbitrator Order Checklist (the "Order Checklist").[12] The Note emphasises some essential elements that the EA should take into account throughout the proceedings. The Secretariat also issued a checklist for Orders to provide the EA with guidance, particularly as the ICC EA Rules do not provide for scrutiny of the ultimate order to be rendered. The Order Checklist does not however constitute an exhaustive, mandatory or otherwise binding document. The Task Force recognised that the original idea for an Order checklist stemmed less from its usefulness than from the ICC Court's existing practice of using checklists for arbitral awards for the sake of uniformity. It also appears that, in practice, although the ICC Court does not scrutinise Orders, the Orders are informally perused by the Secretariat. Respecting such uniformity as to form facilitates the quick and informal review of the Order when time is of the essence.

2) Boilerplate forms for Applications, EA correspondence and Orders

55. Acknowledging that EA proceedings are demanding on EAs and parties alike, the Task Force considered whether boilerplate forms for EA Applications, EA correspondence with the Parties and EA Orders would facilitate the process for users and encourage speed and efficiency. The Task Force concluded, however, that such boilerplate materials would unnecessarily stifle the flexibility of ICC EA proceedings and could have a counterproductive effect.

56. Instead, the Task Force expressly recognised the need to clarify what parties should expect from such proceedings so as to encourage early, adequate and efficient procedural behaviour. The Task Force therefore considered sharing examples of case management techniques that could be used for increasing the efficiency of EA proceedings.

57. Drawing from the Task Force members' experience, the following are examples of case management techniques that can be used by the EA and the parties to promote efficiency:

a) The party who wishes to file an Application for Emergency Measures should inform the ICC Secretariat as soon as possible and preferably before submitting the Application so as to allow the ICC Secretariat and the President of the ICC Court to select the EA candidate as soon as possible.
b) The applicant should consider being as inclusive and precise as possible in its Application so as to limit the delay in the notification of the Application and the number of further submissions during the proceedings.
c) The EA could apply greater procedural rigidity than is typically required in arbitral proceedings on the merits, including imposing relatively fixed procedural timetables, and limiting the number of written submissions. The EA could consider holding a procedural conference by telephone as early as possible in the proceedings so as to (i) identify issues that can be resolved by agreement of the parties; (ii) identify issues that can be decided solely on the basis of documents rather than through oral evidence or legal argument at the hearing; (iii) limit the number of written submissions; (iv) assess the need for a hearing and how it should be held (by teleconference or otherwise).
d) With regard to production of documentary evidence, the EA can i) require that the parties produce with their first submissions the documents on which they rely; ii) avoid requests for document production.
e) Limit the length and scope of the written submissions and oral witness evidence if witnesses will be heard in the first place.
f) Start the drafting of the procedural section of the Order as soon as possible.
g) Call upon the Secretariat for guidance in case of doubt.

3) How do parties strategically use EA proceedings?

58. EA proceedings are aimed at obtaining urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal. The ICC Rules have included barriers to avoid abuse of the proceedings such as a USD 40,000 fee per Application and a requirement to file the Request for Arbitration on the merits within ten days of filing the Application. Yet, it appears likely that some parties may use EA proceedings to "test" the merits of their case and then consider whether to settle the case after having exerted some pressure on the responding party.

59. Although the analysed data does not allow for the establishment of a clear link between the strategic use of EA proceedings and the settlement of cases that started with an EA Application, it is a fact that the settlement rate of cases that started with EA proceedings is relatively high. Out of the first 80 ICC EA cases studied, 25 cases settled on the merits before the issuance of a final award.[13] Among those 25 cases, four cases settled *before* the EA's order was issued and 21 cases settled *after* the issuance of the EA's Order. The emergency measures requested by the applicant were ordered (wholly or partially) in only seven of the 21 cases that settled after the issuance of the Order. No relevant link could be established between the measures ordered by the EA and the settlement.

12 All ICC Notes and Checklists are available at https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists/ and in the ICC Digital Library (http://library.iccwbo.org/dr-practicenotes.htm).

13 By the time the text of this Report was finalised, the arbitrations on the merits corresponding to the first 80 EA cases had not all been concluded. Consequently, the settlement rate of cases following an EA procedure may turn out to be higher.

60. A closer look at the first 80 ICC EA proceedings invites three considerations. *First*, in situations where the requested measure was closely tied to the object of the arbitration on the merits, the EA procedure appears to have contributed to resolving the controversy. For example, in three ICC EA proceedings where the exclusive measure requested was placement of money in an escrow account, the cases settled within six months following the EA's Order.[14] *Second*, in instances where the EA expressed a view on the merits of the case, settlement seems to have been facilitated. For instance, in one case, in which the applicant sought an anti-suit injunction order barring the respondent from pursuing its action before courts, the EA dismissed the Application, noting in passing that the case was weak on the merits.[15] The parties settled less than a month after the EA's Order was rendered. *Third*, settlements can also relate to the emergency measures themselves. In some instances, notably under the HKIAC Rules[16] but also in at least two ICC EA proceedings, parties have been able to obtain an Order by consent, i.e. an Order agreed to by the parties and the EA on the emergency measures allowing the parties to focus on the merits of the dispute. In another ICC case, the EA recorded the respondent's commitment to fulfil some of the applicant's requests in the Order's dispositive section but dismissed all other requests.

B. Threshold issues

1) Introduction

61. The EA Provisions invite consideration of three threshold issues: *applicability* of the rules to the EA Application pursuant Articles 29(5) and 29(6); *jurisdiction* of the EA to rule on the Application; and *admissibility* of the relief requested that cannot await the constitution of the tribunal under Article 29(1) as part of the EA Application. This Section of the Report considers these threshold issues, with the aim to provide examples of practice that may assist practitioners and EAs in efficiently and effectively navigating the EA process.

62. The significance of these threshold issues is evidenced by the fact that disputed issues of applicability, jurisdiction and/or admissibility were involved in 56 of the 80 EA cases reviewed. Of these 56 disputes involving threshold issues, three EA Applications were rejected (in whole or in part) as part of the applicability determination undertaken by the President of the ICC Court, and another 18 EA Applications were denied (in whole or in part) by the EA as failing to meet jurisdiction and/or admissibility requirements. The frequency with which threshold issues are raised is perhaps unsurprising given the contentious nature of a typical EA Application and the incorporation of a strict urgency requirement within the admissibility criteria (as discussed below).

63. The starting point for a consideration of threshold issues is the ICC EA Provisions themselves. *First*, Articles 29(5) and 29(6) of the ICC Rules provide that the EA Provisions are only applicable to signatories to the arbitration agreement (or successors thereof), where the arbitration agreement was concluded on or after 1 January 2012, where the parties have not explicitly or implicitly opted-out of the EA Provisions, and where the parties have not agreed to another pre-arbitral procedure for interim relief. *Second,* Article 1(5) of Appendix V of the ICC Rules requires that the President consider the applicability of the EA Provisions before allowing the Application to proceed. *Third*, Article 6(2) of Appendix V provides that the EA's Order shall determine admissibility of the Application pursuant to Article 29(1) and the EA's jurisdiction to order relief. *Fourth*, Article 29(1) requires that the applicant demonstrate a need for "urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal". While providing this basic framework for threshold issues, the EA Provisions do not set out the standards to be applied.

64. A review of the first 80 ICC EA cases, reports from other institutions, and the experience of the Task Force reveals that in practice the definitions of the three threshold issues of applicability, jurisdiction and admissibility are not used consistently. Indeed, the Task Force cautions that these concepts may be defined differently and used interchangeably by practitioners from diverse jurisdictions and under different national laws. Subject to this caution, however, it appears to the Task Force that in many cases issues regarding applicability of the EA Provisions are jurisdictional in nature.

65. The paragraphs below discuss each of the concepts of applicability, jurisdiction and admissibility (B.2), followed by a summary of how such threshold issues have been handled by ICC and EAs in the first 80 ICC EA proceedings (B.3). The Report then addresses choice-of-law in determining threshold issues (B.4) and, finally, how the EA's decision on threshold issues may impact subsequent analysis by the arbitral tribunal appointed to determine the merits of the dispute (B.5).

2) Applicability, jurisdiction and admissibility

a) Applicability: The role of the President of the ICC Court in pre-screening EA Applications

66. Articles 29(5) and 29(6) of the ICC Rules state that the EA Provisions shall apply only if: i) the parties are signatories to an arbitration agreement governed by the ICC Rules, or are successors to signatories; ii) the arbitration agreement was concluded on or after 1 January 2012 or where the parties have agreed that the EA Provisions apply; iii) the parties have not expressly opted out of the EA Provisions; and iv) the parties have not opted for another pre-arbitral procedure providing for conservatory or interim relief.

14 ICC EA Cases No. 1, 3 and 20.
15 ICC EA Case No. 7.
16 Two out of HKIAC's first six EA cases ended through an Order by consent.

67. When a party applies for EA proceedings, its Application must provide documentary evidence to show that these four criteria are met, including identification of the arbitration agreement and any agreement about the applicable rules of law.[17]

68. The Application is directed to the President of the ICC Court, who is responsible for considering whether the EA Provisions apply based upon a review of the information submitted with the EA Application.[18] The President's scrutiny is limited to the four conditions in Articles 29(5) and 29(6). In case these conditions are considered by the President not to be met, the Application shall not proceed. In addition, and consistent with Article 29(1), the President will not accept the Application if the file has already been transmitted to the arbitral tribunal pursuant to Article 16 of the ICC Rules.

69. The President´s analysis on applicability is final when the President holds that the Application shall not proceed. Yet, given that it is an *ex parte* test, if the President holds that the Application shall proceed, the EA may be compelled to revisit applicability issues if the respondent raises them. Article 1(5) of Appendix V phrases the President´s task as one to "consider" applicability, and not to decide on it. Such revisiting of the conditions provided in Articles 29(5) and 29(6) by the EA may well take the form of the EA´s *jurisdictional test rather than being framed again as a test of applicability*. Indeed, as requested by Article 6(2) of Appendix V, some EAs have revisited these issues in their Orders.[19] Importantly, the President may also take note of a potential threshold issue arising under Article 29(5) or 29(6) for purposes of applicability but allow the EA to make a final ruling on the issue. For example, in at least two cases, the President allowed EA Applications to go forward where the agreement was in effect prior to 1 January 2012 but where (i) the agreement was amended after 1 January 2012 or (ii) the arbitration agreement included a reference to application of the ICC Rules in effect at the time of commencement of the arbitration.

70. In all first 80 ICC EA cases, the President's decision was made within 24 hours of receipt of the Application.[20] If the President considers that the criteria in Articles 29(5) and 29(6) are met, the Secretariat notifies the Application to the responding party or parties (and if possible, identifying at the same time the EA who has been appointed). However, "[i]f and to the extent that the President considers otherwise, the Secretariat shall inform the parties that the EA proceedings shall not take place with respect to some or all of the parties".[21] The Secretariat is available to give guidance concerning application of the EA Provisions in advance of the actual filing. But, of course, once submitted, the test on applicability falls to the President.

71. The President has used the power to decline an application only rarely. Of the first 80 ICC EA proceedings, only two cases have been rejected in their entirety outright by the President. In two further cases, the President did allow the EA application to proceed but not with respect to all the parties initially addressed.

72. In the first case, the President determined that the application should not proceed pursuant to Article 29(5) because the named party was not a signatory itself. The EA Provisions were designed to reduce the risk of jurisdictional challenges that would delay the proceedings; limiting the EA Provisions to signatories was one way to reduce that risk: "The purpose of this limitation is to reduce the potential for abuse of the procedure and to provide for a *prima facie* jurisdictional test that is straightforward for the President to administer".[22]

73. The second case involved an arbitration agreement dated 2006 and the parties had not agreed to the EA Provisions. *A posteriori,* the President confirmed that the EA Provisions were not applicable.

74. In the third case, the Application named the signatory and a number of non-signatories and the President allowed the EA Application to proceed only with respect to the signatory respondent and not against the respondent's non-signatory subsidiaries.[23]

75. In a fourth case, which involved multiple contracts, the President decided that, without prejudice to the parties' status in the main arbitral proceedings, the EA Provisions were not applicable with respect to one of the two applicants who was only signatory to the contract concluded before 1 January 2012. The President nonetheless allowed the EA Application to proceed with respect to the other applicant leaving the question of the date of conclusion of the arbitration agreement with respect to amendments included in a post-2012 contract for the EA to decide.

17 J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (ICC, 2012), p. 308, § 3-1097 "Note to Parties".

18 Article 1(5) of Appendix V to the ICC Rules.

19 For example, ICC EA Case No. 5 in which the President decided that the EA proceedings will proceed, specifically leaving the EA to decide whether a post-1 January 2012 amendment to a contract had the effect of bringing the EA Application within Article 29. See also "Interim Relief From An Emergency Arbitrator Not Available Under the ICC Rules in Context of a Dispute Arising Out of a FIDIC Contract," *International Arbitration Quarterly Review*, Addleshaw Goddard, June 2017, pp. 6-7; see also E. Kantor, "Emergency Arbitration of Construction Disputes – Choose Wisely or End Up Spoilt for Choice", *Kluwer Arbitration Blog*, 15 February 2017.

20 See *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 308, § 3-1096.

21 Art. 1(5) of Appendix V to the ICC Rules.

22 ICC EA Case No. 2. See also *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 308, § 3-1098 and A. Carlevaris, J. Feris, "Running in the ICC Emergency Arbitrator Rules: The First Ten Cases", *ICC International Court of Arbitration Bulletin*, Vol. 25(1) (2014), p. 29: "[T]he 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".

23 ICC EA Case No. 23.

76. The President's role in screening EA Applications to determine whether the EA Provisions are applicable is consistent with the approach taken by some other institutions. For example, the SCC Rules state "[a]n Emergency Arbitrator shall not be appointed if the SCC manifestly lacks jurisdiction over the dispute".[24] Less overtly, the SIAC Rules state that the SIAC President shall appoint an EA only "if he determines that SIAC should accept the application for emergency interim relief".[25] Likewise, the HKIAC Rules state that "[i]f HKIAC determines that it should accept the Application, HKIAC shall seek to appoint an Emergency Arbitrator".[26] The International Centre for Dispute Resolution (ICDR) Rules make no mention of the pre-screening but, in fact, the ICDR administrator will undertake a "preliminary review" to determine that the application is complete and falls *prima facie* within the EA provision.[27]

77. Finally, a knotty applicability issue is presented by the question of whether the parties' agreement to a dispute board ("DB") procedure should preclude application of the EA Rules. Under the ICC Dispute Board Rules, a DB can be appointed at the outset of a project or in the event of a dispute to i) help the parties informally resolve disputes;[28] ii) issue recommendations on disagreements;[29] or iii) issue binding conclusions on disputes.[30] Further, the ICC DB Rules provide that the DB has the power to "decide upon any provisional relief such as interim or conservatory measures".[31] Pursuant Article 29(6)(c) of the ICC Rules, the EA Provisions are inapplicable where the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory or interim measures. The *Secretariat's Guide to ICC Arbitration* notes that the use of a DB procedure providing for issuance of interim measures is an implied opt-out of the EA Rules.[32] That said, commentators have argued that DB procedures should not preclude the parties from seeking EA relief, even though this may not have been the original intent. Commentators point out that DBs are often composed of engineers, who may be less well-equipped than lawyers to address emergency interim measures. Practice has also shown that DBs are rarely used to address provisional or interim measures. Finally, in some cases the DB may not yet have been constituted so that urgent interim relief is unavailable. Accordingly, it has been suggested that Article 29(6)(c) should be clarified to ensure that the EA Provisions are available even where DBs and similar procedures have been agreed. Task Force members concurred that such a clarification would be helpful, although some noted that the current Article 29(6)(c) does not inevitably preclude application. For example, the EA could still conclude that where no DB is constituted, or when it is disputed whether a DB was constituted or where the DB consists of engineers but the emergency measure is of a legal nature, then the parties' adoption of the DB procedure is not a choice providing for an effective granting of conservatory or interim measures. Ultimately, whether or not the agreed DB procedure provides for an effective "provisional relief such as interim or conservative measures" depends on specific facts of the case, which can only be examined by the EA. Accordingly, the President of the ICC Court may allow the Application to proceed and leave the final determination on whether the requirement of Article 29(6)(c) is met to the EA. In the summary of cases involving threshold issues below, a case is described where the EA suggested that the mere fact of the parties' agreement to a DB would not in and of itself lead to lack of jurisdiction of the EA. In any event, while this issue is debated, commentators suggest that parties should make clear in their contracts whether incorporation of a DB is to be taken as a waiver of the right to invoke the EA procedures.[33]

b) Jurisdiction: The EA's authority to order the relief requested

78. After the determination of applicability by the President of the ICC Court, all jurisdictional and admissibility issues are to be considered by the EA.[34]

79. In the first 80 ICC EA proceedings, the EA's jurisdiction has been contested in approximately 33 cases. As noted, many of the topics raised as "jurisdictional" may also be considered as affecting admissibility and applicability. Specific cases are discussed below ("3) Summary of cases involving threshold issues").

80. As to the procedure for raising a jurisdictional objection, the Task Force noted that many EAs raised jurisdiction *sua sponte* at the preliminary hearing or in early correspondence. In several cases, jurisdiction was agreed even if questions of admissibility were contested. If not agreed, the matter has usually been the subject of written submissions and/or argument. While there is no specific deadline in the EA Rules for making a jurisdictional objection, the timeliness of such an objection was raised and dismissed in at least one case. The procedural approach to resolving jurisdictional questions, including issues such as burden of proof, is within the EA's discretion.

81. The ICC EA Provisions state that "[i]n the Order, the emergency arbitrator shall determine … whether the emergency arbitrator has jurisdiction to order Emergency Measures". The Order is to be in writing

24 Art. 4(2) of Appendix II to the SCC Rules (2017).
25 Para. 3 of Schedule 1 to the SIAC Rules (2016).
26 Para. 5 of Schedule 4 to the HKIAC Rules (2013).
27 See M. Gusy, J. Hosking, F. Schwarz, *A Commentary to the ICDR International Arbitration Rules*, (Oxford University Press, 2009) §37.15, referring to Article 6 of the ICDR International Rules (2014).
28 ICC Dispute Board Rules (2015), Article 16.
29 ICC Dispute Board Rules (2015), Article 17.
30 ICC Dispute Board Rules (2015), Article 18.
31 ICC Dispute Board Rules (2015), Article 15(1).
32 See *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 309, § 3-1102.
33 See T. Webster and M. Buhler, Handbook of ICC Arbitration, Third Edition, Sweet & Maxwell, 2014.
34 Note that the Secretariat will play an ongoing role for example in ensuring that the Request for Arbitration is timely filed in accordance with Article 29(1) and Article 1(6) of Appendix V. If the Request for Arbitration is not filed within the relevant deadline, the President will terminate the EA proceedings. Among the first 80 EA cases, there has never been a need for such termination.

and is to state the reasons for the decision.[35] The Task Force noted that as a matter of logic, the EA should first consider jurisdiction within the Order. In more than one final EA Order, the EA opted to address jurisdiction and admissibility as threshold issues before proceeding to the merits of the Application. Nothing prohibits an EA from issuing a separate decision on jurisdiction (and admissibility) prior to an Order on the merits, although as a practical matter this may be difficult given the expedited timetable.

c) Admissibility: Is there any impediment to the claim being admissible, including assessing whether the measures cannot await the constitution of an arbitral tribunal

82. As with any arbitration on the merits, questions of the admissibility of a claim or of the specific relief sought may be raised by the responding party in an EA proceeding. Examples of admissibility objections raised in the first 80 ICC EA proceedings are summarised below ("3) Summary of cases involving threshold issues").

83. However, of particular significance in the EA context, is the requirement in Appendix V, Article 6(2) that the EA "shall determine whether the Application is admissible pursuant to Article 29(1) of the Rules". Article 29(1) provides that EA proceedings are only available to parties that need "urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal". Unsurprisingly, many of the ICC EA cases have invoked these provisions and disputed whether the urgency requirement was met.[36] This raises several issues that were discussed by the Task Force:

- *First*, it is clear that the condition under Article 29(1) "cannot await the constitution of an arbitral tribunal" is to be ruled upon by the EA. The decision of the President of the ICC Court to accept the applicability of the EA Provisions does not imply that the President considers there to be sufficient urgency for the purposes of admissibility.
- *Second,* "urgency", as a test often applied to the merits of the Application, may well be a different test and is not to be measured only by whether the measures requested "cannot await the constitution" of the tribunal. Rather, the reference to the relief not being able to await constitution of the tribunal provides temporal guidance on one aspect of what may constitute the necessary "urgent interim or conservatory measures". Despite this distinction, some EAs have taken the shortcut of equating "urgency" with not being able to "await the constitution" of the tribunal.
- *Third*, the Task Force has noted that there are divergent views on whether urgency in the sense that it cannot await the constitution of the tribunal constitutes *only* a threshold issue of admissibility or whether it is also a substantive requirement of the merits of the Application.[37] A review of the first 80 ICC EA cases shows that EAs are not consistent in their approach to, and consideration of, urgency. For instance, nine of the ICC EA proceedings were dismissed specifically on admissibility grounds; some of those cases were dismissed on the basis of a failure to prove sufficient urgency for purposes of Article 29(1) and specifically addressed the "cannot await the constitution of an arbitral tribunal" requirement; and some EAs noted that there was therefore no need to consider the merits of the Application. In another five cases, the EA chose to address the Article 29(1) requirement of urgency *together* with the broader standard to be applied when deciding whether relief was justified on the merits. One EA specifically held that the "cannot await the constitution of an arbitral tribunal" requirement is not intended for admissibility or jurisdiction purposes, but is rather to be considered as a necessary part of the standard to be used when deciding on the merits.[38] Such an approach, however, seems inconsistent with the language of Article 29(1). One EA stated that for the admissibility test it is sufficient for the EA to assess whether the *need* to decide on the relief can or cannot await for the constitution of the tribunal, but that it is not asked to assess whether the requested measures themselves cannot await the constitution of the tribunal, as this would mean that this criterion applies on the merits for granting emergency relief, which the EA considered to not be within the scope of the ICC Rules. Here too, it seems to the Task Force that this approach is inconsistent with the language of Article 29(1).

84. Many Task Force members considered that the "cannot await the constitution of an arbitral tribunal" condition must be assessed *both* as a matter of admissibility and on the merits, but there was no consensus view on whether this requires a separate assessment at two separate stages. Some noted that it is possible that the EA might apply different legal standards and/or scope of evidential review to considering urgency as a matter of admissibility rather than on the merits. One EA, having noted that the Rules do not address this question, opted to undertake a *prima facie* assessment on whether the requested measure could wait the constitution of the arbitral tribunal at the admissibility stage but "subject … to a more detailed further analysis [as part] of the merits of the Application and the emergency measures sought".[39] This two-step approach has been followed by other EAs. While not taking a position on its necessity, several members of the Task Force agreed that such treatment reflects a pragmatic

35 Art. 6(2) of Appendix V to the ICC Rules.

36 A review of the first 80 EA cases indicates that to the extent that EAs consider urgency as a threshold question rather than only on the merits of the Application, some EA Orders discuss urgency as a matter of jurisdiction rather than admissibility. In addition, on occasion Articles 29(5) and 29(6) have been the basis of an admissibility test. The latter, in the view of the Task Force, seems incorrect.

37 See infra Section III.D(3)(a) discussing the standards to be applied in considering urgency.

38 ICC EA Case No. 8.

39 ICC EA Case No. 32.

solution consistent with the language of Article 29(1), international arbitration practice, and the expedited nature of an EA Application.

85. As a practical matter, the issue of whether urgency is to be treated separately within the admissibility requirement of Article 29(1) or together as part of the merits is unlikely to lead to a different conclusion on whether sufficient urgency exists to grant the Application. However, it may have other consequences. For example, where an EA declines to issue the emergency measure sought only on the ground that it can await the constitution of the tribunal deciding on the merits, this may provide the disappointed applicant with more flexibility to argue urgency afresh to the full tribunal.

3) Summary of cases involving threshold issues

86. This Section provides illustrative examples of threshold issues raised in the first 80 EA proceedings reviewed by the Task Force.

87. Challenges on the basis of threshold issues were successful (in whole or in part) in 21 cases.

a) In a first case, the arbitration agreement was included in an agreement that was executed prior to January 2012, but amended after that date.[40] The applicant argued that the prerequisite of Article 29(6)(a) was met because the amendment also applied to the arbitration agreement such that the EA Provisions in the 2012 amendments to the Rules should apply. The President of the ICC Court took note of the issue and set the EA in motion, but decided to allow the EA to rule on the issue. The EA found that under the law of the contract (Brazilian), the amendments did not renew the contractual relationship in its entirety, and that therefore the arbitration agreement was concluded prior to 1 January 2012. The EA relied on Article 6(2) of Appendix V to conclude that he was not competent to rule on the Application.

b) A similar issue arose in a case involving an arbitration agreement embodied in a contract prior to the entry into force of the 2012 Rules and the EA Provisions, but amended several times after 2012. One of the questions was whether such amendments had also reaffirmed the arbitration clause post-2012. The EA considered on the basis of the applicable law whether any post-2012 amendments made to the initial pre-2012 agreement would also apply to the arbitration agreement and decided that it did not. As a consequence, the post-2012 amendments to some clauses in the main contract did not reaffirm the arbitration clause post-2012 and the EA did not accept that the arbitration agreement was concluded after 1 January 2012 for the purpose of the EA proceedings. The other question, in the same case, concerned the situation of multi-contracts with several arbitration agreements made prior to and after 2012, and whether it was possible to read all contracts together and rely on a post-2012 arbitration clause for jurisdictional purposes in order to request EA relief with respect to all contracts. The EA decided it was not and declined jurisdiction to order emergency relief with respect to one of the claims.

c) Another case involved a multi-tier dispute resolution clause with a 90-day negotiation period.[41] The EA held that the negotiation period was a condition precedent to the initiation of the arbitration proceedings and "a limitation on the parties' consent to arbitrate". The EA further held that the "emergency arbitrator proceedings are not a separate and distinct procedure from arbitration, but an optional first or early stage". Therefore, the EA concluded that the negotiation period was a condition precedent to the EA proceedings as well and that the Application was inadmissible. As discussed below, however, in the majority of cases, EAs have found that EA proceedings are not incompatible with, or limited by, multi-tiered dispute resolution clauses.[42]

d) In one case, the EA declared that the claim for emergency relief of a second (previously undisclosed) applicant, raised as part of the reply briefing, was inadmissible.[43] The EA held that such "joinder" was not provided for in the EA Provisions.

e) In one case, the respondent challenged jurisdiction on the basis of Article 29(6)(c) of the ICC Rules, arguing that the parties had opted out of the EA proceedings when choosing the Dispute Adjudication Board ("DAB") rules following the FIDIC contracts. The respondent argued that the FIDIC DABs also have the power to decide upon any provisional relief such as interim or conservatory matters, which is to be understood as a "pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures", under Article 29(6)(c). The EA concluded that it lacked jurisdiction on the basis of Article 29(6)(c), and accepted that the parties effectively had agreed to "another pre-arbitral procedure", which is empowered to provide for "the granting of conservatory, interim or similar measures". The EA supported the decision by referring to the *Secretariat's Guide to ICC Arbitration* which mentions the "use of a dispute board that may issue interim measures" as one of the examples of an "implied opt-out".[44] The EA carefully set out, however, that it is not the simple fact that the contract provided for a DAB procedure, but that this particular DAB was i) already in place when the EA Application was sought, and ii) that it was empowered to grant similar provisional interim relief. It duly noted that parties to FIDIC agreements are free to amend the

40 ICC EA Case No. 5.

41 ICC EA Case No. 26.

42 See infra para. 88(a) of the Report.

43 EA Case No. 32.

44 *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 309, § 3-1102.

clauses and opt out of the DAB or to exclude its power to order interim relief.

f) In two cases, the EA held that the specific relief requested was not interim or conservatory in nature, as the measure related to the merits, and that, therefore, the claims were inadmissible.[45]

g) In five cases, the EA considered whether the applicant had established sufficient urgency to satisfy the requirements of Article 29(1), and decided - specifically as a matter of admissibility - that it had not and that the request can await the constitution of the tribunal.[46] In one of these cases, the failure to prove urgency was cited in addition to another stand-alone ground of non-admissibility.[47]

88. Other jurisdiction challenges from the first 80 EA Applications, can be summarised as falling within the following five buckets:

a) Multi-tiered dispute resolution clauses. This objection has been raised in six EA proceedings with varying results. While, as discussed above, one EA found that a contractual negotiation period was an unfulfilled condition precedent to the EA proceedings, in at least three other cases, the EA found that the contractual negotiation process did not preclude the EA Application.

- The dispute resolution clause at issue in one case mandated a compulsory 60-day mediation process prior to initiating arbitration, but the EA Application was filed at the same time that mediation was initiated. The respondent argued that the 60-day mediation process was a condition precedent to arbitration and, thus, the EA lacked jurisdiction. The EA rejected this argument and noted that to hold otherwise this would deprive the parties of interim relief at the time it was most necessary.
- In a second case the arbitration clause stipulated a "cooling off" period of 30 days in which the parties shall attempt to find an amicable solution. Although not invoked by the respondent as a ground for lack of jurisdiction, the EA, out of its own motion, found that such cooling off period did not stand in the way of starting the EA proceedings given the urgency of the relief sought by a party.
- In a third case, jurisdiction was also contested by the respondent on the basis of the Article 29(5) arguing that a similar cooling off period should be considered a mandatory mediation period as well as a pre-existing arbitral referee mechanism. The EA dismissed the argument providing that i) a cooling off/negotiation period is not to be understood as a mediation phase, and ii) that it did not preclude from starting emergency proceedings.
- A significant portion of the Task Force supported this approach, arguing that the EA's role is merely to preserve the *status quo*. Indeed, it is quite possible that at the conclusion of the EA proceedings, the parties could engage in whatever pre-arbitration dispute resolution is mandated.[48] By analogy, in many jurisdictions, interim relief can be obtained in court in aid of mediation. But others warned that there can be no "one size fits all" approach, rather, the EA should consider each case on its merits and be sensitive to applicable law issues that may come into play.

b) Date of the agreement. In seven EA proceedings, issues were raised concerning whether the agreement met the Article 29(6)(a) requirement of having been entered into on or after 1 January 2012. In one case, for example, the agreement was signed in 2012 but was the result of a call for tenders that pre-dated the ICC EA Provisions. The EA determined that the EA Provisions applied because the agreement itself was formed in 2012. In reaching this conclusion, the EA relied on the applicable national law.

c) Concurrent jurisdiction. In 12 cases, the respondents argued that the EA should decline jurisdiction (or not admit the Application) based on concurrent proceedings in national courts or in some other dispute resolution forum. The objection is typically premised on Article 29(6)(c), which precludes application of the EA Provisions where there is an agreement to another pre-arbitral procedure for obtaining interim relief. So far, EAs have rejected challenges of this sort relying on Article 29(7), which states that the EA's jurisdiction is non-exclusive. In one case, the EA recognised that, under the ICC Rules, interim relief may be sought in parallel both from the arbitral tribunal and a competent court. Article 29(7) was reportedly included because of concerns of members of the ICC Commission that the existence of EA Provisions alone "could lead to the adverse consequence of some state courts deciding to deny their own jurisdiction to issue interim or conservative measures".[49] This is discussed below in the context of interactions between EA proceedings and national law.[50]

d) Non-signatory/standing. In seven cases, the EA Application involved a named party to the EA proceedings (or a third party affected by the proceedings) that was arguably not a signatory

45 ICC EA Cases Nos. 38, 41.
46 Including ICC EA Cases Nos. 25, 38, and 39.
47 ICC EA Case No. 38.

48 Some commentators have raised questions regarding the relationship between timing obligations imposed by a multi-tiered clause and the Appendix V, Article 1(6) obligation that the Request for Arbitration must be received by the ICC within 10 days of the Secretariat's receipt of the EA Application. This can be addressed in several ways, with commentators noting that the parties could obtain an extension from the EA of the obligation to file the Request for Arbitration pursuant to Appendix V, Article 1(6), or one could file the Request for Arbitration but obtain a stay pending compliance with the pre-arbitration clause.
49 Nathalie Voser, "Overview of the Most Important Changes in the Revised ICC Arbitration Rules", *ASA Bulletin*, Vol. 29, No. 4, 2011, p. 814.
50 See infra Section IV(A) "Enforcement".

(or successor) to the arbitration agreement, thereby falling afoul of Article 29(5).[51] As noted above, in one such instance, the President of the ICC Court, exercising his review powers under Article 1(5) of Appendix V, determined that the Application would not proceed.[52] In a second case, the President concluded that the Application could not proceed with respect to the signatory's subsidiaries. In a third case, the President decided that the Application could not proceed with respect to one of the two applicants but declared the EA Provisions applicable with respect to the other. In four other cases, in quite different circumstances, the matter was left to the EA. In one case, the EA rejected the respondent's challenge to the applicant's standing to bring a claim following an assignment of the contract, finding that the applicant remained a party to the arbitration agreement, and therefore retained standing.[53] In a second case, the EA declined to join a non-signatory to the EA Application[54]. In a third case, the EA found there was no jurisdiction to grant a requested measure that would impact a non-signatory to the agreement and noted that such decision was without prejudice to the possibility that the non-signatory could be found to be bound to the arbitration agreement as part of the arbitration on the merits.[55] In the last case, the *locus standi* of one of the applicants initially seemed to be contested, but the EA's Order eventually resulted in an Order by consent and the parties had not objected to jurisdiction or admissibility for the purpose of the Order by consent.

e) **Scope of relief/authority of EAs.** In a significant number of cases, objections were also made on grounds that the scope of relief sought was inappropriate and/or that the EA lacked authority to order the interim measure. Such objections have been treated as issues of jurisdiction or admissibility. For example, in one such case the respondent alleged that the EA did not have authority to order the reinstatement of an employee who was not a party to the proceedings.[56] Resolution of these objections is highly specific to the law and facts involved. In one case, a jurisdictional objection was raised as to the *ratione materiae* of the requested relief claiming that the relief sought did not fall within the jurisdiction of the EA. The EA decided that the measure requested did relate to the subject matter of the dispute (on the merits) and made reference to Article 17 of the UNICTRAL Model Law. In another case, the EA considered whether it had the power to grant the interim relief on the basis of the *lex arbitri,* and yet another EA merely satisfied itself that the dispute referred to in the Application fell within the scope of the parties' agreement and its arbitration clause.

4) Law applicable to the EA's consideration of threshold issues

89. The EA Provisions do not specify the law applicable to the threshold issues. With respect to choice-of-law issues in interim relief in general, "commentators and emergency arbitrators have, to date, preferred the view that interim relief is procedural in nature, and therefore not bound by the constraints of the law applicable to the contract itself".[57] In a few of the first 80 cases, EAs held that they are subject to the *lex arbitri*, including rules that apply to the issuance of interim relief by arbitrators. In a significant number of cases, EAs found that their determination was to be guided by, but not bound by, relevant national law. G. Born argues that given the number of state laws that could apply to the substance of any dispute, "the better view is that international sources provide the appropriate standards for granting provisional measures in international arbitration".[58] Several EAs in ICC proceedings have followed this approach, including in the context of threshold issues.[59]

90. With respect to jurisdiction determinations, most EAs have considered the law most relevant to the specific issue. For example, in one case where jurisdiction was challenged on the basis that the applicant was not a signatory for purposes of Article 29(5), the EA applied the *lex contractus* to determine that the applicant remained a party to the arbitration agreement.[60] Similarly, where the applicant relied on the effect of a contractual amendment to come within the Article 29(6) requirement of having an agreement concluded on or after 1 January 2012, the EA referred to the law of the contract.[61] In another case, the EA applied the *lex arbitri* to determine i) whether parties were able to consent to use an EA, and ii) whether the relief requested was an available remedy.[62]

91. The Task Force notes that in some legal systems there may be laws that limit an arbitrator's authority to issue interim measures in general, which could impact the EA's jurisdiction. In at least 10 cases, the EA confirmed that the applicable national law was not inconsistent with the EA proceedings or the specific relief sought, typically by analogy to arbitral interim relief in general.[63]

51 Including ICC EA Cases Nos. 2, 4, 23, 32.
52 ICC EA Case No. 2.
53 ICC EA Case No. 4.
54 ICC EA Case No. 32.
55 ICC EA Case No. 46.
56 ICC EA Case No. 32.
57 E. Sussman and A. Dosman, "Evaluating the Advantages and Drawbacks of Emergency Arbitrators", *New York Law Journal*, 30 March 2015.
58 G. Born, *International Commercial Arbitration* §17.02., (2nd ed., Kluwer, 2014): "These sources consist of arbitral awards, where tribunals have considered similar issues, drawing on common principles of law in developed states".
59 Some Task Force members noted, however, that consideration should be given to whether application of international sources or standards could complicate enforcement of an EA order or award.
60 ICC EA Case No. 6.
61 ICC EA Case No. 4.
62 ICC EA Case No. 23.
63 Including ICC EA Cases Nos. 1, 3, 21.

5) Impact of the EA's decision on threshold issues before the arbitral tribunal

92. Article 29(3) of the ICC Rules explicitly provides that an EA's Order does not bind the arbitral tribunal "with respect to any question, issue or dispute" and the tribunal is free to modify, terminate or annul any Order made by the EA. This presumably includes an EA's decision on jurisdiction and/or admissibility with respect to the Application. Theoretically, this might arise for example in the context of a request to terminate or modify any emergency measures in place once the tribunal is constituted.

93. While not binding, an EA's Order on jurisdiction could have some *indirect* impact on the arbitral tribunal to the extent that the tribunal is considering the same questions and evidence. But, as noted, the grounds for jurisdiction in the merits phase may be quite different. Thus, for example, one EA found it had no jurisdiction over a non-signatory party but noted that this was without prejudice to whether the non-signatory could be a proper party to the hearing on the merits.[64]

94. Likewise, with respect to admissibility, an EA's finding that the matter was sufficiently urgent so that it could not await the constitution of the tribunal could impact the tribunal's consideration of urgency, although (as noted) the urgency test is likely to be assessed based on the different timeline of whether relief can await the final award. Similarly, should the EA find the Application inadmissible because it *could* await the constitution of the tribunal, this would be of limited relevance to the consideration of urgency in the context of a request for interim relief made before the tribunal deciding on the merits.

C. Procedural matters

1) Introduction

95. This Section of the Report discusses the EA proceedings from the transmission of the file to the EA until the rendering of the Order, not including the threshold issues and standards for admissibility of an Application pursuant to Article 29 and Appendix V of the ICC Rules. This discussion of procedural issues draws upon the analysis of the first 80 ICC EA cases and feedback from the Task Force, other Commission members, and the Secretariat.

96. It should be noted at the outset that the EA enjoys wide discretion to tailor the procedure employed to the needs of the case. Subject to any agreement of the parties and any applicable mandatory laws of due process, national procedural laws and soft law should not impinge on the EA's discretion in this regard.

97. Indeed, Article 5(2) of Appendix V to the ICC Rules provides that the EA "shall conduct the proceedings in the manner which the [EA] considers to be appropriate, taking into account the nature and the urgency of the Application". It adds that the EA, in all cases, "shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case". The EA's discretion, on the other hand, is constrained as a practical matter by Article 6(4) of Appendix V to the ICC Rules, requiring that the EA render the Order within 15 days of transmission of the file (unless an extension is granted). At a general level, and as borne out by a review of the 80 first ICC EA cases, the Task Force confirms that EAs use their broad discretion to best serve the needs of a particular case and resolve the practical and procedural challenges created by the expedited timetable. A review of the ICC EA Applications also confirms that no major issues of procedure have surfaced that could not be resolved by the EA.

98. Perhaps even more so than in other parts of this Report, this Section is not intended to be prescriptive or to advocate universally applicable standards of process. The ICC EA cases reviewed concern diverse topics in different regions of the world, triggering diverse challenges with diverging procedural solutions applied by the respective EAs. Procedural flexibility is firmly embedded in Appendix V, and this Report is in no way intended to stifle that flexibility.

99. Notwithstanding the foregoing, the Task Force concludes that it would be useful to describe procedural issues in the EA context, only as a potential source of inspiration and information for future parties and EAs. Thus, this Section points out procedural questions that have arisen in cases, describes how they have been answered by EAs in ICC proceedings, provides guidance on common procedures employed by EAs, and makes specific recommendations where the Task Force is convinced that there is no room for doubt or interpretation.

2) Rules and norms governing the procedure

100. As a starting point, EAs must apply the ICC Rules in as far as the EA proceedings are concerned, which as mentioned, give the EA considerable discretion. Article 5 of Appendix V, in full, reads as follows:

> 1. The emergency arbitrator shall establish a procedural timetable for the emergency arbitrator proceedings within as short a time as possible, normally within two days from the transmission of the file to the emergency arbitrator pursuant to Article 2(3) of this Appendix.
>
> 2. The emergency arbitrator shall conduct the proceedings in the manner which the emergency arbitrator considers to be appropriate, taking into account the nature and the urgency of the Application. In all cases the arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

101. As pointed out in *the Secretariat's Guide to ICC Arbitration*, "[Article 5(2) of Appendix V to the ICC Rules] is broader than Articles 19 and 22(2), which require an arbitral tribunal in all circumstances to consult with the parties and generally respect any

64 ICC EA Case No. 46.

agreement they may reach".[65] In as far as respect for the parties' agreement on procedure is concerned; the Task Force did not have the impression that there is any material significance to the differences between Articles 19 and 22(2) of the ICC Rules and Article 5(2) of Appendix V. However, consulting the parties "in all circumstances" before taking decisions on process was considered by many on the Task Force to be incompatible with the strict time constraints of the EA process. It was pointed out that an EA, for example, is expected under Article 5(1) of Appendix V to establish a procedural timetable "within as short a time as possible". Accordingly, while consultation with the parties on a draft of such a timetable was considered highly desirable by the Task Force – and such consultation indeed very frequently took place in the first 80 EA proceedings – circumstances may arise in which prior consultation with the parties on procedural decisions may not be practically feasible.

102. The ICC Rules do not provide EAs with guidance regarding the process to be applied beyond Article 5 of Appendix V. In this respect, the Task Force focused primarily on whether EAs applied either national procedural laws and/or soft law norms (e.g. the *IBA Rules on The Taking of Evidence in International Arbitration* or the *IBA Guidelines on Party Representation in International Arbitration*).

103. *First,* an analysis of the first 80 ICC EA proceedings reveals that EAs did not tend to refer to, or take explicit inspiration from, any national procedural laws. It cannot be ruled out that in exercising their discretion, some EAs did in fact draw inspiration from national procedural laws. Yet, neither the practice in the ICC EA cases nor the views of the Task Force members suggests EAs should consider themselves bound by any (non-mandatory) national procedural norms.

104. Of course, where potentially applicable, EAs have in practice sought to take into account mandatory provisions of relevant national laws (i.e. arising from the law of the seat, of the agreement, of the arbitration agreement or of the possible place(s) of enforcement of the Order). Such caution is unsurprising given that, even though the EA's decision is in the form of an "order" and not an award, an EA's decision might still be the object of *exequatur* in some jurisdictions and thereby subject to scrutiny.[66] Accordingly, EAs have on occasion been confronted with the daunting task of seeking to identify and navigate potentially relevant mandatory provisions of national laws within the very limited time given to them. For this reason, it goes without saying that the parties should identify to the EA as early as possible the process for identifying any such relevant norms.

105. *Second*, a review of the ICC EA Orders provides little evidence that specific soft law norms have been regularly applied to the EA proceedings or used as guidance. This in itself does not mean that such norms have not been applied or provided inspiration in specific cases, whether implicitly or explicitly. Members of the Task Force, however, have observed that soft law norms are generally not designed to govern interim relief requests and may, in whole or in part, be unsuitable for that reason. At the same time, EAs have been guided by soft law where in the exercise of their procedural discretion they take decisions on issues that are addressed by such soft law norms.

3) Temporary measures protecting the status quo

106. Whether an EA could grant emergency measures *ex parte* was a debated topic within the Task Force. Some Task Force members emphasised that *ex parte* measures should be available if arbitral interim measures are to be a complete alternative to going to courts. In this respect, some forms of interim measures can, by their very nature, only be effective if they are implemented without the respondent's knowledge. One commentator noted that the need for *ex parte* relief is driven in part by the fear of a respondent moving assets out of the jurisdiction, and that this may be less concerning in the context of an arbitral award enforceable under the New York Convention in 159 countries. Regardless of whether indeed *ex parte* measures *should* be available as interim measures, the Task Force has limited its consideration only to whether the ICC Rules allow *ex parte* emergency measures. The Task Force concludes that true *ex parte* emergency Orders, where the respondent was not notified, was not given the opportunity to be heard and in which the EA issues a final EA Order are incompatible with the ICC EA Provisions.

107. This conclusion is a consequence of Article 1(5) of Appendix V, which provides that once the President of the ICC Court is satisfied that the EA Provisions apply, "the Secretariat shall transmit a copy of the Application and the documents annexed thereto to the responding party".

108. As such, the fact that the Application may be transmitted to the respondent before the EA's appointment precludes the possibility of an EA issuing truly *ex parte* emergency Orders, i.e. without the respondent even being aware of the Application.[67] In their analysis of the first ten ICC EA Orders, A. Carlevaris and J. Feris confirmed the following:

> There is no provision for *ex parte* proceedings. The Secretariat is required to notify the responding party of the Application. 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 Arbitration Rules, the Secretariat notified the Application to the responding party after first informing

65 See *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, at p. 298, § 3-1058(d).

66 See infra Section IV, "Post-emergency arbitration considerations".

67 The same conclusion applies in the SCC Emergency Procedure, which requires that notice be given to the responding party. See J. Lundstedt, "SCC Practice: Emergency Arbitrator Decisions: 1 January 2010 – 31 December 2013", available at p. 1, https://sccinstitute.com/media/29995/scc-practice-2010-2013-emergency-arbitrator_final.pdf.

> 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.[68]

109. The ICC Rules thus do not contain a provision similar to the Swiss Rules of International Arbitration, which, at Article 26(3) combined with Article 43, allows *ex parte* relief by an EA. Article 26(3) reads as follows: "In exceptional circumstances, the arbitral tribunal may rule on a request for interim measures by way of a preliminary order before the request has been communicated to any other party, provided that such communication is made at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard".[69]

110. While it is clear that in ICC EA proceedings, the Application must be transmitted to the respondent, the Secretariat has acknowledged that:

> While not expressly mentioned in the Rules, it is conceivable that the emergency arbitrator might issue an initial order (e.g. a freezing order or an order otherwise maintaining the status quo) before the responding party has filed its response. Depending on the circumstances, granting the responding party an opportunity to comment after the initial order has been rendered might still be considered as reasonable within the meaning of Article 5(2) of Appendix V.[70]

111. In one of the first 80 ICC EA Applications, the applicant sought an immediate order on an *ex parte* basis, to restrain respondents from receiving payment related to bank guarantees and bonds. The EA immediately rejected this request on the basis that the ICC EA Provisions did not allow to do so without hearing the respondent or at least providing it the opportunity to present its case.

112. While it is therefore uncontroversial that true *ex parte* orders are not available under the ICC EA Provisions, the question is open whether the EA could grant a provisional measure for the duration of the EA proceedings aimed at protecting the *status quo*, even before the respondent has had an opportunity to respond to the Application.

113. Indeed, a review of ICC EA cases reveals at least one instance where an EA has specifically granted a request by the applicant to order the respondent to maintain the *status quo* during the EA proceedings - and in this specific case temporarily refrain from calling the bank guarantee - before the respondent filed its response to the Application.[71] In at least four other instances such measures were requested but not granted. In one of those cases, the EA determined he had no jurisdiction to decide on the Application at all. In another case, the request for provisional measures was not explicitly addressed, for other reasons unrelated to the EA's power to order such provisional measures. It has thus been deemed appropriate by at least one EA, without having heard the respondent, to issue such a provisional measure, (in that case enjoining the respondent from drawing under a letter of credit for the duration of the EA proceedings). Such a temporary measure was issued to preserve the *status quo*, during the EA proceedings, without pre-judging the merits of the EA Application but should not be understood as a (final) EA Order in which eventually the respondent will, and should, have the opportunity to be heard.

114. Despite the existence of this single precedent, it must be noted that several members of the Task Force and contributors to the Commission voiced opposition even to this limited form of temporary measure to preserve the *status quo* during the EA proceedings. Critics argue that such measures cannot be reconciled with the respondent's right to be heard, particularly where the ICC Rules do not expressly authorise the EA to grant such temporary measures. Instead, they point to the duty in Article 5(2) of Appendix V to ensure that "each party has a reasonable opportunity to present its case". They suggest that the EA may, for example, not be aware when rendering such a temporary measure that the respondent has a particularly strong and urgent countervailing interest in executing certain measures that could trump the interest of the applicant in maintaining the *status quo*.

115. On the other hand, those in favour of the EA having such authority cite to Article 29(2) of the ICC Rules, by which the parties have agreed to "comply with any order made by the emergency arbitrator", as further support that the EA may issue a temporary measure intended to maintain the *status quo* during the EA proceedings. Similarly, they rely on the parties' general duty to arbitrate in good faith and the wide discretion of the EA under Article 5 of Appendix V to justify the rendering of such temporary measures in appropriate circumstances.

116. Based on the debates in the Task Force and within the Commission, it is fair to conclude that there is no commonly accepted view, nor a clear majority position, on this topic. Practice and the review of the first 80 ICC EA cases also show, however, that it is common that applicants struggle with the question of how to ensure that the relief they seek is not frustrated before an EA can issue an Order. In this respect, the Task Force notes that it is not unusual for some form

---

68 A. Carlevaris, J. Feris, supra note 22, p. 32.

69 In its Answer to the Task Force survey, the SCAI mentions a case where an *ex parte* measure was granted; it consisted in prohibiting the respondent from disposing of its assets and specific goods; according to the SCAI's Answer: "The EA found that the applicant had a legitimate interest in obtaining orders prohibiting the respondent from disposing of its assets and specific goods, and that such interest substantially outweighed the harm that the respondent would likely suffer as a result of these measures". See also Art. 50.2 of the Arbitration Rules of the Arbitrators and Mediators Institute of New Zealand (AMINZ) (allowing a party to file an application for appointment of an EA to issue preliminary orders without notice to the other side "where to give notice would defeat the entire purpose of the application").

70 See *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 298, at § 3-1058(d).

71 In ICC EA Case No. 21, the applicant requested a temporarily measure to order the respondent to immediately refrain from executing the letter of credit. The request was temporarily granted but later revoked in the final EA Order.

of temporary measure preserving the *status quo* during the EA proceedings to be ordered, or at least considered (and sometimes in agreement with the Respondent) at the outset of the EA proceedings before the respondent has had an opportunity to be heard. The contentious factor is the extent of the EA's power to render such measures prior to the respondent being heard.

117. Based on the Task Force's discussions, it is suggested that the competing views expressed might be able to be reconciled, depending on the circumstances of the case. In practice, procedural solutions might be found in which the respondent's right to be heard is safeguarded and an applicant's urgent interest in a temporary measure preserving the *status quo* for the duration of the EA proceedings is done justice. Various procedural mechanisms have been suggested. For example, in appropriate circumstances, the EA could notify the respondent that the the requested provisional order will be granted absent the respondent's objection within a very short deadline. Alternatively, the EA could issue the requested temporary measure while, at the same time, expressly allowing the respondent the opportunity to object to it within a very short time period. A further alternative envisions the temporary measure being granted for only a very limited duration so that it expires as of right unless extended by way of a full hearing. Any of these scenarios would allow the EA to hold an urgent teleconference to hear both parties before either confirming or withdrawing his or her temporary decision.

4) Case management, written submissions, evidence and hearing

118. The Task Force further examined the way procedures were concretely handled in the first 80 ICC EA cases, to determine whether there are any common practices. Before dealing with several specific issues (b), the following general considerations can be identified (a).

a) General considerations

119. *First*, as already noted, Article 5(2) of Appendix V gives broad discretion to EAs in the conduct of the proceedings; indeed, greater than the powers arbitrators enjoy under Articles 19 and 22 of the ICC Rules, which oblige them to consult with the parties before adopting procedural measures. The practice of the ICC EA cases shows that EAs have embraced this broad power to tailor procedures to suit the specific needs of the broad variety of cases considered and to overcome the practical obstacles faced in an expedited procedure.

120. *Second*, it has been suggested in the Task Force that the EA's powers (subject to mandatory provisions of relevant applicable laws) include as a minimum the powers of arbitrators acting under the Expedited Procedure Provisions introduced in the ICC Rules of 2017. More specifically, reference is made here to Articles 3(4) and 3(5) of Appendix VI of the ICC Rules and to their analysis in the *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*.[72] This would mean, for example, that EAs, like arbitrators in expedited procedures, could in appropriate circumstances i) decide the case on documents only, with no hearing and no examination of witnesses, and ii) limit the number, scope and length of submissions. Although a hearing did take place in the vast majority of ICC EA cases so far, no hearing was held in a few cases.

121. *Third*, even if time is of the essence in EA proceedings, and even if EAs benefit from great discretion in the management of the procedure, due process remains a fundamental requirement. EAs must make sure, and in the cases reviewed they have made sure, that each party has a reasonable opportunity to present its case.

b) Specific issues

122. **Challenge of the EA.** Article 3 of Appendix V of the ICC Rules provides for challenges of EAs. In four of the ICC EA cases, the EA was timely challenged. All four challenges were decided by the ICC Court, after allowing the EA and the non-challenging party the opportunity to submit comments, each within four days from the day the challenge was made. The challenges were not just on the basis of alleged conflicts but also based on the EA's qualifications and even misconduct. All challenges were rejected.

123. **Case management conference.** Holding such a conference is not required. In the ICC EA Applications, there was no such conference in 55 cases. While case management conferences were not common in the early EA proceedings, case management conferences were often held by phone in more recent EA proceedings at the very early stages, after the transmission of the file to the EA. There is widespread support among the members of the Task Force for an early telephone case management conference. Likewise, ICC supports the use of case management conferences and can provide resources on request. EAs have used such conferences for many purposes, such as:

- setting the timetable;
- determining whether, when and how a hearing should be held;
- agreeing how evidence would be presented;
- agreeing, where possible, on the appropriate standard to apply for considering the Application;
- clarifying emergency relief sought;
- addressing any issues regarding the obligation to file a Request for Arbitration within 10 days of the Application; and
- simply allowing for the key players in the case to get acquainted to ensure as smooth as possible a process.

72 Reference is made to the Note dated 1 January 2019, paras. 93 et seq.

124. **Procedural timetable.** According to Article 5(1) of Appendix V quoted above, EAs must establish a procedural timetable "normally within two days from the transmission of the file". This deadline was met in the majority of the first 80 ICC EA cases. Often, due to the short period of time allowed and possible delays in establishing contact with the respondent (especially absent email addresses), EAs wrote to the parties as soon as possible after having received the file to establish – without prior consultation of the parties – a procedural timetable and basic procedural directions. In this initial communication, EAs have also sometimes given the parties a set period to comment on the timetable and directions. In the same initial communication, EAs have sometimes requested that the parties advise whether a hearing will be requested and even proposed the rules that would be applicable to any such hearing (in terms of timing, place, scope, etc.), subject to the parties' comments before a certain date.

125. **Written submissions.** Practice varies with respect to the number and sequence of written submissions. In the ICC EA cases, the most common number of submissions addressing the merits of the relief was four, being the Application, a response, a reply, and a rejoinder. In at least one case, the respondent filed a counter-Application seeking urgent relief.73 Statements of costs were sometimes submitted separately. Typically, apart from the EA submissions, the claimant will also during the EA proceedings file with ICC its Request for Arbitration on the merits. In the minority of cases, written submissions were limited to the EA Application and a response. Given the fact that the Order is to be issued within 15 days of receipt of the file by the EA, and the fact that a hearing was very often held, the deadlines set for the written submissions were invariably very short. The Task Force noted that applicants control the time of submission of their Application and therefore have an advantage over the respondent in terms of preparation time and planning. In addition, respondents have argued that requiring a response prior to submission of the Request for Arbitration could give the applicant an unfair advantage in the arbitration on the merits. In at least one case, the EA delayed the deadline for the response until after the filing of the Request for Arbitration. This could be particularly advantageous if, for example, witness statements or even expert reports are submitted by the applicant. In setting the time table and deadlines for submissions, EAs may wish to take this advantage into consideration in appropriate circumstances in order to safeguard the respondent's right to present its case.

126. **Witnesses.** There was much debate among the members of the Task Force on whether EAs should permit recourse to witness testimony. Some argued that relying on witness evidence could be incompatible with the nature of EA proceedings. Others pointed out that, in practice, there will be very limited opportunity, if any, to hear witnesses and that the EA's reliance on witness statements might – depending on the circumstances – be inappropriate. In this respect, there is some evidence that where witness evidence (including from the respondent) has been permitted, it has led, in a very small number of cases, to the need to extend the 15-day deadline for rendering an Order. Further, some considered that given that only a prima facie analysis of the evidence would be undertaken, contemporaneous documentary evidence should in principle be preferred to witness testimony. However, there is no rule preventing an applicant or a respondent from submitting witness statements or expert reports, and neither is there a rule preventing the EA from relying on such evidence.

127. In the first 80 ICC EA Applications, witness statements were submitted in 18 cases, and expert reports were filed in three cases. In only a few of these cases, witnesses or experts were called for oral testimony. In one exceptional case, the Application came before the EA with several witness statements and the applicant also requested live testimony. Respondent also produced several witness statements in reply. This was taken into consideration at a conference with the parties when discussing the calendar. It was decided that there would be two rounds of submissions, and that no more documents or witness statements would be produced in the second round. Finally, there was a full day hearing with all the witnesses being heard.

128. Practice thus reveals that, in the majority of ICC EA cases, no witness statements and no expert reports were filed and that if such statements or reports are filed, witness hearings and cross-examination are highly unusual. There are however no absolute rules in this regard, and it is ultimately the EA who decides how to exercise the discretion provided for in Article 5 of Appendix V of the Rules with regard to witness and expert evidence. While the parties' right to be heard should be respected, there is no requirement that the EA hear (all) witnesses or experts who submitted statements or reports, nor must the EA rely on these statements or reports in the eventual Order.

129. **Hearing.** Among the ICC EA cases reviewed, a hearing was held in 53 cases (in person in 20 cases and by telephone in 33 cases). In 20 cases, no hearing took place at all. Subject to mandatory provisions of the relevant laws,[74] it is up to EA to determine the appropriate procedure. As discussed, the EA may render the Order by deciding on documents only (including potentially witness statements) or by conducting a hearing (where only counsel could have the floor, or counsel and parties, or counsel and witnesses, etc.) in person or even by videoconference, telephone or similar means of communication. During the case management conference, it is usually determined whether the parties envisage holding a hearing. Even if a party does request a hearing, the EA has no strict obligation under the Rules to hold one. However, particularly if requested by both parties, it

73 ICC EA Case No. 50.

74 Some laws require that a hearing be organised when a party in an arbitration so requires.

may be deemed advisable to hold a hearing to ensure that both parties have an adequate opportunity to present their respective cases. In several EA cases, a transcript or audio recording of hearings was made available to the parties and the EA.

5) Burden of proof

130. It is not completely clear whether the issue of burden of proof is a question of a procedural or substantive nature, or whether this depends on the concrete question at stake.75 In EA proceedings, the EA will not be issuing any binding determination of disputed factual allegations. As such, the EA is not to pre-judge the dispute on the merits. Accordingly, the standard and burden of proving factual allegations have been of less prominence in ICC EA cases than in arbitrations on the merits.

131. The allocation of the burden of proving factual allegations does not appear to have been highly controversial in the first 80 ICC EA cases. Although the standards applied to the question of whether interim relief was justified have differed,[76] EAs have usually held that it is the applicant's burden to establish a *prima facie* compelling case that the requested measures are justified and required. This, in turn, suggests that it is the applicant who bears the burden to prove – at least to a prima facie standard – the facts upon which the Application relies. Many ICC EA cases so far have merely sought to protect or restore the status quo for the duration of the arbitration on the merits or seek to prevent (irreparable) harm from being suffered, and as such have not essentially relied or depended on the veracity of extensive factual allegations.

132. In so far as the burden of proof has been explicitly addressed, the general rule *"actori incumbit probatio"* has often been applied by EAs, meaning that each party bears the burden of proving the facts relied on to support its case. By analogy, reference has been made in this context to Article 27(1) of the UNCITRAL Rules of Arbitration providing that "[e]ach party shall have the burden of proving the facts relied on to support its claim or defense".

133. In the Task Force discussions, several members suggested that the degree of intrusiveness of the measures sought could have an impact on the evidence to be required by an EA. The more intrusive a measure would be, the higher the burden (on the applicant) to prove the factual allegations relied on in the context of the EA proceedings. Conversely, when the measure sought is less burdensome on the respondent, an EA may be persuaded to apply a lower evidentiary standard with respect to the factual allegations in dispute.

6) Non-participating respondent

134. In all the 80 ICC EA Applications, except in two cases where the EA Rules were deemed not to be applicable, the respondent participated. The ICC EA Rules do not contain any particular provision on non-participating respondents. During the Task Force discussions, no consideration emerged suggesting that the attitude of an EA should be different than that of a regular arbitrator when the respondent is not participating. In short, the EA proceedings are to be pursued with the non-participating party being notified of all communications.

7) Time limit for the Order

135. Article 6(4) of Appendix V provides that the Order shall be rendered within 15 days from the date the file is transmitted to the EA. The same Article 6(4) provides that this time limit can be extended by the President of the ICC Court either at the request of the EA or on the president's motion. In ten of the first 80 ICC EA Applications, no Order was rendered due to withdrawal or non-applicability of the ICC EA Rules. Out of the 70 remaining cases:

- In 33 cases, the 15-day deadline was complied with. The Order was made in less than 15 days in three cases.
- In 32 cases, the Order was rendered between day 16 and day 19.
- In 5 cases, the Order was rendered more than 19 days after the file was transmitted to the EA, in each case after an extension was approved by the President. In one case (the longest case by far), the total time elapsed between the transmission of the file to the EA and the Order was 30 days. These delays can primarily be attributed to parties agreeing on an extensive hearing schedule affecting the procedural timetables, or a request for temporary suspension of a scheduled hearing resulting from an initial non-compliance of a respondent with a preliminary Order to maintain the *status quo* such as the calling of a letter of credit. Based on these statistics, it can be concluded that the ICC EA proceedings are almost invariably concluded within or very shortly after the very challenging 15-day deadline foreseen in the ICC Rules.

D. Substantive standards

1) Introduction

136. This Section of the Report discusses the substantive criteria for the determination of whether to grant emergency relief, relying on the Task Force analysis of the first 80 ICC EA proceedings, National Reports, the experiences of other institutions, feedback from Task Force members, as well as relevant academic commentary.[77] More specifically, this Section provides a survey of the norms governing

75 G. Born, supra note 58, n° 2312: "There is little authority on the allocation of burdens of proof in arbitral contexts".

76 See infra Section III.D "Substantive Standards".

77 See also Annexes I and II of the Report.

consideration of EA Applications (D.2), the substantive standards applied in determining Applications (D.3), and other considerations for granting emergency relief, including provision of security and the nature of the relief requested (D.4).

2) Norms applicable to EA Applications

137. Article 29 and Appendix V of the Rules do not articulate any specific applicable substantive standards for the EA's consideration of an Application. This is in keeping with the non-prescriptive approach of other institutional rules, which at most indicate that the requested measure must be urgent, necessary, or appropriate in light of the circumstances.[78]

138. The Task Force notes that, in the absence of prescriptive norms applicable to EAs, most EAs have been willing to apply substantive criteria developed in connection with the granting of interim measures by arbitral tribunals.[79] In this respect, an analysis of the first 80 ICC EA Applications shows that, in at least 49 cases, the EAs explicitly applied the substantive requirements for the granting of interim measures in accordance with standards distilled from international arbitration practice, rather than by reference to any specific domestic law. As one EA put it, EAs are not bound by the applicable substantive law governing the dispute "since the grant of provisional relief is not by nature a matter of substantive law".

139. In contrast, in a significant number of ICC EA cases, the EA at least considered the impact of certain provisions of the *lex arbitri* and/or the *lex contractus* in determining the Application. One EA explicitly considered that an EA decision must comply with applicable or mandatory domestic law. In several cases, EAs concluded that the decision to grant emergency relief should be guided by principles of domestic law, but ultimately found that in the absence of any guidance in domestic law, international standards should apply. Further, in a number of cases the EA considered the *lex arbitri* only for the purposes of admissibility of the EA Application, and made reference to the standards established in international arbitration for the substantive assessment of the request.

140. In sum, EAs have shown a preference to avoid the application of domestic law and to have recourse to "the practice generally followed by international arbitrators", "common principles of law", and/or "international sources" instead. Such an approach is supported by commentators who suggest that an approach based on international practice is more likely to be in accordance with the expectations of the parties and to result in broadly uniform and predictable results.[80] Whatever standard is adopted, the Task Force encourages the early discussion of this issue, maybe even at the case management conference, to try to reach consensus.

141. Although not yet specifically addressed by an EA operating under the ICC Rules,[81] an interesting question concerns the relationship between EA proceedings and decisions rendered by state courts concerning interim measures.[82] Commentators have noted that while both may address the same subject matter, the two fora are conceptually distinct and decision-makers need not reach the same result.[83]

3) Substantive criteria for granting emergency relief

142. As stated above, the ICC Rules do not prescribe requirements for relief other than that the requested urgent measures are admissible when they "cannot await the constitution of an arbitral tribunal" (Article 29(1) of the ICC Rules). Consequently, the EA Rules set forth in Appendix V require that the requesting party state in its Application for Emergency Measures "the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal" (Article 1(3)(e), Appendix V to the ICC Rules). The EA Provisions were intended to enable the parties to seek extrajudicial interim or conservatory measures before the arbitral tribunal was in a position to act under Article 28.[84]

78 See, e.g. SCC Rules 2017, Appendix II; LCIA Rules 2014, Art. 9B; SIAC Rules 2016, Schedule I; CIETAC Rules 2014, Art. 23: Rules of Arbitration of the Arbitration Center of Mexico, Art. 30 Bis. In contrast, a few arbitral institutions provide a specific standard. See e.g. ACICA Rules 2016, Schedule 1, Art. 3.5 (requiring (i) irreparable harm; (ii) harm substantially outweighs the other party; and (iii) reasonable possibility that the requesting party will succeed on the merits).

79 See, inter alia, G. Born, supra note 58, p. 2464: "[T]he better view is that international sources provide the appropriate standards for granting provisional measures in international arbitration". See also A. Yesilirmak, 'Interim and Conservatory Measures in ICC Arbitral Practice, 1999-2008', *ICC International Court of Arbitration Bulletin* (Special Supplement 2011), p. 10; F. Ferrari, S. Kröll, Conflict of Laws in International Arbitration (1st ed., Sellier, 2010), p. 442; P. Sherwin, D. Rennie, "Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis", *American Review of International Arbitration*, 2010, Vol. 20, p. 323; J. Beechey, G. Kenny, "How to Control the Impact of Time Running Between the Occurrence of the Damage and its Full Compensation: Compensatory and Alternative Remedies in Interim Relief Proceedings", *Dossier of the ICC Institute of World Business Law: Interest, Auxiliary and Alternative Remedies in International Arbitration* (ICC, 2008) p. 109; J. Lew, L. Mistelis, S. Kröll, *Comparative International Commercial Arbitration*, (Kluwer, 2003), p. 602. See also Interim Award of September 2003, ICC Case No. 12361 and Procedural Order of March 2006 in ICC Case No. 13856, available at http://library.iccwbo.org/.

80 Ibid.

81 In the only case of which the Task Force is aware, a US federal court issued a temporary restraining order concerning a party's parallel EA Application under the ICC Rules. But the matter was settled before any substantive steps were taken in the EA proceedings. See *Alstom v. Gen. Elec. Co.*, 228 F. Supp. 3d 244 (S.D.N.Y. 2017)

82 A. Carlevaris and J. Feris, supra note 22, p. 36: "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 … Given the frequency with which parties seek interim relief in the courts, the question can be expected to arise in the future".

83 See, e.g. M. Goldstein, "A Glance Into the History for the Emergency Arbitrator", *Fordham International Law Journal* (2017), Vol. 40.3, p. 796 (noting the mission of Emergency Arbitration is to "provide only so much temporary relief as is necessary to maintain the effective ability of the full arbitral tribunal to address continued provisional relief once it is constituted").

84 See *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 294, §§ 3-1051 and 3-1052; see also supra paras. 2 to 4 of the Report.

Accordingly, this narrow definition of urgency contrasts with the broader discretion given under Article 28(1) of the ICC Rules to the arbitral tribunal that may order "any interim or conservatory measure it deems appropriate". The Task Force noted that this distinction is in line with the EA's role as preliminary means for users to obtain urgent relief pending constitution of the tribunal.

143. Despite this apparently strict standard of admissibility, an analysis of the 80 ICC EA proceedings shows that, in practice, EAs have examined the requirement of urgency (a), as well as additional criteria often defined through international practice relating to interim measures ordered by arbitral tribunals (b).

a) Urgency

144. Article 29 of the ICC Rules affords emergency relief to a party that "needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal".[85] The language of Article 29 and Article 1, Appendix V of the ICC Rules emphasises the importance of urgency to a successful Application.

145. ICC EAs have referred to the urgency requirement in most of the decisions rendered to date. However, the interpretation and scope of said requirement is far from uniform.

146. *First*, there are divergent views regarding the characterisation of urgency as an admissibility condition or as a substantive requirement, or both.[86] In one instance, an EA limited the meaning of urgency, as a threshold question, to the fulfilment of the requirement that the emergency relief "cannot await the constitution of an arbitral tribunal".[87] In the same vein, an EA held that, as a question of admissibility, "following the President's initial review, the EA needs to analyse, under Article 29(1) whether the situation presented and allegedly requiring emergency relief "cannot await the constitution of an arbitral tribunal".[88] Yet in another case, the EA specifically held that the "cannot await the constitution of an arbitral tribunal" requirement is not used for admissibility or jurisdiction purposes, but rather is to be considered as a necessary part of the standard to be used on the merits. However, the Task Force cautions that this latter approach seems inconsistent with Article 29(1).

147. Many of the Task Force members advocated reconciling these approaches to assess urgency at two different stages. As a question of admissibility, a party seeking emergency relief should establish *prima facie* that the request cannot await the constitution of the arbitral tribunal. Then, as an issue of the merits of the EA Application, the party applying for emergency relief should provide a more comprehensive analysis of the urgency, as part of establishing that the measures are in fact warranted in light of the particular circumstances of the case. This two-step approach has been applied in some cases and is discussed above.[89]

148. *Second*, whether as a threshold matter or on the merits, the EA's approach to assessing urgency has not always been consistent. Article 29 of the ICC Rules sets a high standard, requiring that the urgency in question "cannot await the constitution of an arbitral tribunal". The majority of EAs considered urgency on this basis. But in at least 12 cases, the EA took into account other urgency factors, including whether the applicant contributed to the urgency, whether there are compelling reasons that ground the urgency of the measure requested, or whether applicant demonstrated the relief requested is urgently required to avoid imminent irreparable harm. For example, one EA referred to the test as the "urgent risk of irreparable harm" test. Applying such a standard, the EA also examined whether potential damages that would occur absent the emergency measures could instead be compensated by monetary means. If so, the urgency requirement was deemed unlikely to be fulfilled.

149. Other factors may also be relevant to considering urgency. Thus, for example, referring to two ICC cases in which interim measures (as opposed to emergency measures) had been rejected by the arbitral tribunals because the remedy sought "alter[ed] the agreement of [the] parties or their contractual obligations",[90] an EA found that urgency cannot be premised on facts or circumstances known to the parties at the time of the conclusion of the contract, overriding the parties' previously negotiated arrangements. In these circumstances, the EA considered that the parties were on notice of their respective needs and already had the opportunity to negotiate the protections they deemed necessary.

150. Urgency is not exclusive to ICC EA proceedings. Indeed, lack of urgency is the most common basis for denial of an emergency measure under the SCC Rules: between 2010 and 2013, five out of seven EA cases were denied because of lack of urgency.[91] As of 31 December 2014, the most common ground for rejection of interim measures has remained urgency.[92]

85 Ibid.

86 See supra Section III.B(2)(c) discussing the urgency requirement in the context of the threshold admissibility issue.

87 ICC EA Case No. 11.

88 ICC EA Case No. 16.

89 See supra para. 87 of the Report; see also ICC EA Cases Nos. 23 and 32.

90 A. Yesilirmak, supra note 83, p. 11. See also ICC Case No. 10648, Partial Award, 2001; ICC Case No. 12361, Interim Award, 2003.

91 Arbitration Institute of the Stockholm Chamber of Commerce, J. Lundstedt, "SCC Practice Note: Emergency Arbitrator Decisions 2010-2013" ("SCC Practice Note 2010-2013"), https://sccinstitute.com/media/29995/scc-practice-2010-2013-emergency-arbitrator_final.pdf, Case 1, p.4; A. Havedal, "SCC Practice Note: Emergency Arbitrator 2015-2016" ("SCC Practice Note 2015-2016"), https://sccinstitute.com/media/194250/ea-practice-note-emergency-arbitrator-decisions-rendered-2015-2016.pdf.

92 Arbitration Institute of the Stockholm Chamber of Commerce, L. Knapp, "SCC Practice: Emergency Arbitrator Decisions 2014", https://sccinstitute.com/media/62020/scc-practice-emergency-arbitrators-2014_final.pdf.

Similarly, EA decisions under the rules of the ICDR, LCIA, SIAC and others all emphasise urgency as a key, indeed often determinative, criterion.[93]

b) Other factors drawn from interim measures practice

151. The Task Force notes that, in addition to urgency, EAs routinely also consider the substantive criteria applicable in deciding applications for interim measures outside of the EA context. These criteria include the likelihood of success on the merits (*fumus boni iuris*) (i), the risk of serious harm (*periculum in mora*) (ii), the risk of aggravation of the dispute (iii), the absence of prejudgment on the merits (iv), and proportionality/balance of equities (v). As discussed below, EAs tend not to apply these elements cumulatively or as a laundry list. Rather, EAs assess which elements are relevant in light of the particular circumstances of the case.[94]

(i) Likelihood of success on the merits (fumus boni iuris)

152. In the context of interim measures applications before arbitral tribunals, the condition of likelihood of success on the merits (*fumus boni iuris*) requires the party requesting interim relief to show a reasonably arguable case or a reasonable probability of prevailing on the merits.[95] This requirement ensures that a party will not be granted interim relief if there appears to be little prospect that it will prevail in the final award.[96] Typically, however, the tribunal's inquiry into the merits of the parties' claims and defenses is only on a *prima facie* basis, without any detailed or definitive assessment of the evidence or the merits of the parties' legal arguments.[97]

153. In the first ICC 80 EA Applications, at least 31 EAs also considered the likelihood of success on the merits. Indeed, after urgency, and along with the risk of irreparable harm, it is the most commonly applied criterion in ICC EA practice.

154. In 25 of the 31 ICC EA cases in which likelihood of success on the merits was considered, the EA required the applicant to establish a *prima facie* case. One EA mentioned that the request is justified on the merits "if there is, on a *prima facie* basis, a reasonable possibility that the requesting party will succeed on the merits of the claim".[98] In another case, the EA showed concern about prejudging the merits stating "some issues at stake depend on a deeper debate, not admissible in an urgent measure proceeding" and that "this leads to the conclusion of absence of *fumus bonis iuris*".[99] In a further case, the EA stated that the "lack of *fumus bonis iuris* is sufficient to reason dismissal of the measure requested".[100]

155. This approach is consistent with practice under other EA rules. In ICDR practice, the "good prospects of success on the merits" requirement has routinely been considered as one of the conditions necessary for emergency relief.[101] Similarly, a survey of SCC EA practice shows that the "chance of success on the merits" is one of the set of factors that have become commonly accepted as prerequisites for granting emergency relief.[102] In this respect, some EAs in SCC proceedings were satisfied if a claimant presented a *prima facie* case on the merits, i.e. a mere showing that the elements of a claim are present. Most EAs operating under the SCC Rules, however, set a higher threshold requiring applicants to demonstrate a "reasonable possibility" of success on the merits.[103] In one EA proceeding, the EA denied the request for emergency measures because the claimant had failed to prove a *prima facie* reasonable chance of success on the merits.[104]

156. The Task Force received feedback suggesting that, where the EA denies relief at least in part based on consideration of likelihood of success on the merits, the EA might consider issuing his or her Order on a without prejudice basis. The commentator suggested that such approach would clarify that the EA's decision is preliminary and provide prospective applicants with some comfort about the negative impression of an unsuccessful Application on the tribunal deciding on the merits.

(ii) Risk of irreparable harm (periculum in mora)

157. The requirement of *periculum in mora*, or "danger of delay" is a key element in seeking interim measures before arbitral tribunals. In short, it requires that relief may be granted only if the applicant demonstrates that it may suffer "irreparable" damage or injury in the absence of such relief.[105] There is some debate, and a general lack of consensus, over the level of harm necessary to satisfy this requirement. In many jurisdictions the term "irreparable harm" typically refers to an injury that cannot be compensated by way of a damages award.[106] However, in international arbitration practice, the *periculum in mora* requirement has often been interpreted to require a showing of serious or grave harm, even if compensable by money. As one EA observed, "the more common view is that the international standard requires a lesser showing, being a likelihood of serious harm that might not be

93 G. Born, supra note 58, p. 2452.
94 For example, one EA specified that "it is impossible to establish in advance an unalterable list of required conditions as some will be applicable and others not applicable, depending on the facts of each case" (ICC EA Case No. 10).
95 G. Born, supra note 58, pp. 2424-2563.
96 Ibid.
97 Ibid.
98 ICC EA Case No. 11.
99 ICC EA Case No. 5.
100 ICC EA Case No. 14.
101 G. Lemenez, P. Quigley, "The ICDR's Emergency Arbitrator Procedure in Action, Part I: A Look at the Empirical Data", *Dispute Resolution Journal* (2008), p.5; M. Gusy, J. Hosking, F. Schwarz, *A Commentary to the ICDR International Arbitration Rules* (Oxford University Press, 2nd ed. 2019) Ch. 6.
102 SCC Practice Note 2015-2016, supra note 91.
103 Ibid.
104 Ibid.
105 G. Born, supra note 58, pp. 2424-2563.
106 M. Goldstein, supra note 83, pp. 780-797.

capable of being remedied, fully or at all, in a final award". This less stringent reading of the requirement is more appropriate to the fundamental purpose of arbitral provisional relief, which is to preserve the rights of the parties until the final award is rendered,[107] while the EA's objective is rather to preserve those rights until the arbitral tribunal is in place and capable of adjudicating on provisional relief.

158. An analysis of the first 80 ICC EA cases reveals that the EA considered irreparable harm in half of the cases. It should be noted that it was not clear from all Orders which level of harm was deemed to be "irreparable". In at least 21 of those 40 cases, the EA considered that "irreparable harm" should not be interpreted in a literal sense, but should instead refer to serious and substantial harm. For example, one EA 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".[108] Similarly, another EA sought guidance in Article 17(A) of the UNCITRAL Model Law of 2006[109] to hold that the risk of irreparable harm requirement does not require demonstrating that the harm suffered in the absence of protection cannot be compensated through an award on damages. Rather, the harm should be serious and imminent, tipping the balance in favour of the requesting party.

159. Other arbitration rules, such as those of the Australian Centre for International Commercial Arbitration (ACICA), expressly cite the risk of irreparable harm as a precondition for EA relief.[110] An overview of the EA proceedings from the SCAI has also shown irreparable or substantial harm as a criterion consistently applied by EAs.[111] Looking at the data available from the applications filed with the SCC, "irreparable harm" is part of the commonly-accepted factors for granting emergency relief. In addition, the "urgency" and "irreparable harm" requirements are frequently discussed together.[112] Indeed, some EAs in SCC proceedings do not even consider urgency to be a separate factor, but rather inherent to the requirement that the measures requested are necessary to avoid irreparable harm. Subsequently, in measuring urgency or risk of irreparable harm, most EAs in SCC proceedings analysed whether the harm may be compensable by an award of damages and, if so, found that the request for emergency relief should be denied.[113]

(iii) Risk of aggravation of the dispute

160. The principle of non-aggravation of a dispute "seeks to preserve the respective rights of the parties to a dispute until a final decision has been rendered".[114] "Risk of aggravation of the dispute" means that the EA must consider whether the grant or refusal of emergency relief would aggravate the dispute. It is intended to protect the parties from suffering any further damages. This element must not be confused with the "preservation of the *status quo*", which is another type of interim measure that can be requested.[115] The "risk of aggravation of the dispute" element is rarely discussed in academic articles and publications on EA proceedings. However, some EAs have acknowledged the "risk of aggravation of the dispute" as a factor to consider when exercising their discretion to grant emergency relief.

161. An analysis of the first 80 ICC EA cases shows that EAs mentioned this factor for granting emergency relief in 12 cases. In one case, the EA decided that the applicant was entitled to relief despite the absence of the risk of irreparable harm, as the dispute would otherwise have worsened and granting the request would not cause irreparable harm to the responding party.[116] It is the only ICC case known to the Task Force in which the risk of aggravation *in itself* sufficed to grant emergency relief. In the other cases, this element has been assessed in conjunction with others. In some of the cases, the "preservation of the *status quo*" was mentioned in the applied criteria. However, it is not used as a substitute to the term "no aggravation of the dispute" but as a supplement. The EA considered that there is a "need to avoid aggravation and preserve *status quo"* (emphasis added).

---

107 Ibid.

108 See A. Carlevaris and J. Feris, supra note 22. Similarly one EA considered that "irreparable harm" must be understood in an economic and not literal sense and that the damages only need to be substantial: "Standard is not so high as to require harm that cannot be compensated by money but rather the that the harm will alter the *status quo* significantly and compound the damages" (ICC EA Case No. 3). In more recent cases, an EA considered that "to obtain interim measures, it is not necessary to establish that there is a risk of irreparable harm, i.e. of a harm that cannot adequately be compensated by an award of damages. A risk of serious or substantial harm may be sufficient, depending on the circumstances" (ICC EA Case No. 33), whereas other EAs considered themselves empowered to grant relief in an interim stage to avoid harm which would be caused if the relief had not been granted at an interim stage and the determination would be made by the arbitral tribunal, without referring to a specific standard of harm.

109 Article 17(A)(1) of the of the UNCITRAL Model Law 2006: "(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that: (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination. [...]" See also Article 26(3)-(4) of the UNCITRAL Arbitration Rules 2010 and Article 23.4 of the HKIAC Rules (2013), which set forth similar requirements for obtaining an interim relief.

110 ACICA Arbitration Rules 2016.

111 SCAI, "Emergency Relief under the Swiss Rules: An overview after 4 years of practice" (2017), https://www.swissarbitration.org/files/620/untitled%20folder/Emergency%20Proceedings%20under%20the%20Swiss%20Rules%20(2017).pdf.

112 SCC Practice Note 2015-2016, supra note 91.

113 Ibid.

114 D. Rivkin, "Re-Evaluating Provisional Measures through the Lens of Efficiency and Justice", *International Arbitration Under Review: Essays in Honour of John Beechey* (ICC, 2015), p.4.

115 See A. Carlevaris and J. Feris, supra note 22, p. 34.

116 Ibid, p. 25.

162. Consideration of this factor is also borne out to some extent in EA applications under other rules. In EA practice under the LCIA Rules, for example, the risk of aggravation of the dispute is considered as a component of the urgency requirement.[117] The EA evaluates the risk of aggravation of the dispute, along with the risk of serious and irreparable harm and the risk of compromised procedural integrity of the arbitration, in order to decide whether the urgency requirement is met. In the 30 Applications filed with the SCC from 2010 to 2016, this requirement has only been mentioned twice.[118] In those cases, the EA considered whether granting the interim relief would aggravate the dispute.

(iv) No prejudgment on the merits

163. When deciding applications for emergency relief, the EA should avoid prejudging or predetermining the dispute itself.[119] As discussed earlier, this does not mean that an EA may not consider the likely prospects of a claim.[120] It does however mean that, in doing so, the EA must not "decide" on the merits of the case, and must not overstep the arbitral tribunal's role of assessing the merits in light of the parties' submissions in the arbitration.[121]

164. The analysis of the first 80 ICC EA cases demonstrates that EAs referred to the "no prejudgment on merits" criterion in a total of 19 cases. In all but one case, the criterion was applied cumulatively. In a single case, the request was denied in order to avoid prejudging on the merits; the EA stated that "[h]owever wide may be the latitude that I enjoy to take pragmatic and necessary action, any such action must necessarily be of an interim or conservatory nature, which among other things means that it must be capable of reassessment if appropriate in the course of arbitral proceedings to resolve the parties' dispute". In other words, an EA will not grant an emergency measure if said relief is the same as the one requested on the merits.

165. Similarly, EA cases statistics from the SCC show that, among the EA applications determined between 2014 and 2016, only two EAs cited the "no prejudgment" condition.[122] In one such case, the EA found that the claimants' requested delivery of certain products under a distribution agreement were not interim measures, but instead constituted a judgment on the merits. The EA stated that said deliveries would make a later judgment wholly or partly superfluous.[123] In the second case, the EA held that "[i]t is not the function of an emergency arbitrator … to decide the merits of the parties' respective cases, particularly where such cases are, necessarily, materially incomplete and turn on complicated and potentially difficult issues of law".[124] In ICDR arbitration, the application of the "no prejudgment on the merits" condition was only found in a one case where the EA denied a declaratory judgment request stating that "the purpose of the emergency relief was not to anticipate the decision on the merits, but to preserve the *status quo*".[125]

(v) Balance of equities (proportionality)

166. Finally, EAs have also balanced the interests of the parties, i.e. weighing any harm caused by granting the measure against the likely harm to the applicant if said relief is not granted. Tribunals frequently consider the balance of the interests in addressing requests for interim measures. This may include consideration of the relative financial positions of the parties to ensure that no substantial disadvantage occurs as a result of the interim measure.[126] The "balance of equities" is a common law principle often applied when granting provisional relief.[127] It may be assessed also within the related concepts of balance of hardships, balance of inconvenience, or proportionality.[128]

167. Contrary to the "risk of aggravation to the dispute" or "no prejudgment on the merits", the "balance of equities" or proportionality element is expressly stated in a few EA Provisions. The ACICA Rules provides that parties requesting an emergency interim measure must show, among other things that "such harm substantially outweighs the harm that is likely to result to the party affected by the Emergency Interim Measure if it is granted".[129] Further, pursuant to the UNCITRAL Model Law (Article 17(A), para. 1(a)),

117 R. Gerbay, L. Richman, M. Scherer, "Chapter 10: Expedited Formation of the Arbitral Tribunal, Emergency Arbitrators and Expedited Replacement of Arbitrators", *Arbitrating under the 2014 LCIA Rules: A User's Guide* (Kluwer, 2015), pp. 133-166. "Even though there is no universal consensus on the definition of 'urgency', arbitral decisions have held that this requirement is met if there is a risk of (i) serious and irreparable harm to one of the parties; (ii) aggravation of the dispute during the proceedings; or (iii) compromised procedural integrity of the arbitration".

118 SCC Practice Note 2010-2013, Case 1; SCC Practice Note 2015-2016, Case 3.9, supra note 91.

119 Chartered Institute of Arbitrators' International Arbitration Practice Guideline, Applications for Interim Measures (2015). Indeed, Articles 29(3) and 29(4) recognise that the arbitral tribunal is the ultimate decision-making authority and that the EA's Order shall not bind the arbitral tribunal. See also *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 305, § 3-1088.

120 See supra Section III.D(3) "(i) Likelihood of success on the merits (fumus boni iuris)".

121 G. Born, supra note 58, pp. 2424-2563.

122 SCC Practice Note 2010-2013, supra note 91.

123 Ibid. Case 3.

124 Ibid. Case 7.

125 G. Lemenez, P. Quigley, "The ICDR's Emergency Arbitrator Procedure in Action, Part I: A Look at the Empirical Data", Dispute Resolution Journal (2008), p.5; M. Gusy, J. Hosking, F. Schwarz, *A Commentary to the ICDR International Arbitration Rules*, supra note 27.

126 *Chartered Institute of Arbitrators' International Arbitration Practice Guideline, Applications for Interim Measures* (2015).

127 See, e.g. *Winter v. Nat. Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986); *Roso-Lino Beverage Dist., Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir. 1984); *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1983); *Zoll Circulation, Inc. v. Elan Medizintechnik, GmbH*, 2010 WL 2991390 (C.D. Cal. July 26, 2010) (granting injunctive relief pending arbitration but only as to claims for which plaintiff demonstrated balance of equities that favored plaintiff).

128 *Winter*, supra note 127, at 376-77 (noting that the court must consider the competing claims of injury and effect on each party of granting or withholding the relief requested).

129 ACICA Arbitration Rules 2016, Schedule 1, Art. 3.5(b).

one of the conditions for granting an interim measure is that "[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted".

168. The analysis of the first 80 ICC EA cases shows that EAs referred to the "balance of equities" factor for deciding whether to grant emergency relief in at least 16 decisions. In one case, the EA described the notion of balance of equities as "the likelihood that applicant will receive compensation for the potential damage suffered as a result of the requested measures not being granted is greater than the likelihood that the respondent will receive said compensation in the opposite case". In another case, the EA considered "whether the threatened injury outweighs any harm that would result from the grant of the relief sought, whether grant of the relief sought would disserve the public interest, and whether the applicant can compensate the other party in damages if the relief turns out to have been wrongly granted."

169. Looking at the data available from the SCC, the "proportionality" condition has been commonly accepted as a prerequisite for granting emergency relief.[130] Where all other factors are met (jurisdiction, chance of success on the merits, and urgency), the EA will consider the proportionality of the requested measure by weighing the harm avoided against the potential harm inflicted upon the respondent. If granting the relief would cause significant harm to the respondent, the EA is unlikely to grant the applicant's request.[131] An EA in SCC proceedings noted that proportionality "is commonly assessed as a balance of hardships" and "if the negative impact of the requested relief is disproportionate to its benefit, then either the request must be declined or the relief redesigned to reduce the burden on the subject party".[132]

4) Other considerations for granting emergency relief

170. In addition to the substantive considerations outlined above, EAs have also taken into account the provision of security from the requesting party (a) and whether the relief requested is appropriate (b).

a) Provision of security as a condition to the relief granted

171. The ICC Rules expressly provide that EAs can subject their Orders to the posting of security. Appendix V, Article 6(7) provides that "[t]he emergency arbitrator may make the Order subject to such conditions as the emergency arbitrator thinks fit, including requiring the provision of appropriate security". Conditioning emergency relief on the posting of security can allow the EA to balance the interests of the parties[133] and to take into account the practical effects of granting a measure that is, by definition, provisional.[134] Through the provision of security, the EA ensures that the adverse party will be able to recover damages if the provisional measure proves to have been wrongfully ordered.

172. Article 28 of the ICC Rules, as well as many national laws, also specifically provide for the possibility that a tribunal may order security to be posted as a condition of any provisional relief granted.[135]

173. Despite this express authorisation, among the first 80 ICC EA Applications, not one case in which the EA granted relief included the provision of security as a condition.

174. In at least nine cases, the requested measure involved security or some form of cross-undertakings. In the majority of these cases, the EAs expressly declined provision of security. In two cases, a form of security was granted in the sense that, as requested, the payment of amounts in escrow was ordered. In one case, the EA presented the possibility of requiring the posting of security as a means to offset the emergency measure's risk of altering the *status quo*, by ensuring that the eventual harm caused by the measure could be compensated. As the EA explained, the posting of security would typically be required for measures that modify the *status quo* between the parties, such as orders to transfer possession or to demolish, and not in cases of orders to "not change course". More generally, the EA appeared to suggest that the commonly applied interim measures requirements can be disregarded if they prove inadequate for the specific measure at hand. In that particular case, the EA decided that those requirements did not necessarily apply to the measure that was requested to merely preserve the *status quo*.

175. In at least three cases, the EA considered that a provision of security would not be justified absent an allegation of misconduct. While neither the EA Provisions (Appendix V, Article 6(7)) nor Article 28 applicable to arbitral tribunals specify the conditions

130 SCC Practice Note 2015-2016, supra note 91.
131 Ibid.
132 Ibid. case 3.3.

133 See supra Section III.D(3) "(v) Balance of equities (proportionality)".
134 See supra Section III.D(3) "(iv) No prejudgment on the merits".
135 See Article 28(1). See also *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 292, § 3-1042; G. Born, supra note 58, p. 2508; J. Lew, L. Mistelis, S. Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003) p. 608. See also Article 17(E) of the of the UNCITRAL Model Law 2006: "(1) The arbitral tribunal may require any party to provide appropriate security in connection with the measure. (2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so"; Article 26(6) of the UNCITRAL Arbitration Rules 2010; Art. 25(2), LCIA Rules 2014. In some cases, national laws may hinder the enforcement of an interim measure in case of non-compliance with the required provision of security, see Section 30 (1) (ii) of the Lagos State Arbitration Law; Article 89.1 (v) of the Colombian Arbitration Statute; see also the jurisprudence of the Vilnius country court on the basis of Article 23 of the Law on Commercial Arbitration of Lithuania.

under which payment of security can be required, similar caution can be found in case law regarding requests of security for costs before arbitra tribunals.[136]

176. The practice of EA proceedings under other rules also shows a similar reluctance to require provision of security in the context of emergency measures. Under the SCC Rules, there is no information regarding any instance, in which EAs considered, accepted or denied requiring the posting of security since 2010.[137] The SCAI has handled at least one case in which the respondent requested security.[138] The EA denied the request after determining that the respondent had not demonstrated that damages would be incurred as a result of the interim relief.[139] Similarly, the Arbitration Center of Mexico handled one case in which the claimant requested security and the EA granted the request.[140] Interestingly, even under the ICDR EA provisions, there is no instance in which an EA has ordered the provision of security.

b) Nature of the emergency relief sought

177. Whether viewed as an admissibility issue or as a matter arising in assessing the merits of the EA Application, EAs have frequently had to consider the nature of the emergency measures sought and whether such relief is appropriate.

178. Under the ICC Rules, EAs have the power to order measures of an "interim or conservatory nature". The Rules do not define interim or conservatory measures.[141] Interim (or provisional) relief has generally been defined as "decisions that are made prior to a final award, where the relief granted is usually, but not necessarily, designed to protect a party during the pendency of the proceedings, and which are potentially subject to alteration or elimination in the final award", while conservatory (or protective) relief refers to "relief that is designed to protect or conserve particular rights, regardless of whether it is granted in an interim or a final award".[142] However, none of the first 80 ICC EA cases have applied this distinction. Whenever faced with an EA Application, EAs have only assessed whether the requested measure constitutes preliminary relief.

179. EAs in ICC proceedings have decided the following types of requests for emergency relief:

- anti-suit / anti-arbitration injunctions;
- application of delay penalties (*astreintes)*;
- measures aiming to maintain the *status quo* and preservation of assets or property;
- measures restraining the sale of certain products allegedly in breach of contractual obligations;
- measures demanding performance of contractual obligations;
- measures demanding the reinstatement of individuals in a company, the removal of individuals from board positions or employment, the organisation of shareholders meetings, the passing of board resolutions and participation in board meetings;
- measures enjoining the enforcement of bank guarantees, and a declaratory order of the abusiveness of a potential enforcement of such guarantees;
- measures ordering security, as well as prohibiting the opposing party from drawing down on the performance bond; and
- measures impacting third parties.

180. An analysis of the first 80 ICC EA cases shows that while several EAs have considered the appropriateness of the specific measures sought, this is not always constrained by a technical analysis of whether such measures sought are permitted by any applicable law. EAs specifically address the question of the nature and type of the relief sought in some 25 cases. There is no clear visible trend on the norms applied in this respect. EAs have referred to availability of the relief as determined by the *lex arbitri*, and have sought guidance in international practice. Others have simply assessed whether the requested measures were "fit", "appropriate", or "possible". In at least one case, the EA equated its powers to order emergency relief to that of arbitral tribunals in general. In short, the decisions show a wide degree of discretion and flexibility.

181. ICC EAs have not had the opportunity to address whether declaratory relief is available in EA proceedings. Although an EA was faced with such a request, the Application was denied on other grounds. In the context of the SCC Rules, an EA granted a request for declaratory relief.[143] Conversely, an EA operating under the ICDR Rules rejected an application for declaratory relief because "the purpose of emergency relief [is] not to anticipate the decision

136 N. Blackaby, J. Hunter, C. Partasides, A. Redfern, *Redfern and Hunter on International Commercial Arbitration* (2015), p. 316: "Tribunals have been cautious about granting security in such a situation: in *Commerce Group v El Salvador,* for example, the annulment committee noted that 'the power to order security for costs should be exercised only in extreme circumstances, for example, where abuse or serious misconduct has been evidenced'".

137 See SCC Practice Notes supra notes 91 and 92; see also A. Havedal, "Urgency, Irreparable Harm and Proportionality: Seven Years of SCC Emergency Proceedings", *Kluwer Arbitration Blog* (29 Jan. 2017).

138 The Swiss Rules of International Arbitration allow EAs to order the provision of appropriate security through reference to Article 26; see Article 43(1) Swiss Rules of International Arbitration.

139 SCAI, Case No. 4 (unpublished).

140 The Rules of Arbitration of the Arbitration Center of Mexico (CAM) allows the EA to order a party to post security: see Art. 30 Bis, Sec. 6: "The urgent measure may grant under the condition that the requesting party provides the security fixed by the urgent arbitrator."

141 *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 289, § 3-1036.

142 G. Born, supra note 58, p. 2427. See also *Secretariat's Guide to ICC Arbitration*, op. cit. note 17, p. 289, §3-1036 (noting that common types of interim and conservatory relief include measures that (i) protect the *status quo*; (ii) preserve evidence; (iii) provide security for costs; (iv) secure the enforcement of the award; or (v) order interim payment).

143 SCC Emergency Arbitration (087/2012), in SCC Practice Note 2010-2013, supra note 91.

on the merits, but to preserve the *status quo*".[144] In the Task Force, there was no commonly accepted view as to whether or not declaratory relief could be available in EA proceedings. Some members argued that such relief cannot by definition qualify as interim or conservatory in nature, while others have countered that the wide discretion of the EA could in certain circumstances warrant the issuance of declaratory relief.

IV. POST-EMERGENCY ARBITRATION CONSIDERATIONS

A. Enforcement

182. As EA proceedings have become more prevalent, concerns about the enforceability of EA decisions have given rise to numerous debates.

183. Enforceability concerns have principally arisen from the status of the EA (i.e. whether arbitrator or simple adjudicator), the interim nature of the EA decision, and the specific form of the EA decision. The Report considers these hurdles to enforceability successively keeping in mind that they should not be overstated as most parties seem to comply voluntarily with EA decisions.

1) The status of the EA under national laws

184. Other than those of Hong Kong, New Zealand and Singapore, none of the national laws surveyed contains any provision expressly referring to the EA or the EA proceedings.[145] Most national laws seem to strictly apply to arbitral tribunals only and not to an EA. Given the relatively recent nature of EA proceedings, there is, at present, only limited case law addressing whether the EA is empowered to act under the national arbitration laws and whether national courts are empowered to enforce any decisions rendered by an EA.

185. From the analysis of 45 National Reports, a wide range of interpretations emerge, from expressing an unequivocal view that the EA is an arbitrator and that provisions applicable to the arbitral tribunal should apply to EAs, to others that consider that EA proceedings cannot be equated to proceedings before an arbitral tribunal.

186. Even where there is yet to be explicit confirmation from local courts, most reports from countries that have incorporated the UNCITRAL Model Law (and in particular its provisions on enforceability of interim measures), tend to favour the enforceability of EA decisions considering that full effect should be given to the provisions of the arbitration rules as the expression of the parties' intent and that it is reasonable to assume that the EA has the same powers as an arbitrator.[146]

187. In those countries where the UNCITRAL Model Law has only inspired the local arbitration law, then the position as to enforceability of EA decisions varies widely, even when the arbitration law expressly authorises arbitral tribunals to grant interim measures. In countries such as Belgium, Colombia, Portugal, Brazil, Nigeria, Poland, Spain, Ukraine, Turkey and Venezuela, National Committees tend to consider that arbitral tribunals' power to grant interim measures are consequently extended to EAs, while countries such as India,[147] Macedonia, Malaysia, Serbia and Thailand, are reported to have a restrictive interpretation of EAs' powers.

188. Further, in countries where statutory provisions allow arbitral tribunals to grant interim measures, national laws and practice often draw distinctions between domestic-seated and foreign-seated arbitration. In certain countries, enforcement is easier in domestic-seated arbitration, while in others enforcement is made easier in foreign-seated arbitration where the law of the parties is given prevalence. For example, in Colombia, EA decisions are not enforceable in domestic arbitration while they should be enforceable (due to greater deference to party autonomy) in foreign-seated arbitration. Similarly, in India, enforcement of EA decisions is uncertain in domestic arbitration. The Indian Act does not contain any provision with regard to EAs or emergency awards. However, with respect to emergency awards in domestic-seated international arbitrations, where the relevant institution rules provide for EA proceedings, it is likely that courts would treat the emergency award in the same manner as a regular award, depending on the status ascribed to it under the said rules. In foreign-seated arbitrations, while courts have, on the one hand, held that emergency awards cannot be enforced under the Arbitration and Conciliation Act (1996) and that the only method of enforcing the same would be by filing a suit, courts have, on the other hand, indirectly enforced

144 G. Lemenez, P. Quigley, "The ICDR's Emergency Arbitrator Procedure in Action – Part I: A Look at the Empirical Data", *Dispute Resolution Journal*, August/October 2008, p. 5; M. Gusy, J. Hosking, F. Schwarz, *A Commentary to the ICDR International Arbitration Rules*, supra note 27.

145 For example, national laws of these countries do not expressly refer to EAs: Australia, Austria, Belgium, Brazil, Canada, Chile, China, Colombia, Croatia, Cyprus, Finland, France, Germany, Greece, India, Ireland, Italy, Lebanon, Lithuania, Macedonia, Malaysia, Mexico, Nigeria, Pakistan, Panama, Peru, Poland, Portugal, Qatar, Russia, Serbia, Spain, Thailand, Turkey, UAE, Ukraine, United Kingdom, US and Venezuela.

146 For example, 1985 UNCITRAL Model Law countries: Austria, Canada, Cyprus, Greece and Mexico; 2006 UNCITRAL Model Law countries: Ireland and New Zealand (now provided for in legislation). Australia and Russia seem to consider to the contrary that an EA shall not be equated with an arbitral tribunal. This tendency is based on the opinion expressed by the National Committees and should be confirmed on a case-by-case basis. At the time this Report was drafted there was no case law to confirm the National Committees' reading of their national law.

147 The 246th Law Commission of India Report 2014 had suggested widening the definition of 'arbitral tribunal' under Section 2 (d) of the Arbitration Act, 1996 to include "emergency arbitrator". However, this definition was not included in the Arbitration (Amendment) Act, 2015. Therefore, the concept of "emergency arbitrator" is not yet recognised under Indian law.

the Orders of a foreign-seated EA under Section 9 of the Amendment Act by ordering the same relief based on the same cause of action that was brought before the EA.[148] Panamanian courts enforce domestic interim relief orders upon simple production of the decision, while they scrutinise foreign interim relief decisions through the exequatur process. Illustratively, in Croatia, it is reported that only domestic interim relief orders are considered enforceable.

189. In other countries, arbitral tribunals do not have general powers to grant provisional and conservatory measures either by express provision of the law (e.g. in Italy), or because the silence of the law is interpreted as a prohibition (e.g. in Pakistan). Consequently, in those countries, the direct enforceability of EA decisions is uncertain.

190. As illustrated, national laws differ greatly as to the potential enforceability of an EA Order. Some National Committees have reported that the potential enforceability of EA Orders might be increased if the parties specifically refer to EA proceedings in their arbitration agreement and do not limit themselves to referring to institutional rules containing EA Provisions.[149]

191. A handful of countries have actively addressed the uncertainties surrounding the enforceability of EA decisions by amending their arbitration law. Singapore amended its Arbitration Acts in 2012 providing that an EA constituted an arbitral tribunal and that the EA's decision, whether an "order" or an "award", shall be enforceable in Singapore. Similarly, the Legislative Council of Hong Kong passed the Arbitration (Amendment) Bill 2013 which empowers Hong Kong courts to enforce provisional and conservatory measures granted by an EA. With effect from 1 March 2017, New Zealand has also adopted reforms very similar to the Singapore amendments.[150]

2) Form and interim nature of the EA's decision and impact on enforceability

192. The doubts that have been expressed regarding the purported lack of enforceability of an EA's decision also stem from the fact that i) the EA's decision may be given as an order rather than an award, and ii) the decision of an EA may be viewed as lacking the finality requirement under the New York Convention.

193. Although under Article 28(1) of the ICC Rules the arbitral tribunal is free to determine the form of the measure it adopts,[151] Article 29(2) expressly states that "the emergency arbitrator's decision shall take the form of an order". Other institutions have expressly chosen to characterise decisions on equivalent pre-arbitral interim relief as awards,[152] or more often, have given the EA discretion to characterise the decision as an award or an order.[153]

194. The characterisation of the EA's decision as an "order" or an "award" may be of some concern in some jurisdictions when it comes to enforceability, such as Australia, Lebanon, the UAE, Thailand and Russia. But in most jurisdictions, in application of the principle of "substance over form", the form in which any type of interim measure has been rendered will be of little practical relevance.[154] Mexico has for example recently adopted provisions on court intervention in arbitration proceedings which, among other issues, provides that any interim measure shall be enforced upon request.[155] Mexican legislators also included a procedure for the enforcement of interim measures adopted in a procedural order, or otherwise.

195. According to most commentators of the New York Convention, such decision, irrespective of its characterisation, may not be recognised and enforced in most jurisdictions because interim measures would differ radically from final awards due essentially to the provisional nature of interim measures as opposed to the final nature of an award.[156] That said, it was noted

148 The Delhi and the Bombay High Courts have recently extended the application of Section 9 of the Amendment Act beyond court orders. They indirectly enforced the orders of a foreign seated EA by ordering the same relief based on the same cause of action that was brought before the EA. See *Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd. & Ors.* (2016) 234 DLT 349; *Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd.*, (2017) 4 AIR Bom R 440.

149 For instance, to enforce an EA decision, Panama requires that the parties expressly agree on the principle of enforcement of an EA's decision and set the conditions for such performance. It is reported that Italian courts are likely to enforce EA decisions if such mechanism is considered as a contractual remedy under the doctrine of "*arbitrato irrituale*". Italian courts would consider that the order is of a contractual nature and enforce it accordingly. In the USA, courts have compelled parties to participate in EA proceedings where specifically required by the arbitration agreement. Finally, it is reported that Cypriot courts might interpret the wording of Article 29(3) of the ICC Rules to mean that orders are deprived of finality and therefore not enforceable. Parties may therefore want to consider specifying the nature of EA Orders if they wish to enforce such order in Cyprus.

150 See Arbitration Act, s. 2(1) (enlarging the scope of what constitutes an "arbitration" to specifically include EA proceedings).

151 ICC Rules, Art. 28: "Any [conservatory or interim] measures shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate".

152 SIAC Rules (2016), Art. 1(3), 30; See also LCIA Rules (2014), Arts. 9(8), 9(9); ICDR Rules (2014), Art. 6(4); HKIAC Rules (2013), Art. 3(9) and Schedule 4(12); United Nations Commission on International Trade, *UNCITRAL Model Law on International Commercial Arbitration*, Art. 17(2) (2006), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

153 NAI Arbitration Rules, AFA Rules of Arbitration, ICDR, SIAC and SCC EA Rules.

154 N. Voser, C. Boog, "ICC Emergency Arbitrator Proceedings: An Overview", *ICC International Court of Arbitration Bulletin* (Special Supplement) Vol. 22 (2011) at p. 86.

155 Art. 1479 of the Mexican Code of Commerce: "Any interim measure ordered by an arbitral tribunal shall be recognised as binding and, except that the arbitral tribunal provides for otherwise, it shall be enforced upon request of the above by the competent court, regardless of the state where it has been ordered, and subject to the provisions of article 1480"

156 D. Di Pietro, "What Constitutes an Arbitral Award Under the New York Convention?", *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008), at pp. 155-156. Some prominent authors do not share this view and consider that an arbitral award providing for interim relief may be enforced under the New York

that in countries that have adopted the full version of the 2006 UNCITRAL Model Law, including the optional Article 17 (broadly applicable to interim measures), there is a stronger argument that the EA "order" or "award" will be enforceable.

196. Although Singapore, New Zealand and Hong Kong have enacted legislation providing that EA decisions may be enforced by the courts, and there is case law to the same effect in the USA and in Ukraine, the enforceability of orders in most jurisdictions is unsettled.[157] In most jurisdictions, in the absence of case law on the issue, it is not possible to draw conclusions as to the main lines of interpretation on the enforceability of EA decisions under the New York Convention.

197. In 2003, the Paris Court of Appeal refused enforcement of an order rendered pursuant to the then applicable ICC Pre-Arbitral Referee mechanism, declaring that the Referee was a third-party adjudicator as opposed to an arbitrator. The Paris Court of Appeal considered that the Referee's power was contractual in nature and not jurisdictional. It further considered that the Referee's decision could not be considered as an award under French law as it was not final.[158] The reasoning of the Court of Appeal in relation to the non-jurisdictional nature of the Pre-Arbitral Referee was highly criticised and would unlikely be relied upon today for EA proceedings where, contrary to the ICC Pre-Arbitral Referee Rules, the EA Provisions are incorporated in the ICC Rules. Yet, the *Cour de Cassation* held on 12 October 2011 that an award is "a decision of an arbitral tribunal which finally settles in whole or in part, the underlying dispute either on the merits, on jurisdiction or on any procedural issue which terminates the arbitral proceedings".[159] As all interim measures are subject to modification, termination or annulment until a final decision is made by the arbitral tribunal, it is unlikely that French courts will enforce EA decisions as long as such definition of award stands.

198. On the other hand, US case law has developed a more favourable interpretation of the finality of interim orders by focusing on whether the order disposes of a separate, self-contained issue. The 6th Circuit Court held that "[t]he interim award disposes of one self-contained issue, namely, whether the City is required to perform the contract during the pendency of the arbitration proceedings. This issue is a separate, discrete, independent, severable issue".[160] Similarly it was held by the Southern District of New York that "an award is final if it resolves the rights and obligations of the parties definitively enough to preclude the need for further adjudication with respect to the issue submitted to arbitration",[161] and by the Northern District of California that "this Court has authority under the FAA to review and vacate an arbitration panel's interim order … [a]s noted above, such an order is sufficiently 'final' to permit judicial review".[162] While few courts have directly addressed EA proceedings, as opposed to interim orders issued by an arbitral tribunal, those that have considered an EA's decision have treated it for all purposes as if it were an award made by a fully constituted arbitral tribunal.[163]

199. Notwithstanding the above, the increasing use of EA proceedings worldwide suggests that users are not dismayed by questions around enforceability of the EA's decision. The EA proceedings seem to work as a self-contained efficient and binding tool that already benefits from high levels of compliance by the parties and from the support of some courts.[164]

a) Compliance with EA decisions

200. EA proceedings seem to draw their efficiency, first, from the binding nature of their decisions;[165] and second, from the fact that the party who seeks

---

Convention provided that the arbitral decision granting interim relief constitutes an arbitral award at the place of arbitration. See e.g. Albert Jan van den Berg, "The Application of the New York Convention by the Courts", "Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention", *ICCA Congress Series* No. 9 (1999), at pp. 25-35. F. Santacroce, "The emergency arbitrator: a full-fledged arbitrator rendering an enforceable decision?", *Arbitration International*, Vol.31(2) 2015, 302 ff. The interpretation of the term award under the New York Convention is still evolving as demonstrated by Jan Paulsson's recent analysis of the Convention in "The 1958 New York Convention" (Kluwer, 2016), at pp. 97-136. N. Voser, C. Boog, supra note 155, at p. 86: "Whether an emergency arbitrator's Order is enforceable in a state court is a question governed not by the ICC Rules but by the law at the place of enforcement. Generally speaking, Emergency Measures are not enforceable under the New York Convention because they do not qualify as an « award » within the meaning of Article I(1) of the Convention".

157 B. Beigel, "The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis" (2014) 31(1) *Journal of International Arbitration* 1-18; L. Parkin and S. Wade, "Emergency arbitrators and the state courts: will they work together?" 80(1) *Arbitration* 48-54 (Chartered Institute of Arbitrators, 2014); The Higher specialised Court of Ukraine in Civil and Criminal Matters confirmed the enforceability of an EA's order which required Ukraine to refrain from levying a tax which amounted, according to the Kyiv Court of Appeal, to amend Ukrainian legislation.

158 *Société Nationale des Pétroles du Congo and Republic of Congo v. TEP Congo*, Paris Court of Appeal, 29 April 2003.

159 French *Cour de Cassation*, 12 October 2011, No 09-72.439.

160 *Island Creek Coal Sales v. City of Gainesville, Fla.*, 729 F.2d 1046 (6th Cir. 1984).

161 *Ecopetrol S.A. v. Offshore Expl. & Prod. LLC,* 46 F. Supp. 3d 327 (S.D.N.Y. 2014).

162 *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 937 (N.D. Cal. 2003).

163 See, e.g. *Yahoo! Inc. v. Microsoft Corp.*, 983 F. Supp. 2d 310 (S.D.N.Y. 2013) (confirming an EA award issued pursuant to the AAA Rules ordering specific performance to restore the *status quo*); *Blue Cross Blue Shield of Mich. v. Medimpact Healthcare Sys.*, Inc., No. 09-14260, 2010 WL 2595340 (E.D. Mich. June 24, 2010) (same).

164 D. Paraguacuto-Mahéo, C. Lecuyer-Thieffry, "Emergency Arbitrator: A new player in the field – the French perspective", *Fordham International Law Review,* Vol 40, Issue 3 (2017); At least in one known instance, the preliminary relief judge of the Amsterdam District Court in the Netherlands provided indirect support to the enforceability of an ICC EA Order (ECLI:NL:RBAMS:2017:282); In *Pre-Paid Legal Services, Inc. v. Kidd,* No. CIV-11-357-FHS, 2011 WL 5079538 (E.D. Okla. Oct. 26, 2011), the Court directed the parties to submit to the EA proceedings and extended the emergency Temporary Restraining Order sought by the applicant "to allow the parties to properly present, and the emergency arbitrator to properly consider, a request for emergency measures".

165 See ICC Rules (2012), Art. 29(2); SCC Rules (2010), Appendix II, Arts. 9(1), 9(3)); SIAC Rules (2016), Schedule 1(12); ICDR Rules (2014), Art. 6(4); HKIAC Rules (2013), Schedule 4(16).

compliance with the EA's decision can obtain support both from local courts and from the arbitral tribunal on the merits.[166]

201. There remains a risk that the party against whom the decision is directed fails to abide by it. Such risk may be perceived as greater in the context of EA proceedings where the EA who decided the urgent relief will not decide on the merits of the case[167] and where the arbitral tribunal hearing the merits of the case could be asked to reassess the decision of the EA.[168]

202. Yet, there are reasons to believe that parties voluntarily comply with EA decisions. To assess whether parties voluntarily comply with EA's decisions, different factors have to be taken into account including the number of emergency decisions effectively ordering an emergency measure, the number of emergency decisions exclusively deciding on allocation of costs, the orders obtained by consent and the number of settlements on the merits.

- Of the first 80 ICC EA Applications, only 23 have ended with the EA ordering all or some of the requested interim or conservatory measure. Out of the first six emergency cases managed by the SCAI, four requests were partially or fully granted, one dismissed and one withdrawn. Before the SCC Arbitration Institute, ten requests out of the first 14 requests were denied. Before the HKIAC, two out of the six Applications ended with a consent Order; one with a dismissal of the request, one Application was withdrawn, and one was rejected at the outset by the Centre.
- Among the successful applications, some were obtained through a consent Order, thereby limiting the issue of enforcement.[169] Preliminary feedback also indicates that EA proceedings are a potential early settlement tool on the merits. As a matter of fact, out of the first 80 ICC EA cases, 25 cases settled on the merits before the issuance of any final award, among which four settled before any Order was ever issued. For those cases, there are rarely enforcement issues given the high level of compliance with commitments undertaken in settlement settings.
- Of the 80 ICC EA Applications, there were approximately five occurrences where one of the parties did not comply with the EA's Order. In two instances, compliance issues were limited to the payment of the costs of the emergency proceedings.

203. Compliance issues related to the ordered emergency measures, excluding costs, were therefore encountered in only three cases out of the 23 ICC EA proceedings where an emergency measure was ordered. For those cases where the responding party fails to comply with the Order, applicants can seek support from local courts or raise a claim against the non-complying party before the arbitral tribunal.

b) Applicants can seek support from local courts

204. In the event of non-compliance, the successful applicant can attempt to seek support from local courts either in an enforcement action, particularly in UNCITRAL Model Law inspired countries, or in a breach of contract claim.

205. In certain jurisdictions, like in France, courts could be seized through a summary judgment to order specific performance of an EA's Order. Filing for a summary judgment would only be possible during the limited period of time between the issuance of the EA's Order and the constitution of the arbitral tribunal. Once the arbitral tribunal is in place it may be argued that, pursuant to Article 29(4) of the ICC Rules, the arbitral tribunal has sole jurisdiction on claims arising out of or in connection with the compliance or non-compliance of the Order and a claim before the arbitral tribunal to have the Order reconsidered pursuant to Article 29(3) of the ICC Rules may bar any application before state courts. At that time, however, it would be possible for the arbitral tribunal to confirm the Order in the form of an award or otherwise if it deems it is appropriate.

206. In countries where courts can sanction non-compliance with an EA's Order, most of the time through fines for contempt of court or *astreintes*, it is often requested that the Order envisions these potential sanctions. This is the case in Austria, Belgium, and the United Kingdom.[170]

207. Finally and drawing from experience, it appears that EA decisions, even if not complied with by the party against which the order is made, could influence local courts to support the decision of the EA. A Task Force member mentioned a case where the order not to draw on performance bonds was not respected by the responding party, who called the bonds. Despite the EA's decision, the first ranking bank, which was not a party to the EA proceedings, paid the responding party. The applicant then successfully seized the courts of the counter-guarantor bank, asking for an order that the counter-guarantor be ordered not to pay the first rank guarantor bank. Such a local court decision would have been very difficult to obtain had the applicant not first obtained the Order from the EA.

166 Although most national law provisions provide for local courts' assistance to arbitral tribunals and not specifically to EAs, most jurisdictions seem to admit court assistance to arbitration proceedings in general.

167 See N. Voser, C. Boog, supra note 154, pp. 81, 86.

168 See Art. 29(4) ICC Rules (2012); app. II Article 9(2) SCC Rules (2010); Schedule 1(10) SIAC Rules (2016); Art. 9(11) LCIA Rules (2014); Schedule 4(18) HKIAC Rules (2013); and Art. 6(5) ICDR Rules (2014).

169 Two out of the first six cases of HKIAC ended through a consent Order.

170 Out of the 45 National Reports that have examined the question of the courts' power to adopt sanctions in case of non-compliance with an EA's Order, 22 considered that sanctions were possible especially if the Order provided for such sanction. For instance: Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Finland, Greece, Lebanon, Lithuania, Mexico, Pakistan, Portugal, Singapore, Spain, Ukraine, United Kingdom, USA, Venezuela.

In other words, the EA eventually proved to be useful, even though it had been disregarded by the party to whom it had been directed.

c) Applicants can seek support from the arbitral tribunal

208. Under most arbitration laws, there is no statutory or case law limitation on the ability of an arbitral tribunal to take into account the non-compliance with an EA's order or award when considering the merits of the case or deciding on costs,[171] although the ability to impose penalties is generally more debated.

209. This is consistent with those institutional arbitration rules which expressly provide for the EA's decision to be binding upon the parties, and for the parties to undertake to comply with it.[172]

210. Further, Article 29(4) of the ICC Rules provides that "[t]he arbitral tribunal shall decide upon any party's requests or claims related to the EA proceedings including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order".[173] This provision gives the arbitral tribunal the power to i) reallocate the costs of the EA proceedings in light of a party's failure to carry out the Order; or ii) deal with the issue of compensation for costs and damages if the party who has been granted the Emergency Measures does not ultimately prevail on the merits.

211. Therefore, in the event that a party fails to comply with the EA's Order, the aggrieved party may request that a constituted arbitral tribunal deciding on the merits determine whether such failure caused an injury and whether it should be compensated. This provision provides for the possibility of the arbitral tribunal reallocating the costs of the EA proceedings in light of a party's failure to carry out the order or to deal with the issue of compensation for costs and damages if the party who has obtained the emergency measures does not prevail in the arbitration.

212. Damages can only be awarded to the non-defaulting party when a direct causal link is established between the party's non-compliance with the Order and the damage that has allegedly been suffered.[174]

213. Interestingly, among the first 80 ICC EA proceedings, there is only one known case where an arbitral tribunal granted damages for failure to comply with an EA's Order. In that case, the EA issued an anti-suit injunction Order. Breaching both the Order and the arbitration agreement, the respondent maintained its claims before the national courts and attempted to enforce the national court decision. Considering that such breaches were sufficiently serious, the arbitral tribunal ordered the respondent to pay i) all fees and costs expended by the claimant in resisting the respondent's legal actions, ii) all sums that the claimant might be ordered to pay in the future in those pending proceedings and iii) all fees and costs that the claimant might incur if the respondent succeeded in its parallel proceedings.

214. Post-EA arbitral tribunals could also be inclined to order additional relief, including drawing adverse inferences in situations in which the interim measure ordered aims at preserving documents or other evidence that is potentially relevant and material to the outcome of the case.[175] However, such measures should be exceptional and are not admitted in all jurisdictions.[176] The data analysed to date does not provide evidence of any tribunal drawing an adverse inference as described.

215. Finally, arbitral tribunals will also take responsibility for any unexecuted part of the EA's Order, notably as to costs, and reflect it in their final award. For example, in one ICC EA case, although the EA dismissed the Application for Emergency Measures, the Respondent was still ordered to pay the costs of the EA proceedings, including the applicant's legal fees. As the respondent did not comply with the EA's Order, the arbitral tribunal in its final award, ordered the respondent to pay all costs and legal fees including those incurred during the EA proceedings. Yet, the arbitral tribunal refused to grant claimant damages and lost profits for respondent's failure to comply with the EA's Order considering a lack of sufficient evidence.

3) Complicating compliance factors

216. The Task Force is aware of certain complications that have arisen in the compliance phase. Some are due to insufficient details in the EA's decision (timeframe, modalities of execution of the measure, etc.) and, in one instance, the tribunal deciding on the merits was simply too slow in assisting the party with encouraging compliance with the EA Order. The parties are therefore encouraged to specify in the merits proceeding whatever requests they have

171 In certain jurisdictions however, such as Poland, Nigeria and UAE, arbitral tribunals will only be allowed to order damages as a remedy on the merits in case of non-compliance with the EA's Order if it was provided in the arbitration agreement. In Germany, arbitral tribunals could order penalties payable to the aggrieved party if a penalty clause conforming to the requirement of the German Civil Code was included in the contract.

172 Appendix II Article 9(1)(3) SCC Rules (2010); Schedule 1(12) SIAC Rules (2016); Article 6(4) ICDR Rules (2014); and Schedule 4(16) HKIAC Rules (2013).

173 See also Appendix II Article 10(5) SCC Rules (2010); Schedule 1(13) SIAC Rules (2016); Article 9(10) LCIA Rules (2014); Article 6(8) ICDR Rules (2014); Schedule 4(15) HKIAC Rules (2013).

174 D. Paraguacuto-Mahéo, C. Lecuyer-Thieffry, supra note 165.

175 Pursuant to Article 9(5) of the IBA Rules on the Taking of Evidence in International Arbitration, if a party fails without satisfactory explanation to produce any document requested in a request to produce to which it has not objected in due time or fails to produce any document ordered to be produced by the arbitral tribunal, the arbitral tribunal may infer such evidence would be adverse to the interests of that party.

176 Based on the National Reports provided to the Task Force, 22 countries out of 45 admit the drawing of adverse inference by arbitral tribunals in case of non-compliance.

for interim or conservatory measure so as to facilitate enforcement of the EA decision. The institutions are also encouraged to ensure that the newly-appointed members of the tribunal deciding on the merits are made aware that compliance with EA decisions may require their immediate attention.

B. Modification of the EA's decision by the EA or the arbitral tribunal

217. The EA has the ability to modify the EA's Order prior to the constitution of the arbitral tribunal.[177] Article 6(8), Appendix V of the ICC Rules provides that "[u]pon a reasoned request by a party made prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 of the Rules, the emergency arbitrator may modify, terminate or annul the Order".

218. In at least one ICC case, the applicant sought a modification of the EA's Order and issuance of further emergency relief a few weeks after the initial EA Order was made. As the arbitral tribunal was not yet constituted, the EA addressed the emergency request (which was partially granted). The data does not, however, allow for any broad conclusion as to the extent to which EAs or arbitral tribunals on the merits have in practice modified or confirmed the EA's original decision. The Task Force members suggest that arbitral institutions establish formal follow-up procedures for further analysis.

219. It is most likely that Orders are not modified unless the objecting party can show that circumstances have changed to such an extent since the rendering of the Order that a modification of the Order is warranted.

220. Based on available data from the first 80 ICC EA proceedings, modification of an EA Order was requested only eight times. Such requests were filed five times before the EA pursuant to Article 6(8) of Appendix V of the ICC Rules, and three times before the arbitral tribunal or sole arbitrator constituted to determine the merits pursuant to Article 29(3) of the ICC Rules. The requests for modifications were dismissed in seven cases and granted in one case.

221. For instance, in one case, as the applicant did not comply with the EA's Order to pay the costs of the EA proceedings, the respondent filed a request with the EA to modify the Order to i) set a time limit for payment, ii) order the applicant to pay interest, and iii) pay for the respondent's costs in seeking enforcement of the Order. The EA dismissed the request for modification considering that i) urgency was missing, ii) the requested measure was unnecessary, and iii) it should have been sought before the Order was even issued.

222. In another case, the respondent filed a request for modification of the EA's Order arguing that the order to place money in an escrow account should be revised in light of changes of circumstances and lack of urgency. Considering the respondent's failure to comply with the original Order, the claimant also requested a modification of the Order, including, inter alia, a request for *astreinte*. The EA was not persuaded that the circumstances upon which the order was granted were materially different and did not find sufficient justification for modifying the Order. While neither party had succeeded in its request for modification of the Order, the EA considered that the respondent had first brought the request for modification and had yet to comply fully with the Order. Accordingly, the EA ordered the respondent to pay claimants the costs for responding to the request for modification.

223. In a third case, the respondent had asked the EA to modify its order to include legal costs which had not been awarded to any party in the initial Order. The EA rejected such request and held that it was not within its mandate to decide on the merits. While insisting that it was not asking to overturn the EA's Order, the respondent requested the arbitral tribunal to complete the Order as to the legal costs incurred in the EA proceedings. The arbitral tribunal agreed to do so and specified that "[w]hen the emergency arbitrator's order has been made, only the subsequent arbitral tribunal is competent to decide on requests of the parties to award costs, as in the case at hand".

224. In three other cases, the requests to modify the Order were exclusively made before the arbitral tribunal or sole arbitrator. For example, in one ICC EA case, the EA ordered the respondent to ensure that the applicant's affiliate (the project company) would obtain the renewal of a permit. As the permit was not renewed, the sole arbitrator accepted the applicant's request to modify the EA's Order considering that it was not bound by it and that circumstances had changed since the Order had been issued. It thus ordered the respondent to inform the applicant of its steps taken to ensure renewal of the permit.

C. Settlement of the dispute

225. As already mentioned, the settlement rate among the first 80 ICC EA cases is relatively high, with 25 cases having settled on the merits before the issuance of any final award. No definitive conclusion can be drawn from these figures as the analysed data does not allow one to establish a direct link between emergency proceedings having taken place and the reasons behind a settlement. The Task Force believes, however, that EA proceedings can give the parties a better understanding of the case and of their chances of success. This is especially true where the EA expressed views as to the strength or weakness of any of the parties' positions.

177 The ICC Rules provide that the EA "shall not act as an arbitrator in any arbitration relating to the dispute that gave rise to the Application". ICC Rules (2017), Appendix V, Art. 2(6). Contrary to the ICC Rules, some other institutions allow for an EA to be appointed to the Arbitral Tribunal upon agreement by the parties. See, e.g. ICDR Rules (2014), Art 6(5); SCC Rules, Appendix II, Art. 4(4); SIAC Rules, Schedule 1, No. 6; Swiss Rules of International Arbitration, Art. 43(11).

226. Indeed, a party will take the EA's *prima facie* analysis of the case very seriously. Such analysis can act as a reality check on the strength of the party's case and lead to early settlement. In at least 11 cases, it is likely that the Order had an influence on the settlement, either by admission of the parties or as a result of the EA's *prima facie* findings on the merits.

227. This side effect of EA proceedings ought to be only that; a side effect. Parties should not confuse EA proceedings with other dispute resolution tools, which may be more appropriate depending on the objectives they are seeking. It is not excluded that Orders may be partially rendered by consent following the parties' joint request that the EA decide on certain disputed issues, or that the EA provide views to facilitate settlement. It is not recommended however that the EA include *obiter dicta* or preliminary views (except upon request of the parties) on disputed issues with relevance to the merits of the dispute beyond what is necessary to the decision as to whether the measure requested should be awarded. Indeed, the jurisdiction of the EA is limited to determining whether an urgent interim or a conservatory measure is warranted. Further, the EA has limited time and limited evidence to issue a decision, which is temporary in nature and not binding upon the arbitral tribunal.

Annex I

Overview of the First 80 ICC EA Applications

A. GENERAL INFORMATION

(i) Numbers and origins. Introduced by the 2012 ICC Rules of Arbitration and in force since 1 January 2012, the Emergency Arbitrator Provisions ("EA Provisions") consisting of Article 29 and the Emergency Arbitrator Rules (Appendix V), have so far enabled parties to apply 95 times for EA proceedings.[178] This overview will limit itself to the first 80 ICC EA cases, including the 80th EA Application filed on 30 April 2018.

The first 80 ICC Applications for Emergency Measures under the EA Provisions involved a total of 247 parties, 121 applicants and 126 respondents, of 51 different nationalities and from all continents.[179] Among the 80 EA Applications filed, approximately 30% of the applicants came from Latin America and the Caribbean; this high demand shows the particular relevance of making emergency relief available to parties from that continent. It may be worth noting that parties in these cases have in the majority chosen a seat of arbitration outside Latin America. Over 25% of the applicants came from North and West Europe, and 10% from North America. There is a relatively lower demand for emergency relief from parties in Asia, Africa, and Central and East Europe.

Thirty cases involved at least two parties with the same nationality, out of which 15 involved parties exclusively with the same nationality and could therefore be considered as "domestic" even if the dispute contained international elements.

Regardless of whether parties had recourse to state courts for interim relief in parallel to these EA Applications, these figures show that parties have widely accepted and used the services of an EA offered by ICC in different corners of the world.

(ii) Multiple parties. Twenty-two out of the 80 EA Applications involved more than two parties and were as such considered as multiparty cases with as many as four applicants and ten respondents.

(iii) Multiple contracts. Twenty-seven of the 80 EA Applications involved multi-contracts with at its maximum six related contracts containing different but compatible arbitration agreements.

(iv) Sectors. The transactions underlying the first 80 EA Applications covered diverse sectors. Half of the applications related to the construction, engineering and energy sectors; ten cases related to share purchase agreements; and fewer cases related to the metals and raw materials industry; the transportation sector; the telecommunications sector; leisure, entertainment and media; the sale of agricultural and chemical products in the agribusiness, real estate transactions; equity interest purchase agreements, and the pharmaceutical business.

The EA proceedings have not only been used in the private but also in the public sector. Of the 80 EA cases, eight cases involved states or state entities and in all cases but one, the state or state entity was the responding party.

(v) Amount in dispute. The amount in dispute in these cases ranged from approximately USD 250,000 to USD 20 billion, with an average amount of USD 190 million. These figures confirm the initial thought that EA proceedings are not limited to high-value cases and suggest that the additional costs incurred by the proceedings have not been a deterrent to their use even in lower value cases.[180]

B. PLACE AND LANGUAGE OF THE EA PROCEEDINGS

(i) Seat. Article 4(1), Appendix V provides that if the parties have agreed on the place of the arbitration, this place should also be the place of the EA proceedings. Otherwise, the President of the ICC Court will fix the place of the EA proceedings.

Forty-three EA proceedings were seated in Europe: in Paris (17 cases), Geneva (nine cases), London (eight cases), Amsterdam (two cases), Zurich (two cases), Madrid (two cases), Vienna, Basel, and in Istanbul. Twelve EA proceedings were seated in North America: in New York (seven cases), Houston (three cases), Miami, and in Dallas. Ten EA proceedings were seated in Latin America: São Paulo (four cases), Mexico City (three cases) Bogota, Medellin, and in Santiago de Chile. Finally, ten EA proceedings were seated in East and West Asia: in Singapore (five cases), Hong Kong, Doha, Manama, Tel Aviv and in Maui.

In 73 of the 78 EA proceedings that eventually took place, the place was provided for by the arbitration agreement. As already explained by A. Carlevaris and J. Feris:

178 Number of ICC EA Applications as of 1 March 2019.

179 Algeria, Austria, Australia, Bahrain, Benin, Bolivia, Bosnia and Herzegovina, British Virgin Islands, Brazil, Bolivia, Cayman Islands, Chile, China, Colombia, Dem. Rep Congo, Cyprus, Ecuador, France, Germany, Hong Kong, Hungary, Ireland, Israel, Italy, Lebanon, Luxemburg, Senegal, South Korea, , Marshall Islands, Lebanon, Mauritius, Mexico, Morocco, The Netherlands, Oman, Panama, Peru, Poland, Philippines, Qatar, Romania, Saudi Arabia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, UAE, United Kingdom, Ukraine, USA.

180 A. Carlevaris and J. Feris, supra note 22, at p. 28.

> 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 the place indicated in the arbitration agreement in the main contract.[181]

The five cases where a decision from the President of the ICC Court was needed to fix the place of EA proceedings included the following situations: [182]

- The arbitration agreement provided that "[t]he seat of arbitration shall be New York". As New York is a state and the place of arbitration must be a city, the President fixed the seat as New York [City], New York. In the related arbitration proceeding, the claimant had also specified the seat to be New York, New York (USA).
- The arbitration agreement provided for the seat to be "the State of New York, Country of New York"; the latter was understood to refer to the borough of Manhattan, New York City.
- The arbitration agreement did not provide for a seat. Claimant proposed Amsterdam as the seat and the President of the ICC Court fixed the seat as proposed. In making the decision, the President considered that neither party was from the Netherlands but that the applicable law of the contract was Dutch law. The Netherlands' favourable approach to enforcement of EA decisions was also taken into consideration. [183]

(ii) Language. 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 EAs. According to the ICC Rules, Applications must be drafted in the language of the arbitration if this has been specified in the arbitration agreement or subsequently agreed by the parties (Article 1(4), Appendix V). If not, it is to be drafted in the language of the arbitration agreement.

In 74 out of 78 EA proceedings, the language of the arbitration was determined in the arbitration agreement; in the other cases, the issue was not controversial and subsequently agreed on by the parties. EA proceedings were generally held in English, but French was the second most used language in ten cases. Spanish was the language of the proceedings in eight cases and Portuguese in two cases.

181 Ibid. p. 30.

182 When fixing the place of EA 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, and relevant language(s), the aim being to avoid any surprises for the parties.

183 See supra Section III. D(2) "Norms applicable to EA Applications".

C. THE EMERGENCY ARBITRATORS

(i) Appointment of the EA and nationality. As explained below, out of the first 80 Applications, the President of the ICC Court declared the EA Provisions applicable 78 times and allowed the EA proceedings to proceed. Naturally, no appointments were made for the two Applications for which the President had declared the EA Provisions to be inapplicable. Out of these 78 EA cases, a total of 80 EAs were appointed by the President pursuant to Article 2, Appendix V. [184] This can be explained by the fact that two EAs had to resign and were subsequently replaced. These EAs resigned due to potential issues of impartiality and independence pursuant to the disclosure of new facts.

The nationalities of these 80 appointed EAs, 60 men and 20 women, demonstrate significant diversity. They originated from: Argentina, Australia (three EAs), Brazil (seven EAs), Belgium (four EAs), Canada (seven EAs), Chile, Costa Rica, Colombia (two EAs), Denmark, Egypt, France (15 EAs), Germany (six EAs), Greece, the Netherlands (two EAs), Iran, Italy (two EAs), Ireland, Lebanon (two EAs), Malaysia, Mexico (two EAs), New Zealand, Peru (two EAs), Portugal, Spain (three EAs), Switzerland (four EAs), Sweden (four EAs), United Kingdom (six EAs), USA (13 EAs) and Venezuela.[185]

Two EAs were appointed on the same day of the Secretariat's receipt of the Application, 49 EAs were appointed on the day following the Secretariat's receipt of the Application, and 27 EAs were appointed within two days pursuant to Article 2(1) of Appendix V.[186]

(ii) Challenge. Pursuant to Article 3(2) Appendix V, the ICC Rules allow for the possibility of challenging an EA. Of the first 80 appointments, four challenges were made before the expiry of the time limit for rendering the Order, but in each of these cases the

184 A. Carlevaris and J. Feris, supra note 22: "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. 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 the place of arbitration and their ability to conduct the proceedings in the required language".

185 Unlike sole arbitrators and presidents of arbitral tribunals acting under the ICC Rules, EAs 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 EA who is a national of that country.

186 Of the two remaining EAs, it seems that finding the suitable and available EA for a case is one of the reasons that may cause delay.

challenges were dismissed.[187] In each of these cases, the EA and the other party were heard. One challenge was filed one day before the expiry of the time limit for rendering the Order; the Order was rendered within the deadline and the challenge was decided by the Court later, after granting the EA and the other party a short time to submit comments.

D. THE APPLICATION AND THE FILING OF THE REQUEST FOR ARBITRATION

(i) Filing the Application. When parties wish to have recourse to ICC EA proceedings, they shall submit an Application pursuant to Article 1 of Appendix V. Five EA Applications were filed by email directly to the teams already in charge of an on-going arbitration on the merits, two EA Applications were filed through the regular email address for filing a Request for Arbitration (arb@iccwbo.org), another five hard copy EA Applications were hand delivered to the ICC Secretariat. The remaining EA Applications were filed through the specifically dedicated email of emergencyarbitrator@iccwbo.org, which is the correct address to use for submitting an EA Application prior to the Request for Arbitration.

(ii) Applicability of the EA Provisions. Pursuant to the Rules, when the Application is filed, the President of the ICC Court is required to decide whether the EA Provisions apply on the basis of Articles 29(5) and 29(6), which set out four separate requirements.

Among the first 80 ICC EA Applications filed since 1 January 2012, 78 EA cases were set in motion by the President. Hence, in only two cases the President considered that the EA Provisions did not apply.

In one case, the Application did not fulfil the Article 29(5) requirement that the parties must be signatories to the arbitration agreement.[188] The Application was filed after 1 January 2012 but brought under an arbitration agreement that was included in a bilateral investment treaty ("BIT") dated 2001 which entered into force in 2003 and the BIT as such was not signed by the responding party. The President considered the applicability of the EA provisions in light of (i) the requirement that all parties be signatories of the arbitration agreement (or successors to such signatories) and (ii) the requirement of Article 29(6) that the arbitration agreement be concluded before 1 January 2012. The President decided that the EA Provisions did not apply to this Application as the first requirement of "signatories" to the arbitration agreement was not met. In reaching this decision, reference was made to the ICC Commission Report on *States, State Entities and ICC Arbitration*,[189] which explains that (i) the purpose of the signatory requirements under Article 29(5) was, among others, to exclude investment arbitration from the EA Provisions, and (ii) that parties to an arbitration agreement that is formed by the offer contained in the BIT and the investor's acceptance by a Request for Arbitration cannot be considered signatories for the purposes of Article 29(5).[190]

The second EA Application that was not set in motion by the President involved an arbitration agreement dated 2006, thus prior to date of entry into force of the EA Provisions, and the parties did not agree that the provisions could apply a posteriori.

(iii) Notification and participating parties. When the President of the ICC Court decides that the EA Provisions apply, it triggers the notification of the Application to the responding party by the Secretariat. (Article 1(5), Appendix V). The respondents participated actively in all of the 70 cases in which an Order was issued, and in no case was due process a subject of contention.

(iv) Filing of the Request for Arbitration within 10 days. A particularity of ICC emergency relief is that an Application can be filed before the submission of the Request for Arbitration, upon the condition that the Request for Arbitration must be filed within 10 days of the Secretariat's receipt of the Application, unless the EA determines that a longer period of time is necessary. If no Request for Arbitration is submitted within the deadline set by the Rules or within any new time limit determined by the EA, the EA proceedings shall be terminated by the President of the ICC Court (Article 1(6), Appendix V).

Among the 78 Applications set in motion by the President of the ICC Court, the Request for Arbitration had been filed prior to the EA Application in 18 cases. In one case, the EA Application was filed approximately one month after the submission of the Request for Arbitration but still before the filing of the answer to the Request and the constitution of the arbitral tribunal. In another case, the applicant for emergency relief was also the respondent to the Request for Arbitration on the merits filed. It was considered that the requirement embodied in Article 1(6) was fulfilled as the applicant had filed a counterclaim in the

187 If a party wishes to challenge the appointment of an EA, 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). Article 3(1) Appendix V. There is no provision suspending the EA proceedings while a challenge is pending, and the challenge can be decided even after the EA's Order has been made.

188 ICC EA Case No. 13.

189 ICC Commission Reports are available at **https://iccwbo.org/commission-arbitration-ADR** and in the ICC Digital Library (**http://library.iccwbo.org/dr-commissionreports.htm**).

190 ICC Commission Report *States, State Entities and ICC Arbitration* at paras. 51 - 52. With respect to the second question on whether the arbitration agreement was concluded after 1 January 2012, the applicants relied on the fact that the offer to arbitrate in the BIT does not limit the reference to the Rules to the version applicable at the time of the BIT's entry into force. The applicants argued that a generic reference to the ICC Rules means that the State made an offer to arbitrate under the ICC Rules in force at the time the offer is accepted and that it is universally accepted in investment treaty arbitration that the date of the arbitration agreement is the date of the filing of the Request for Arbitration. Since the offer was accepted when the investor, i.e. applicants, filed the Request for Arbitration after 1 January 2012, the EA Provisions of the 2012 Rules applied.

arbitration on the merits, which was thus considered equivalent to the Request for Arbitration for the purpose of Article 1(6) Appendix V.[191] In a third case, the Application was not filed by the claimant in a newly commenced or imminent arbitration, but rather by the respondent in an on-going arbitration.[192] Although the EA Provisions did not expressly contemplate such a situation, the Application was considered admissible and EA proceedings were set in motion in the already existing arbitration.

In three cases, the respondent submitted a counterclaim which was addressed by the EA with the initial Application; no separate Application needed to be filed.

Out of the 78 EA cases that proceeded after green light was given by the President, the Request for Arbitration and the EA Application were submitted simultaneously in 12 EA cases. In 47 EA cases, the application was submitted before the Request for Arbitration. In accordance with Article 1(6) of Appendix V, among those 47 cases, 35 Requests for Arbitration were filed within the 10-day period, without the need to request an extension. (In three cases, the Sunday was excluded in the counting of those 10 days, effectively resulting in 11 days). In five cases, parties did need to request the EA to extend beyond the 10-day timeline varying from two extra days to 30 days and for different reasons. All requests for a time extension were granted by the EA and in each of these cases the Request for Arbitration was filed within this extended time limit. In one case, the EA was withdrawn before the Request for Arbitration was filed and due. In another case, the Application was withdrawn as the emergency relief was no longer needed. As a consequence, there was no need for the President of the ICC Court to terminate any EA proceedings among the first 80 Applications on the basis that the Secretariat had not received the Request within 10 days or within an extended time limit of the Secretariat's receipt of the Application pursuant Article 1(6) of Appendix V.

Commentators have noted that the requirement that the Request for Arbitration be filed within 10 days of the Application could conflict with the parties' obligations under a multi-tiered dispute resolution clause. This issue can be addressed by the parties in a number of ways, for example by filing a Request for Arbitration and then seeking a stay pending compliance with the escalation clause, or by obtaining an extension of the filing requirement from the EA.

E. THE PROCEEDINGS

(i) Timetable and conducting the procedure. Article 5(1) of Appendix V requires the EA to establish a procedural timetable for the EA proceedings within as short a time as possible, normally within two days from the transmission of the file. In the majority of the 80 ICC EA cases, the procedural timetable was issued between one and two days.[193] In some cases, the procedural timetable was issued later, generally due to the issuance of a new calendar after an extension request.[194]

The EA Provisions do not propose or recommend the holding of a case management conference, but among the 78 EA Applications that proceeded, a case management conference was held in 25 cases, in one case it was even held twice, and in 53 cases a case management conference was not held.

With respect to the number of submissions, the majority of the EA cases included an Application, a response, a reply and a rejoinder. In six cases, there were only two submissions (Application and response), and in four cases, only one submission. In two exceptional cases, 10 and 16 submissions had been filed. Occasionally, an EA would ask for a separate submission of costs.

(ii) Evidence and burden of proof. Hearings were held in 53 cases, in person (in 20 cases) and by telephone (in 33 cases). Witness statements were issued in 18 cases (between one and ten in each of these cases). Expert reports were issued in three EA cases (between two and four reports).

As explained below, the 80 Applications studied eventually resulted in 69 Orders. Out of those 69 Orders, the EA explicitly considered that the burden of proof lies with the party wishing to have recourse to an emergency arbitrator and thus with the applicant. In 30 Orders, there was no express consideration from the EA regarding which party bears the burden of proof. In none of the cases did the EA consider or order a shift of the burden of proof to the responding party.

F. THE REQUESTED EMERGENCY MEASURES

The first 80 EA Applications concerned requested measures which can be classified in six main categories:

- preserving the *status quo* (in 51 cases): applicants sought maintaining the *status quo* to guarantee enforcement. For instance in one case the applicant requested an order from the EA for a preliminary injunction to preserve the *status quo* and to maintain the distribution agreement in effect;
- specific performance (in 23 cases): applicants sought obtaining specific performance under the contract;
- declaratory relief (in ten cases);
- transfer of money into an escrow account (in seven cases);

191 ICC EA Case No. 7.
192 ICC EA Case No. 47.

193 On the same day in 5 EA cases, after one day in 27 cases and within two days in 19 cases.
194 Within three days in 10 EA cases, within four days in 8 cases, within five days in 1 case, within six days in 1 case, within seven days in 1 case. In one particular circumstance, the timetable was issued after 14 days.

- interim payment (in eight cases); and
- anti-suit injunctions (in six cases): applicants for instance sought an injunction preventing the respondents from bringing any legal actions in state courts until the merits of the dispute had been decided.

In some cases, the requests fell under more than one category. For instance, in one case, the applicant requested a declaration that he did not have to provide payment of the last instalment in addition to requesting the preservation of the *status quo*.[195]

G. THE ORDERS

As explained above, among the first 80 ICC EA Applications filed, the President of the ICC Court considered that the EA Provisions did not apply in only two cases. Out of the 78 cases set in motion, eight cases were withdrawn, of which three cases settled during the EA proceedings (prior to an Order) and five cases where the EA issued a termination Order. In one case, the parties came to an agreement which led to a consent Order.

As a result, the 80 Applications resulted in 69 EA Orders: 19 Orders rejected the Application for Emergency Measures in whole or in part on grounds of jurisdiction and/or admissibility. Out of the 59 Orders addressing the merits, the EA entirely rejected the requested relief in 36 cases, and partially or fully granted the requested Emergency Measures in 23 cases (the EA fully granted the requested emergency relief in only 8 of those cases).

H. THE COSTS

Article 7(1) of Appendix V requires an applicant to pay USD 40,000 (USD 10,000 for ICC administrative expenses and USD 30,000 for the EA's fees and expenses) when filing its Application.

Of the first 80 EA Applications, nine were withdrawn or the EA Provisions were declared not to apply and therefore no Order was rendered. Consequently, these Applications are not taken into account with respect to (the allocation of) costs. Nonetheless, it is worth noting that in one case in which parties withdrew prior to the issuance of the Order, the President of the ICC Court fixed the costs exercising the right thereto pursuant to Article 7(5) of Appendix V and determined the amount to be reimbursed to the applicant.[196]

Among the 69 Orders issued, EAs allocated the costs according to the "costs follow the event" principle in 56 Orders. However, some distinctions need to be made in the application of such principle:

- In 39 Orders, the "costs follow the event" principle was applied without taking into consideration any other elements. The non-prevailing party was ordered to pay the costs of the arbitration.
- In 11 Orders, even though the EA followed the same the behaviour of the parties such as compliance with intermediary orders, level of diligence, practice of good faith and timely submissions was taken into consideration by the EA applying the "costs follow the event" principle and impacted the allocation of costs.
- In 6 Orders, the EA followed the "costs follow the event" principle for the legal costs which were not awarded. The various reasons which led to these decisions included: i) the responding party reserved its rights to claim damages and reimbursement of costs including legal costs against applicant; ii) the parties did not make any submissions as to reasonable legal and other costs, and iii) the EA reserved the decision on legal costs to be determined by the arbitral tribunal.
- In 13 Orders, the EA did not follow the principle "costs follow the event" but instead based the decision on costs on other considerations such as: i) the EA allocated, following the parties' requests, costs based on the reasons to seek the Order and their behaviour; ii) parties' agreement during their oral submissions that applicants should bear 100% of the ICC administrative fees and EA's fees and that each party would bear their own (legal) costs; iii) notwithstanding the fact that applicant did not prevail, it was justified in making its claims and therefore each party should bear its own costs; and iv) parties' agreement to defer the decision on costs to the arbitral tribunal. Introductory Note

195 ICC EA Case No. 4.
196 ICC EA Case No. 9.

Annex II

ICC National Committees' Answers to Questionnaire on the Status of EA Proceedings under Local Law

INTRODUCTORY NOTE

The Questionnaire addressed to ICC National Committees was one of the main sources for the Task Force study.[197]

This Annex II consists of 45 National Reports largely provided by the ICC National Committees and is meant as a general overview only. It should not be understood as exhaustively reflecting the current provisions of local laws or status of case law at the date of publication. ICC and its constituent bodies should not be held responsible for the accuracy of the information provided below and collected from the ICC National Committees' Answers received between May 2016 and March 2019.[198]

THE QUESTIONNAIRE

The Task Force call for National Reports raised the following issues:

1. Whether the national laws of each jurisdiction prevents or limits an EA from rendering an order granting interim relief or to the contrary allows an EA to render an order subject to penalties for non-compliance (**'Status of the emergency arbitrator'**).

2. The impact of national laws on the enforcement of an EA decision or decisions by arbitrators granting interim relief, notably the relevant criterion and limitations commonly applied in each jurisdiction, as well as practical issues to be taken into consideration (**'Enforcement of interim/conservatory measures'**).

3. Since enforcement of an EA's order is not always possible in law or practice in relevant jurisdictions, the Task Force sought to understand the experience under each jurisdiction with alternatives available under the law and in practice to address non-compliance with an EA´s order (**'Alternative remedies for non-compliance with the EA's order'**) and more specifically:

- Are damages available as a remedy in the arbitration on the merits?
- Can state courts order penalties for non-compliance with an EA´s order?
- Is interim relief available in the arbitration on the merits securing relief?
- Will non-compliance with an EA´s order impact the findings of the Arbitral Tribunal on the merits on substance or on costs?

The following ICC National Committees submitted their Answers to the Questionnaire:

1- Australia, 2- Austria, 3- Belgium, 4- Brazil, 5- Canada, 6- Chile, 7- China, 8- Colombia, 9- Croatia, 10- Cyprus 11- Finland, 12- France, 13- Germany, 14- Greece, 15- Hong Kong, 16- India, 17- Ireland, 18- Italy, 19- Lebanon, 20- Lithuania, 21- Macedonia, 22- Malaysia, 23- Mexico, 24- Netherlands, 25- New Zealand, 26- Nigeria, 27- Pakistan, 28- Panama, 29- Peru, 30- Poland, 31- Portugal, 32- Qatar, 33- Russia, 34- Serbia, 35- Singapore, 36- Spain, 37- Sweden 38- Switzerland, 39- Thailand, 40- Turkey, 41- Ukraine, 42- United Arab Emirates, 43- United Kingdom, 44- United States of America, 45- Venezuela.

197 See para. 50 of the Report.
198 See "Note to Readers", p. 3 of the Report.

1- AUSTRALIA Arbitration Statute(s) International Arbitration Act 1974 ('IAA'). UNCITRAL Model Law (1985) incorporated in IAA in 1989. 2006 amendments to the UNCITRAL Model Law incorporated in IAA amended in 2010. State and Territory Commercial Arbitration Acts incorporating 2006 version of UNCITRAL Model Law.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> Nothing in IAA regarding EA, i.e. neither prohibited nor recognised. > Term 'arbitral tribunal' as used in IAA does not cover/include the EA. > ATs and courts can order interim measures. > It appears possible to extend this principle to the EA's decisions, but no authority to date.	Enforceable	Uncertain	Penalties / Sanctions for non-compliance with EA's decision	NO Unless in the final award	YES
Form of the order	> An interim measure may be ordered in the form of an award.			Power to award damages in case of non-compliance with EA's order	YES	No information
Limits	> Risk that Australian courts do not consider the EA as an AT under the terms of Art. 2(b) of the UNCITRAL Model Law, or that the EA has the powers to order interim decisions as defined under Arts 17(1) and 17(H) of the UNCITRAL Model Law. > No interim order on *ex parte* basis. > Orders from AT, hence EA, cannot affect third parties.			Possibility to draw adverse inference from non-compliance with EA's order	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

<table>
<tr><td colspan="2">2- AUSTRIA

Arbitration Statute(s)
UNCITRAL Model Law (1985) incorporated in the Austrian Civil Code of Procedure.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> EA not addressed under Austrian law.
> But as Austrian law expressly authorises an AT to order interim measures (except where parties agree otherwise), an EA must be equated with an AT.
> EA therefore allowed to issue interim measures.</td><td rowspan="4">Enforceable</td><td rowspan="4">Enforceable</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>NO

Unless included within interim orders which shall then be subject to enforcement before state courts.</td><td>No information

State courts shall apply/ enforce the penalties which may be included within interim orders to deal with situations of non-compliance.</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Order granting interim relief may be subject to coercive action which cannot however be enforced by the AT, and consequently by the EA (only by state courts).
> No interim order on ex parte basis.
> Interim orders from AT, hence EA, cannot affect third parties.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>Unlikely</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">3- BELGIUM

Arbitration Statute(s)
Belgian Law on Arbitration ('BLA') is set out in Book VI of the Belgian Judicial Code ('BJC').
Belgium adopted the UNCITRAL Model Law (1985) and 2006 amendments,with additions.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> EA not addressed expressly in BLA, but subject to general limits on interim relief applicable to ATs.
> Pending constitution of an AT, interim/conservatory measures may be concurrently ordered either by state courts or the EA.
> Wide margin of appreciation given to EA with respect to the type of interim measures that may be adopted.
> At the request of a party, EA may set penalty in case of non-compliance with order (not) to do something.
> EA is able to order interim/conservatory measures affecting parties abroad.</td><td rowspan="4">Enforceable</td><td rowspan="4">Enforceable</td><td>Penalties/ Sanctions for non-compliance with EA's decision</td><td>YES

Also from EA</td><td>YES

If penalty ordered by EA.

Moreover, President of the Court of First Instance may order all necessary measures for the taking of evidence (Art. 1708 BJC), which may include assistance in case of non-compliance with EA decision relating to evidence</td></tr>
<tr><td>Form of the order</td><td>> The form (award or order) does not matter.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Scope of measures an EA may adopt: wide discretion, limited only by mandatory provisions of the applicable arbitration law and by the arbitration agreement itself.
> AT/EA may not order conservatory attachments.
> Interim orders from AT/EA cannot bind third parties.
> Possibility to opt out/exclude recourse to EA in the arbitration agreement.
> No interim order from AT/EA on *ex parte* basis.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

4- BRAZIL Arbitration Statute(s) Brazilian Arbitration Act of 1996 ('BAA') as amended in 2015.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> No express provision on admissibility of EA. > No distinction between regular AT and EA. > No legal limitation and no doubt as to the power of an EA in Brazil to grant interim relief.	Enforceable	Enforceable	**Penalties / Sanctions for non-compliance with EA's decision**	YES But AT/EA orders containing penalties are subject to enforcement by state courts.	YES
Form of the order	> No information			**Power to award damages in case of non-compliance with EA's order**	YES	No information
Limits	> BAA provides that prior to initiating arbitration, parties may seek provisional measures from a judicial court (Art. 22-A), no exclusive jurisdiction though. > Parties still prefer to resort to state courts before the AT is constituted in order to obtain interim relief.			**Possibility to draw adverse inference from non-compliance with EA's order**	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

<table>
<tr><td colspan="2">5- CANADA

Arbitration Statute(s)
UNCITRAL Model Law (1985) is incorporated in international arbitration laws of all provinces and territories other than Quebec.
The Quebec Civil Code and Code of Civil Procedure are consistent with the UNCITRAL Model Law.
International arbitration laws of Ontario and British Columbia were recently updated to incorporate the UNCITRAL Model Law 2006 amendments, other provinces and territories will likely follow.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> No specific provisions regarding EA.
> No authority regarding EAs to date, but it seems likely Canadian courts would regard an EA procedure as a form of arbitration, and an EA as an AT.</td><td rowspan="3">Enforceable

Enforcement is expressly provided for under Ontario, British Columbia and Quebec statutes.

Enforcement is likely in other jurisdictions, even though not aware of any court decisions confirming same.</td><td rowspan="3">Not aware of any court decisions regarding the enforcement of EA decisions to date, but likely that Canadian courts would enforce them.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>No information, but likely

YES, to the extent an AT has powers to impose penalties/sanctions.</td><td>YES

After order recognising and enforcing the EA decision.</td></tr>
<tr><td>Form of the order</td><td>> Not expressly addressed in statutes incorporating the UNCITRAL Model Law (1985)
> In Ontario and British Columbia, decision may be an order or in another form (see 2006 UNCITRAL Model Law, Art. 17(2)).</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES

Not prevented.</td><td>NO</td></tr>
<tr><td>Limits</td><td>> No limitation as to the type of interim measures ATs can grant.
> Interim orders from ATs cannot affect third parties.
> No interim measure from ATs on ex parte basis, except in Ontario and British Columbia (see UNCITRAL Model Law 2006, Art. 17 B(1)) and Quebec.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES

Not prevented.</td><td>YES

If doing so is relevant to an issue properly before the court.</td></tr>
<tr><td colspan="2"></td><td></td><td></td><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES

Where non-compliance relevant to the exercise of the AT's discretion on costs.</td><td>YES

Where non-compliance relevant to the exercise of the court's discretion on costs.</td></tr>
</table>

6- CHILE Arbitration Statute(s) Law 19.971 on International Commercial Arbitration Law based on the UNCITRAL Model Law (1985) (Off. Gaz. 29 Sept. 2004).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> EA not addressed under national law. > To date, no precedent regarding non-compliance with EA's orders.	Not enforceable Except if seat is in Chile.	Not enforceable Except if seat is in Chile.	Penalties / Sanctions for non-compliance with EA's decision	YES	YES As enforcement mechanism of penalties and conditions.
Form of the order	> Not considered as awards.			Power to award damages in case of non-compliance with EA's order	YES	No information
Limits	> AT only allowed to grant interim relief in international arbitration proceedings based in Chile (Art. 17 of the International Commercial Arbitration law).			Possibility to draw adverse inference from non-compliance with EA's order	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

<table>
<tr><td colspan="2">7- CHINA

Arbitration Statute(s)
Arbitration Law of the People's Republic of China, effective as of 1 Sept. 1995.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Not provided in any national law but certain arbitration institutions of Mainland China provide for EA proceedings in specific situations (Free Trade Zone (FTZ), CIETAC, Beijing Arbitration Commission (BAC), Shenzhen Court of International Arbitration (SCIA)).</td><td rowspan="4">Not enforceable

Even where the award was rendered by a foreign AT.</td><td rowspan="4">Not enforceable

Even where the award was rendered by a foreign EA.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>No information</td><td>No information</td></tr>
<tr><td>Form of the order</td><td>> Only courts may adopt interim measures in China.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Only courts may adopt interim measures in China.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>No information</td><td>No information</td></tr>
</table>

<table>
<tr><td colspan="2">8- COLOMBIA

Arbitration Statute(s)
Law 1563 of 2012.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>Not addressed by the law on arbitration or by Colombian arbitration institutions.

Domestic arbitration
> Quasi-judicial procedure.
> Interim measures issued by ATs considered with same legal value as interim measures from Colombian courts.

International arbitration
> No restrictions regarding EA proceedings.
> Not settled whether EA shall be considered as an AT.</td><td rowspan="4">Enforceable</td><td rowspan="4">Unsettled

Enforcement if EA orders are considered interim measures.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>No information</td><td>YES</td></tr>
<tr><td>Form of the order</td><td>> EA orders are neither "awards" nor "interim measure decisions" because not issued by authority appointed by parties to render final award on the merits.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>NO</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">Domestic arbitration
> Quasi-judicial nature implies significant public order limitations to possibility of contracting out of the arbitration statute.
> Issues decided by EA can be reviewed de novo by AT.
> EA procedures are considered as potentially leading to due process issues.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>Colombian law is silent</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>Colombian law is silent</td><td>NO</td></tr>
</table>

9- CROATIA Arbitration Statute(s) Croatian Arbitration Act (the 'Act') largely based on the UNCITRAL Model Law (1985) (Off. Gaz. No. 88/2001).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> EA not addressed in the Act. > The Act expressly provides for the possibility of interim measures by the AT. The reporters consider that it also applies to measures ordered by the EA.	Enforceable	> If seat in Croatia According to the reporters, interim measure from EA may be enforced by Croatian courts. > If seat outside Croatia According to the reporters, no legal basis under which EA order may be enforced by Croatian courts.	Penalties / Sanctions for non-compliance with EA's decision	Unsettled	No information
Form of the order	> Procedural order or, if the measure finally determines an issue of substance, arbitral award.			Power to award damages in case of non-compliance with EA's order	YES In the proceedings on the merits	NO
Limits	> The Act only applies if place of arbitration is in Croatia. > Nothing said regarding EA sitting outside Croatia.			Possibility to draw adverse inference from non-compliance with EA's order	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

<table>
<tr><td colspan="2">10- CYPRUS

Arbitration Statute(s)
International Commercial Arbitration Law 101/1987.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Nothing under Cyprus law prevents or limits an EA from rendering an order for interim relief in respect of domestic and/or foreign ICC arbitral proceedings.</td><td rowspan="4">Enforceable</td><td rowspan="4">Not enforceable

Questionable whether an EA decision would qualify as an arbitral award at all (even an interim one).

Issue
Art. 29(3) of the ICC Rules which stipulates that the AT may modify, terminate or annul the order made by the EA.

The reporters are of the opinion that EA orders are deprived of finality and thus not enforceable.

Even if not enforceable, parties tend to comply with such orders.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>YES

Same as for those ordered by state courts.</td><td>NO

Only for interim orders by state courts (a fine up to € 128.15 and/or imprisonment up to a month).</td></tr>
<tr><td>Form of the order</td><td>> The law is silent as to what constitutes an award. However, state courts do not refuse to recognise and enforce interim awards in the same way as final awards.
> Questionable whether an EA decision would qualify as an arbitral award at all (even an interim one).</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Parties may apply to state courts to obtain interim measures on an ex parte basis at any time prior or during initiation of the arbitration proceedings.
> Art. 29(3) of the ICC Rules which stipulates that the AT may modify, terminate or annul the order made by the EA.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>No information</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>No information</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">11- FINLAND

Arbitration Statute(s)
Arbitration Law 967/1992 (as amended), inspired from UNCITRAL Model Law with 2006 amendments.
Arbitration Rules of the Finland Chamber of Commerce ('FAI Rules').</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> FAI Rules incorporated separate EA Rules which mirror the ICC EA Rules.
> However, no statutory provision or local case law, i.e. EA proceedings remain purely contract-based.
> National law silent on power of AT/EA to grant interim measures, but opinion that ATs sitting in Finland may order interim measures.</td><td rowspan="4">Not enforceable

There are no statutory provisions which would provide for such enforcement through the judicial system.

Only court ordered interim measures may be enforced in Finland.</td><td rowspan="4">Not enforceable

Same regime as for ATs applies for EA: interim measures cannot be enforced by Finnish state courts.

But does not mean that interim measures would be completely ineffective.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>NO</td><td>NO

However, under certain circumstances, not excluded that a court might decide to entertain a request for penalties.</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Only court ordered interim measures may be enforced in Finland.
> Uncertain whether AT/EA may order interim measures if parties have not agreed on such power. Reporters believe that they do, especially in international arbitration.
> No provision in Finnish law regarding EA.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">

12- FRANCE

Arbitration Statute(s)

Decree No. 2011-48 of 13 January 2011 incorporated in Book IV of the French Code of Civil Procedure ('CCP').

Articles 2059 to 2061 of the French Civil Code as amended by the 2016 reform.

</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> No provision under French law referring to EA proceedings, i.e. no prohibition or limitation.
> ATs have the power to order interim measures (Art. 1468 CCP).
> If the EA were to be considered an arbitrator, then Art. 1468 would apply to the EA.
> Arguable that Art. 1468 applies to EA by analogy as a result of the parties' intent to vest the EA with the same powers as an AT.
> Based on the above, an EA acting in France may grant interim reliefs which are not of the kind provided for by the French rules of civil procedure specifically for state courts.</td><td rowspan="4">Unlikely</td><td rowspan="4">Unlikely

Yet, there might be a way to go before French Courts and request the enforcement of the interim order as a decision of contractual nature.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>YES</td><td>NO</td></tr>
<tr><td>Form of the order</td><td>> Decisions/orders are not proper awards and failure to comply with them would only be considered as a contractual breach.
> Under French law, only decisions taken in the form of an award may be recognised and enforced in France. In this regard, French law does not specify the form of an AT's decision on interim measures.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Limits</td><td>> As case law stands, arguable that an EA may only be seen as an expert or a third-party adjudicator.
> Unlikely that an EA seating in France could issue an ex parte order. This is consistent with the ICC Rules on EA.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>No information</td><td>NO</td></tr>
<tr><td></td><td></td><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

13- GERMANY Arbitration Statute(s) German Code of Civil Procedure ('GCCP') incorporating UNCITRAL Model Law (1985).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> An AT has jurisdiction to order interim measures (Sect. 1041 GCCP). However, German arbitration law on ATs are not deemed to be applicable to EAs. > A draft bill explicitly extending sec. 1041 GCCP to EAs is expected to be published in the course of 2018. > AT hearing the merits also has the power to grant interim measures securing compliance with any EA decision.	Enforceable	Not enforceable pending an extension of Sect. 1041 GCCP	**Penalties / Sanctions for non-compliance with EA's decision**	YES In order for them to be payable to the aggrieved party, there must be a substantive law claim to penalties which may only arise out of a penalty clause in the contract which must comply with the German Civil Code.	YES
Form of the order	> No information			**Power to award damages in case of non-compliance with EA's order**	YES	YES
Limits	> No information			**Possibility to draw adverse inference from non-compliance with EA's order**	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

<table>
<tr><td colspan="2">14- GREECE

Arbitration Statute(s)
Greek arbitration law 2735/1999.
UNCITRAL Model Law (1985) – without amendments of 2006, except Art. 17.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> AT may grant interim measures, unless provided otherwise.
> Nothing prevents EA from granting interim relief.
> Reporters are of the view that EA = AT.</td><td rowspan="4">Enforceable</td><td rowspan="4">Unlikely</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>No information</td><td>YES

But only if deemed enforceable which is unlikely.</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>Not prohibited</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> In principle, AT cannot make ex parte decisions.
> But certain authors argue that ex parte decision from an AT does not necessarily violate Greek public policy.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in decision as to costs</td><td>YES</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">15- HONG KONG

Arbitration Statute(s)
Hong Kong Arbitration Ordinance (HKAO) (Cap. 609).</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Powers of AT to grant interim measures as set out in Part 6 of the HKAO do not apply to the EA.
> Unclear whether the EA has the same general powers as the AT (including power to grant security for costs).
> EA proceedings expressly provided for in the HKAO, including enforceability of EA's orders (Sect. 22A and 22B) (since 2013).
> However silent on whether definition of an 'arbitral Tribunal' includes the EA.</td><td rowspan="4">Enforceable</td><td rowspan="4">Enforceable</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>YES

AT can make peremptory orders but not certain whether it applies to EA orders.

No power to impose financial penalty for non-compliance with peremptory order.</td><td>No information</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>No information</td><td>NO</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> No information</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">16- INDIA

Arbitration Statute(s)
Arbitration and Conciliation Act, 1996 (the 'Act') as amended by the Arbitration and Conciliation Act (2015).
UNCITRAL Model Law (1985).</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> EA not addressed. Courts can grant interim measures under Sect. 9 of the Act even in a foreign-seated arbitration.
> The 246th Law Commission Report recommended the recognition of EA proceedings by changing the definition of a 'tribunal' to include an 'emergency arbitrator'. Said recommendation however was not incorporated in the 2015 amendment.</td><td rowspan="3">Not enforceable

- There is no direct enforcement of AT's interim award in an Indian seated Arbitration. In case a party does not comply with the award, the court can under Sect. 27(5) of the Act proceed for contempt. This will only apply to domestic arbitrations.

- In all foreign-seated arbitrations parties can file for injunction under Sect. 9 of the Act.</td><td rowspan="3">> Seat in India

Enforceable under Sect. 17 of the Act.

> Seat outside India

Not directly enforceable, but the same may be enforced indirectly through either:

- approaching Indian Courts under Sect. 9 of the Act, which provides for Court's power in granting interim measures; or

- approaching the Courts to initiate contempt proceedings against the defaulting party under Sect. 27(5) of the Act.

This works only with respect to interim measures/orders by the Tribunal not in the form of an interim award, considering the latter is expressly included in the definition of the 'award' under the Arbitration Act.</td><td>Penalties/ Sanctions for non-compliance with EA's decision</td><td>NO</td><td>YES

In the form of contempt proceedings under Sect. 27(5) of the Act by virtue of the decision by the Supreme Court in Alka Chandewar vs. Shamshul Ishrar Khan.</td></tr>
<tr><td>Form of the order</td><td>> The Act is silent, however a High-Level Committee Report submitted after the 2015 amendments reiterated the suggestion given by the 246th Law Commission Report and suggested the insertion of the term 'emergency award' within the definition of award under the Act. The Committee also recommended the insertion of a definition of an 'emergency award'.
> Dealing with a SIAC EA, the Bombay High Court in HSBC vs. Avitel seems to have characterised the EA decision as an 'award'.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>Unlikely</td><td>NO</td></tr>
<tr><td>Limits</td><td>> No information</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>NO</td><td>NO</td></tr>
<tr><td></td><td></td><td></td><td></td><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>Unlikely</td><td>NO</td></tr>
</table>

17- IRELAND Arbitration Statute(s) Arbitration Act 2010 ('AA') governs both domestic and international arbitrations seated in Ireland. Based upon the UNCITRAL Model Law, as amended in 2006.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> Unclear whether EA = AT. > An AT seated in Ireland is permitted to grant interim relief pursuant to Art. 17(1) of the UNCITRAL Model Law. > EA not specifically addressed under Irish law. Nothing prevents or limits it. > Hence, EA presumably has the same power as the AT: - with a broad reading of Art. 17(1); or - if provided by applicable procedural rules; or - if expressly included within arbitration agreement.	Enforceable	It depends. If considered as an AT, would be subject to same provisions regarding enforcement of arbitral awards. i.e. generally enforceable.	**Penalties / Sanctions for non-compliance with EA's decision**	Unlikely Nothing in AA allowing EA to render an order subject to penalties for non-compliance. Presumably permissible where agreed by parties. Penalty clause generally excluded in common law.	No information
Form of the order	> No information			**Power to award damages in case of non-compliance with EA's order**	No information	No information
Limits	> Sect. 10 of the AA provides that a party may seek interim measures from State courts before or during the arbitral proceedings. > But application to Irish state courts does not serve as a waiver of the arbitration agreement nor does it constitute a breach of the agreement to arbitrate.			**Possibility to draw adverse inference from non-compliance with EA's order**	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

<table>
<tr><td colspan="2">18- ITALY

Arbitration Statute(s)
Italian Code of Civil Procedure ('CCP').</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> No provisions regulating EA or similar emergency proceedings.</td><td rowspan="3">No information

However, according to some scholars, interim measures granted by ATs seated outside Italy are enforceable in Italy, provided that the decision is issued in the form of an award, as defined by the New York Convention.</td><td rowspan="3">No information

However, according to some scholars, interim measures granted by ATs seated outside Italy are enforceable in Italy, provided that the decision is issued in the form of an award, as defined by the New York Convention.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>No information</td><td>Unlikely</td></tr>
<tr><td>Form of the order</td><td>> No information
> However, from the combined reading of Art. 818 CCP (see below) and Art. 824 bis CCP it might be inferred that an EA's decision in an arbitration seated in Italy cannot have the form of an award.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>It depends.

Damages may be granted if the breach of the EA's decision were considered a breach of contract under the applicable law.

Nothing in Italian law would in principle prevent an AT from awarding damages.</td><td>NO

Absent specific provision in the Italian CCP allowing for a potential claim for damages for non-compliance with the EA's decision to be brought before a court, such claim would fall under the arbitration agreement and outside courts' jurisdiction.</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Art. 818 CCP expressly provides that arbitrators do not have the power to grant interim measures, unless otherwise provided by the law.
> Only state courts are entitled to grant and enforce interim measures. The interpretation of this provision is highly controversial.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

19- LEBANON Arbitration Statute(s) Lebanese Arbitration Act incorporated in the Code of Civil Procedure ('CCP').		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> EA not governed by any specific provision of the Lebanese Arbitration Act. > EA can be deemed to enjoy the same legal status as an AT under Lebanese law. > An AT may order interim and conservatory measures deemed necessary in light of the nature of the dispute (Arts. 789(2) and 589 CCP), therefore the EA too. > Lebanese provisions on international arbitration are silent with regard to matters of interim relief. However, domestic arbitration regime may be extended to international arbitration. Domestic arbitration (Art. 789(2) CCP) provides that an arbitrator may, pending arbitration proceeding, order interim and conservatory measures deemed necessary.	Unlikely	Unlikely	Penalties / Sanctions for non-compliance with EA's decision	YES The arbitrator may also have recourse to the state judge to order such penalties.	YES Judge and emergency judge.
Form of the order	> Interim measures are not considered and treated as final decisions. Can still be reversed or abrogated by the AT who had issued them.			Power to award damages in case of non-compliance with EA's order	YES See Art. 123 of the Lebanese Civil Code for Contracts.	YES
Limits	> Lebanese courts' jurisdiction with respect to such measures is not considered waived by the mere agreement to arbitrate, unless expressly mentioned in the arbitration agreement. > Parties may exclude interim relief from arbitrators by agreeing to the contrary either in an ad hoc arbitration or by reference to specific arbitration rules that do not recognise such jurisdiction to the arbitrators.			Possibility to draw adverse inference from non-compliance with EA's order	No information	No information
				Power to take into account non-compliance with EA orders in deciding the costs	No information	No information

20- LITHUANIA Arbitration Statute(s) Civil Procedure Code, No. IX-743, 28 Feb. 2002 and subsequent amendments. Law on Commercial Arbitration, No. I-1274, 2 Apr. 1996 and subsequent amendments.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> National law allows EA to make order for interim measures.	Enforceable	Unsettled	**Penalties / Sanctions for non-compliance with EA's decision**	No information	YES Non-compliance may lead to a fine up to € 289 for each day of non-compliance.
Form of the order	> No information			**Power to award damages in case of non-compliance with EA's order**	No information	No information
Limits	> Interim measures prior to constitution of the AT are not available if: - the arbitration agreement was signed prior the coming into effect of the arbitration rules; - parties have opted out of such procedure; - parties have agreed upon another pre-arbitral procedure			**Possibility to draw adverse inference from non-compliance with EA's order**	No information	No information
				Power to take into account non-compliance with EA orders in deciding the costs	No information	No information

<table>
<tr><td colspan="2">21- MACEDONIA

Arbitration Statute(s)
Law on international trade arbitration (Off. Gaz. No.39, 30 Mar. 2006).</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Nothing in the Law regarding EA.
> ATs may order interim relief at the request of a party.</td><td rowspan="4">Unlikely</td><td rowspan="4">Unlikely</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>NO</td><td>NO</td></tr>
<tr><td>Form of the order</td><td>> No information.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> It is not incompatible with the arbitration agreement for the state court to grant interim relief before and during the arbitration proceeding (Art. 9).</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>Unclear</td><td>NO</td></tr>
<tr><td>Power to award damages in case of non-compliance with EA's order</td><td>Unclear</td><td>NO</td></tr>
</table>

22- MALAYSIA Arbitration Statute(s) Arbitration Act (2005) (the 'Act') based on UNCITRAL Model Law (1985) with modifications. Kuala Lumpur Regional Centre for Arbitration ('KLRCA'), 2013 Arbitration Rules.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> No specific reference to EA but nothing preventing it. > Under the KLRCA Rules, EA has power to order or award any interim relief that he deems necessary. Reasons have to be put into writing. > EA order is binding on the parties. > Under the KLRCA Rules, parties undertake to comply with the order/award.	Enforceable	Not enforceable EA award/order will not be enforced by High Court as it does not come within meaning of definition of an award under the Act.	**Penalties / Sanctions for non-compliance with EA's decision**	No information	NO
Form of the order	> EA order is not an award.			**Power to award damages in case of non-compliance with EA's order**	NO	NO
Limits	> EA order may be reconsidered, modified of vacated by AT. > Unclear whether EA fall within scope of definition of AT.			**Possibility to draw adverse inference from non-compliance with EA's order**	NO	NO
				Power to take into account non-compliance with EA orders in deciding the costs	NO	NO

<table>
<tr><td colspan="2">23- MEXICO

Arbitration Statute(s)
Federal Code of Civil Procedure.
Commercial Code.
UNCITRAL Model Law (1985) adopted as federal legislation.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Neither prevents nor limits EA from awarding interim relief or otherwise.
> Art. 17 of UNCITRAL Model Law has been incorporated into Art. 1433 of the Mexican Commercial Code. Therefore ATs (and EA by extension) have the power to adopt interim measures.
> Although no specific provisions allowing for ex parte enforcement of an order, there is a Federal Court precedent which authorised a state court to enforce such order from the AT/EA.</td><td rowspan="4">Enforceable</td><td rowspan="4">Likely enforceable</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>YES

However controversial as penalties are seen as part of the imperium. No case law approving or limiting such power.</td><td>YES

But only when enforcement is sought by the relevant party and the party ordered to comply with the EA's order fails to do so.</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES

But better if expressly provided for in the arbitration agreement or in the applicable Rules.</td><td>NO</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> No information</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

24- NETHERLANDS Arbitration Statute(s) Arbitration Act (2015). UNCITRAL Model Law has inspired the Arbitration Act. In the Caribbean parts of the Netherlands Kingdom, the UNCITRAL Model Law applies.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> Permits EA and AT to award interim relief or otherwise. > However, the state courts remain competent to do so if the agreement to arbitrate is not invoked or if the requested measures cannot (notably for want of arbitrability), or not timely, be obtained in arbitration (through the EA).	Enforceable	Enforceable	Penalties / Sanctions for non-compliance with EA's decision.	YES	YES
Form of the order	> May be in the form of an order or an award, the latter if indeed compatible with the ICC Arbitration Rules.			Power to award damages in case of non-compliance with EA's order	YES	YES
Limits	> The limits set by the Dutch Code of Civil Procedure (Art. 254) apply or will be applicable by analogy. These limits pertain to, notably, urgency and an assessment of the interests of the parties with respect to granting or rejecting the requested measure. Reversibility of the requested measure is also a consideration that will have to be balanced by a tribunal in deciding upon requested relief.			Possibility to draw adverse inference from non-compliance with EA's order	YES	YES
				Power to take into account non-compliance with EA orders in deciding the costs	YES	YES But in state courts, costs are assessed on the basis of standard rates and not full costs.

<table>
<tr><td colspan="2">25- NEW ZEALAND

Arbitration Statute(s)
Arbitration Act (1996) (the 'Act') which incorporates the UNCITRAL Model Law with 2006 amendments.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From The EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> ATs and EA can grant interim measures or issue preliminary orders, even on an ex parte basis.
With effect from 1 March 2017, s. 2(1) of the Act provides that emergency arbitrations are 'arbitrations' for purposes of the Act.</td><td rowspan="4">Enforceable</td><td rowspan="4">Likely enforceable</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>No information</td><td>No information</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> More practical to apply directly to courts if urgent interim measures are required prior to initiating arbitration.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

26- NIGERIA Arbitration Statute(s) Arbitration and Conciliation Act 1988 (the 'Act') (Cap. A18, Laws of the Federation of Nigeria 2004) modelled on the UNCITRAL Model Law (1985).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> No specific reference to EA. > At the request of either party, the AT may grant interim measures in the form of an interim award before or during the proceedings (Sect. 13 of the Act). > The Arbitration Rules of the Lagos State Court of Arbitration provides for a Special Measure Arbitrator (SMA) which is similar to the concept of EA (Art. 11). > An interim measure is binding unless otherwise provided by the AT.	Enforceable	Likely enforceable	Penalties / Sanctions for non-compliance with EA's decision	No information	No information
Form of the order	> Can be in the form of an interim award.			Power to award damages in case of non-compliance with EA's order	Not provided in the Act. But parties are free to agree on such powers.	No information
Limits	> The SMA shall not act where the parties have agreed to another pre-arbitral procedure or where the parties have opted out of this provision. > Arbitrators cannot enforce compliance with interim orders since they have no coercive powers.			Possibility to draw adverse inference from non-compliance with EA's order	No information	NO
				Power to take into account non-compliance with EA orders in deciding the costs	No information	NO

27- PAKISTAN Arbitration Statute(s) Arbitration Act 1940 (domestic arbitration). Recognition and Enforcement Act 2011 (incorporating the New York Convention). Arbitration Act, 2011 (implements the ICSID Convention).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> In principle, ATs do not have the power to deal with a request for interim relief. Only state courts have such powers.	Not enforceable Only way is to obtain an interim award as recognised and enforceable as an award by virtue of Sect. 27 of the Arbitration Act.	Not enforceable	Penalties / Sanctions for non-compliance with EA's decision	NO	YES Non-compliance may lead to prison sanctions for a term not exceeding six months. State Court may also order attachment of property.
Form of the order	> Cannot be issued in the form of an award.			Power to award damages in case of non-compliance with EA's order	YES	YES
Limits	> Possible to seek interim relief from state courts at any time.			Possibility to draw adverse inference from non-compliance with EA's order	No information	NO
				Power to take into account non-compliance with EA orders in deciding the costs	No information	NO

<table>
<tr><td colspan="2">28- PANAMA

Arbitration Statute(s)
Law 131 of 2013, which governs domestic and international arbitration.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Arbitration law does not provide for specific rules on EA. Not prohibited.
> ATs have the power to order interim relief, including preliminary orders and ex parte decisions.
> Unsettled whether it extends to EAs.</td><td rowspan="4">Enforceable

> Seat in Panama

Interim relief is recognised as binding by operation of law without any control from State courts which must enforce it within 10 days. The laws give imperium to the arbitrators.

> Seat outside Panama

ATs may not enforce interim measures without exequatur by the Supreme Court of justice.</td><td rowspan="4">Unsettled

Considering that no provision prohibits the EA, the reporters are of the opinion that nothing would prevent performance / enforcement of an EA order if the parties have expressly agreed and set the conditions for such performance.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>YES</td><td>NO</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> State courts remain competent to issue interim measures in support of the arbitration.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>NO</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">29- PERU

Arbitration Statute(s)
Peruvian Arbitration law, enacted by Legislative Decree No. 1071 of 27 June 2008 (monist system).</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> EA is not regulated nor prohibited.</td><td rowspan="4">Enforceable

ATs could enforce their own measures under certain limits.

In case of non-compliance the courts must enforce them at the request of any party.

Measures adopted by ATs out of Peruvian territory could be recognised and executed by Peruvian courts under Legislative Decree 1071.</td><td rowspan="4">Likely enforceable under the same rules relating to awards and interim measures.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>No information</td><td>No information</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> No information</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>No information</td><td>No information</td></tr>
</table>

30- POLAND Arbitration Statute(s) Civil Procedure Code ('CPC') which provisions on interim relief are based on the UNCITRAL Model Law (1985).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> Polish law does not address EA proceedings. > No application for interim or conservatory measures from an EA has ever been submitted to them, i.e. status is still unclear. > Parties may request an AT to grant interim relief, unless agreed otherwise by parties. > The reporters are of the opinion that provisions pertaining to arbitrators should apply to EAs – not settled in doctrine. > Polish law expected to develop further on the issue of EA and adopt a position that enables state courts to enforce EA orders. EA orders would consequently no longer be undermined by uncertain enforceability. > EA may order any type of interim or conservatory measures he or she deems appropriate.	Enforceable	Likely enforceable With foreseeable reform of the law to make it clear.	Penalties/ Sanctions for non-compliance with EA's decision	No information	NO
Form of the order	> No information			Power to award damages in case of non-compliance with EA's order	NO Unless otherwise agreed by the parties.	No information
Limits	> No information			Possibility to draw adverse inference from non-compliance with EA's order	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

31- PORTUGAL Arbitration Statute(s) Law no. 63/2011 based upon the UNCITRAL Model Law as amended in 2006.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> EA not specifically addressed. No reported case law and no relevant published doctrine. > Portuguese Arbitration law provides that an AT may order/grant interim measures and preliminary orders. > Nothing preventing an EA from granting interim measures. However, arbitration agreement may exclude this possibility. > Provisions of Portuguese law applicable to AT shall in principle also apply to EA.	Enforceable	Likely enforceable	Penalties / Sanctions for non-compliance with EA's decision	No information But recent decision of Lisbon Court of Appeal affirmed arbitrator's power to order penalties for non-compliance.	YES Arguably
Form of the order	> No specific information with respect to EA. Interim measures may adopt the form of an award or a procedural order			Power to award damages in case of non-compliance with EA's order	No information	No information
Limits	> No specific limits			Possibility to draw adverse inference from non-compliance with EA's order	No information	No information
				Power to take into account non-compliance with EA orders in deciding the costs	No information	No information

<table>
<tr><td colspan="2">32- QATAR

Arbitration Statute(s)
Law No. (2) of 2017 promulgating the Civil and Commercial Arbitration Law.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Unless the parties agree otherwise, the AT may, at the request of a party, order provisional measures or interim awards that are required by the nature of the dispute or to avoid irreparable damage.
> No specific law addresses the EA</td><td rowspan="4">Enforceable

But:

- the party in whose favor an interim measure is issued must first obtain written permission from the AT before requesting the competent judge to enforce the interim order or award;

- courts will refuse enforcement if the interim order or award contradicts the law or public policy.</td><td rowspan="4">Enforceable

Under the same regime applicable to AT's interim measures.</td><td>Penalties/ Sanctions for non-compliance with EA's decision</td><td>No information</td><td>No information</td></tr>
<tr><td>Form of the order</td><td>> Interim order or decision.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td>Limits</td><td rowspan="2">> In some instances, a party may seek interim relief from the courts. Such request shall not be deemed a waiver of the arbitration agreement.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td></td><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>No information</td><td>No information</td></tr>
</table>

<table>
<tr><td colspan="2">33- RUSSIA

Arbitration Statute(s)
Federal Law on international commercial arbitration No. 5338-1 (7 July 1993), with subsequent amendments, which is a verbatim adoption of the UNCITRAL Model Law (1985).</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> No legal basis for measures ordered by EA.
> Russian law does not prevent EA interim orders.
> However, relevant provisions of the applicable law suggest that only the AT has such powers.</td><td rowspan="4">Not enforceable

Unless in the form of a final award.</td><td rowspan="4">Not enforceable</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>NO</td><td>NO</td></tr>
<tr><td>Form of the order</td><td>> Not in the form of an award.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>NO</td><td>NO</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> If a party to a Russian or foreign seated arbitration needs interim relief, the usual course of action would be to apply to a competent Russian state court.
> Only final awards from an AT are enforceable.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>No information</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>No information</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">34- SERBIA

Arbitration Statute(s)
2006 Arbitration Law.</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Nothing in the law regarding EA.
> ATs may order interim relief at request of a party – unless otherwise agreed by the parties.</td><td rowspan="4">Unlikely</td><td rowspan="4">Unlikely

But interim relief from an EA seated outside Serbia could potentially be enforced if it is in the form of an award as defined under the New York Convention.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>NO</td><td>No information</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>No information</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Interim relief by an AT and an EA are inefficient towards third parties.
> State courts have the power to grant interim relief before and during the arbitration proceedings.
> No alternative mechanism that would address or sanction non-compliance with interim measures ordered by ATs and EAs.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>Unclear</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>Unclear</td><td>NO</td></tr>
</table>

35- SINGAPORE Arbitration Statute(s) International Arbitration Act ('IAA'), Cap. 143A, as amended in 2002 (international). Arbitration Act ('AA') (domestic).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> Expressly provided for in Sect. 2(1) of the IAA and Sect. 2(1) of the AA. > Both acts include a specific provision on EA within the definition of AT (since 2012). > EA decisions may be enforceable in the same manner as if it were made by a court.	Enforceable Expressly provided for in the law.	Enforceable Expressly provided for in the law.	**Penalties / Sanctions for non-compliance with EA's decision**	Singapore law is silent. But penalties for non-compliance mirror the penalties for non-compliance with an order of court.	YES
Form of the order	> Can take the form of an award.			**Power to award damages in case of non-compliance with EA's order**	Singapore law is silent.	No information
Limits	> No information			**Possibility to draw adverse inference from non-compliance with EA's order**	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

<table>
<tr><td colspan="2">36- SPAIN

Arbitration Statute(s)
Arbitration Act 60/2003 (the 'Act').</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> No express reference to EA but no obstacle to its application.
> Arbitrators include EA. i.e. EA can order interim measures.
> Quasi-jurisdictional function performed by AT.
> EA decisions shall be subject to the rules on annulment (arts 40 et seq. of the Act), regardless of their form (award, order…).</td><td rowspan="4">Enforceable

> Seat in Spain

Same regime as for EA

> Seat outside Spain

Same regime as for EA</td><td rowspan="4">Enforceable

> Seat in Spain

Enforcement requires judicial assistance in accordance with terms for enforcement provided by the Civil Procedure Act.

> Seat outside Spain

Enforceability as a general principle, regardless of the form in which they are adopted.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>YES

According to the reporters, the EA may also order penalties/sanction in case of non-compliance)</td><td>YES

As long as the conduct to be performed by the rebellious party falls within the scope of articles 709, 710, and 711 of the Spanish Civil Procedure Act.</td></tr>
<tr><td>Form of the order</td><td>> Can take the form of an award.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>NO

Unless such issue is formally petitioned in the main proceedings by the party in whose favor the order was placed.</td><td>No information</td></tr>
<tr><td>Limits</td><td>> Parties may go either to the AT or the relevant court to request interim measures.
> Judicial interim measures may be granted inaudita parte.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>NO</td><td>NO</td></tr>
<tr><td></td><td></td><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">37- SWEDEN

Arbitration Statute(s)
The new Swedish Arbitration Act became effective as of 1 March 2019 ('SAA').
Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ('SCC Rules').</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> The request for interim measure may only be filed prior to the commencement of the arbitration (according to SCC Rules)
> SCC Rules incorporate a separate appendix dealing with EA Rules. There is no statutory provision in the SAA dealing expressly with EA, but it is held that ATs seated in Sweden may order interim measures.</td><td rowspan="4">Not enforceable.
No statutory provision providing for enforcement
Only court-ordered interim measures may be enforced in Sweden.</td><td rowspan="4">Not enforceable.
Same regime as applies for EA interim measures; they cannot be enforced by Swedish state courts.</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>Although EA decisions are binding on the parties who must comply, there are no specific sanctions for non-compliance according to SCC Rules.</td><td>No</td></tr>
<tr><td>Form of the order</td><td>> An order or an award?
> 'Emergency decision' – is the term used in the SCC Rules.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>No</td><td>No</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> No provision in SAA providing for EA.
> The AT is not bound by the decision of an EA under the SCC Rules.</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>Yes</td><td>No</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>Yes</td><td>Yes</td></tr>
</table>

38- SWITZERLAND Arbitration Statute(s) Private International Law Act (1987, with amendments).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> No express regulation of EA or emergency arbitration proceedings in PILA, but subject to general limits on interim relief applicable to ATs. > EA qualifies as an arbitrator. > Prerequisite for emergency arbitration proceedings is that the parties have agreed on emergency arbitration, be it by express agreement or by reference to institutional rules that provide for EA relief.	Not enforceable If the party concerned does not voluntarily comply with ordered interim measures, the AT/EA may request the assistance of the competent state court. Whether a Swiss court can provide the above-mentioned state court assistance to an AT/EA seated abroad is presently still controversial.		Penalties / Sanctions for non-compliance with EA's decision	Controversial whether EA can impose penalties or private sanctions for non-compliance. EA cannot combine decision on interim measures with threat of public law or criminal law sanctions in case of non-compliance.	EA may seek assistance of the competent state court to ensure compliance of the interim measure. State court can supplement the order with threat of criminal sanctions.
Form of the order	> Orders regarding interim relief of EA are considered not to be 'awards'.			Power to award damages in case of non-compliance with EA's order	YES	NO
				Possibility to draw adverse inference from non-compliance with EA's order	YES	NO
Limits	> EA has authority to grant interim relief only if the parties have agreed on this mechanism (by express agreement or reference to institutional rules that provide for EA relief). > Parties are free to limit or otherwise restrict the EA's powers. > EA can only order an interim relief with regards to a party bound by the arbitration agreement. > EA has wide discretion as to the contents of provisional measure, but EA cannot grant the interim measure 'attachment' foreseen in the Swiss Debt Enforcement Act (so-called 'Arrest' or '*Sequestre*').			Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

<table>
<tr><td colspan="2">39- THAILAND

Arbitration Statute(s)
Arbitration Act 2002 (the 'Act') based on the UNCITRAL Model Law (1985).</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> Nothing preventing EA appointed pursuant to ICC Rules from rendering an order granting interim relief.</td><td rowspan="4">Unlikely to be considered an 'arbitral award' for the purposes of Sect. 41 of the Act, the consequence is that interim / conservatory measures would not be enforceable in Thailand without a separate court order.</td><td rowspan="4">Unlikely</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>Uncertain</td><td>Unlikely</td></tr>
<tr><td>Form of the order</td><td>> Unlikely to be considered as an award.</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> There are no specific provisions in the Act prohibiting the AT from issuing interim measures. However in practice any such order by the AT is unlikely to be enforceable in Thailand without a separate court order.
> Only Thai courts can grant such relief for arbitrations seated in Thailand (Sect. 16 of the Act).</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

<table>
<tr><td colspan="2">40- TURKEY

Arbitration Statute(s)
International Arbitration Law 4686, effective as of 5 July 2001 ('IAL').
Civil Procedure Code ('CPC').</td><td colspan="2">Enforcement of interim/conservatory measures</td><td colspan="3">Alternative remedies for non-compliance with the EA's order</td></tr>
<tr><td colspan="2">Status of the Emergency Arbitrator ('EA')</td><td>From the Arbitral Tribunal ('AT')</td><td>From the EA</td><td>Type of remedy</td><td>From the AT</td><td>From state courts</td></tr>
<tr><td>General</td><td>> No clear provision relating to interim relief granted by EA.
> Express power of AT to grant interim relief (Art. 6 IAL; Art. 414 CPC), unless otherwise agreed.
> If agreement between parties allows EA rules to be used and an EA is appointed, the EA is then able to grant interim relief and interim attachment.
> The AT on the merits can always grant interim relief.</td><td rowspan="4">Enforceable

With assistance of courts.</td><td rowspan="4">No information</td><td>Penalties / Sanctions for non-compliance with EA's decision</td><td>No information</td><td>NO</td></tr>
<tr><td>Form of the order</td><td>> No information</td><td>Power to award damages in case of non-compliance with EA's order</td><td>YES</td><td>No information</td></tr>
<tr><td rowspan="2">Limits</td><td rowspan="2">> Interim relief may also be directly requested from state courts.
> ATs shall not grant interim measures which are required to be enforced through execution offices or to be executed through other official authorities or that bind third parties (Art. 6 IAL).</td><td>Possibility to draw adverse inference from non-compliance with EA's order</td><td>YES</td><td>NO</td></tr>
<tr><td>Power to take into account non-compliance with EA orders in deciding the costs</td><td>YES</td><td>NO</td></tr>
</table>

41- UKRAINE Arbitration Statute(s) Law on international commercial arbitration (1994), based on the UNCITRAL Model Law (1985). International Commercial Arbitration Court ('ICAC') Rules.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> No reference to EA proceedings. > The ICAC has an equivalent of the EA proceedings (Art. 4.1 ICAC Rules): interim relief can be granted prior to constitution of the AT by the President of the ICAC. > ICAC recently showed interest in developing EA proceedings into Ukrainian practice. > EA awards are subject to the same enforcement rules as arbitral awards on the merits.	Likely enforceable	Likely enforceable But only one case to date. Although it is premature to argue conclusively, EA awards appear to be generally considered to fall within the scope of the New York Convention.	**Penalties / Sanctions for non-compliance with EA's decision**	No information	YES Includes fines, imprisonment, etc.
Form of the order	> EA decisions regarded as 'foreign arbitral awards'.			**Power to award damages in case of non-compliance with EA's order**	NO	No information
Limits	> No information			**Possibility to draw adverse inference from non-compliance with EA's order**	NO	NO
				Power to take into account non-compliance with EA orders in deciding the costs	NO	NO

42- UNITED ARAB EMIRATES Arbitration Statute(s) 2018 UAE Federal Arbitration Law ('UAE FAL'); 2008 Dubai International Financial Centre (DIFC) ('DIFC AL'); 2015 Abu Dhabi Global Market (ADGM) Arbitration Regulations ('ADGM AR').		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		From the Arbitral Tribunal ('AT')	From the EA	Type of remedy	From the AT	From state courts
General	> **Onshore:** Subject to the inherent powers of the court (Art. 18, UAE FAL), and unless otherwise agreed by the parties, the AT may, at the request of a party or of its own motion, order interim or conservatory measures as it may consider necessary taking account of the nature of the dispute (Art. 21, UAE FAL). > The UAE Federal Arbitration Law does not contain any specific provisions on EA (nor any express restrictions). > **Offshore:** Unless the parties have agreed otherwise, the AT may, upon the request of a party, order interim measures (of protection) necessary in the circumstances (Art. 24(1), DIFC AL; and similar, Art. 24, ADGM AR). > There is no specific provision on EA in any of the offshore arbitration legislation (nor any express restrictions).	Interim measures and partial awards are likely enforceable, both on- and offshore. (See express wording to that effect at Art. 39(2), UAE FAL, despite wording limited to 'interim awards'; and Art. 30, ADGM AR). Also note Art. 21(4), UAE FAL, which empowers a party to apply to the competent court for the enforcement of any interim order issued by AT (following permission from AT to do so).	Same regime is likely to apply as for AT, subject to confirmation by court practice in further course. For the avoidance of doubt, both the DIFC and ADGM courts are very pro-arbitration. Following the adoption of the UAE FAL, the onshore UAE courts are likely to follow suit (especially if the EA were to be considered as an AT in future court practice).	**Penalties / Sanctions for non-compliance with EA's decision**	**Onshore**: No information, but nothing prohibits it. **Offshore:** Likely to follow UK approach.	**Onshore:** No information, but nothing prohibits it. **Offshore:** Likely to follow UK approach.
Form of the order	> **Onshore:** Order, decision or possibly an award (subject to confirmation by the local courts), but likely to be in the form of an order only in the strict terms of Art. 21, UAE FAL. See express power on part of AT to issue interim and partial awards (Art. 39(1), UAE FAL). > **Offshore:** In any form, including awards (Art. 24(1)(b), DIFC AL).			**Power to award damages in case of non-compliance with EA's order**	**Onshore:** No information (but see Art. 21(2), UAE FAL, providing for general damages arising in connection with enforcement of interim measures). **Offshore:** Likely to follow UK approach. (See also Art. 24(1)(e), DIFC Arbitration Law; Art. 29, ADGM AR).	**Onshore:** No information **Offshore:** Likely to follow UK approach.
Limits	> Parties may reach out to the state courts for purposes of requesting interim relief prior, during and after conduct of the arbitration proceedings (both on- and offshore). > Interim measures may be subject to security ordered by AT or competent court. > Under offshore legislation, AT can only grant interim measures upon party request. > Under Art. 21(1), UAE FAL, AT is empowered to adopt such interim measures of its own motion. > In exceptional circumstances, both on- and offshore legislation empower AT to modify, suspend or terminate interim measures of their own motion, but upon prior notice to the parties.			**Possibility to draw adverse inference from non-compliance with EA's order**	**Onshore:** No information **Offshore:** Likely to follow UK approach.	**Onshore:** No information **Offshore:** Likely to follow UK approach.
				Power to take into account non-compliance with EA orders in deciding the costs	**Onshore:** No information (but possibly covered under Art. 46, UAE FAL). **Offshore:** Likely to follow UK approach.	**Onshore:** No information **Offshore:** Likely to follow UK approach.

43- UNITED KINGDOM Arbitration Statute(s) For England, Wales and Nothern Ireland, Arbitration Act (1996) (the 'Act'); For Scotland, Arbitration Act (2010).		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> No provisions in the Act as to the EA. Nothing prevents it. > For purposes of the National Report, EA qualifies as arbitrator, but room for arguing that an EA is not an arbitrator. > Role of English Courts is to support arbitration process so where AT is competent, the Court's powers to grant interim relief are circumscribed. They may only act in case of urgency if necessary for purpose of preserving evidence and where the AT has no power or is unable to act effectively. > Similarly, the Commercial Court held it is only where powers of EAs are inadequate, or where the practical ability is lacking to exercise those powers, that English Courts may intervene and grant interim measures; otherwise it is for the arbitral process to deal with the matter. > Seized with a request for EA proceedings, the LCIA Court considered that the application lacked urgency and declined the said application. Unsatisfied with this outcome, the Applicant initiated proceedings under Sect. 44 of the Act before the Commercial Court in view of obtaining interim relief. The application was rejected on the ground that the role of the Court is to support the arbitral process where necessary, not to serve as an additional forum.	Enforceable But doubts due to fact that UK law considers that interim measure cannot be enforced under the New York Convention.	Enforceable But same reserve as for AT. **Specific issue of peremptory orders:** EA may render peremptory orders which are enforceable by state courts (s. 42 of the Act).	**Penalties/ Sanctions for non-compliance with EA's decision**	YES ICC UK is of the opinion that an EA is allowed under the Act to penalise parties for non-compliance with arbitral orders.	YES As regard EA orders, contempt would only apply if the EA order had been converted into an order of the English Court.
Form of the order	> No information			**Power to award damages in case of non-compliance with EA's order**	YES Unless agreed otherwise.	No information
Limits	> English Courts already possess established, well-understood and widely-used powers to make interim and conservatory orders in aid of the arbitral proceedings (Sect. 44 of the Act). They are able to do so with much greater speed than under the EA procedure. > As opposed to AT/EA orders, court order can bind a third party (which EA cannot), may be rendered *ex parte*, and may be enforced directly by sanctions without necessity to invoke the peremptory order procedure. > In the many cases where one or more of these features is necessary for the party requiring interim relief, they can apply to the English Courts. > However, the role of the Courts is to support and not replace or provide an alternative to the role of the AT or EA where the powers of the AT or EA are adequate.			**Possibility to draw adverse inference from non-compliance with EA's order**	YES	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES	NO

44- UNITED STATES OF AMERICA Arbitration Statute(s) Federal Arbitration Act ('FAA'), 9 U.S.C.		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> No specific restrictions on the use of EA proceedings. > EA proceedings are treated the same way as any arbitration for purposes of application of the FAA. > EA decision to be treated as an award made by a constituted AT. > AT/EA have broad authority to grant interim or conservatory measures.	Enforceable Very supportive.	Enforceable Very supportive.	**Penalties / Sanctions for non-compliance with EA's decision**	No information	YES
Form of the order	> Can be issued in the form of an award, which is considered as final. > But the 'final' character of interim awards is still subject to further confirmation from US case law.			**Power to award damages in case of non-compliance with EA's order**	YES	No information
Limits	> No information			**Possibility to draw adverse inference from non-compliance with EA's order**	YES Not prevented	NO
				Power to take into account non-compliance with EA orders in deciding the costs	YES Not prevented	NO

45- VENEZUELA Arbitration Statute(s) Commercial Arbitration Law (1998) ('CAL').		Enforcement of interim/conservatory measures		Alternative remedies for non-compliance with the EA's order		
Status of the Emergency Arbitrator ('EA')		**From the Arbitral Tribunal ('AT')**	**From the EA**	**Type of remedy**	**From the AT**	**From state courts**
General	> EA is deemed to have the same force and effect as a court decision > AT may itself enforce interim measures if they do not require the use of 'public force'. Alternatively, the AT may request the assistance of a competent state court. > If interim relief is granted by EA in form of an arbitral award, compliance will be mandatory > EA is often granted and even enforced *ex parte*, without prejudice to the rights of the affected party to seek subsequent remedies.	Enforceable Very supportive.	Enforceable Generally, enforcement of an EA interim relief is subject to the same judicial procedure as any other decision rendered by an AT or a court of law, i.e. a party may request ordinary courts to enforce an interim order from an EA.	**Penalties / Sanctions for non-compliance with EA's decision**	NO	NO However, if compulsory enforcement is mandated by a court of law (upon the request of a party), the non-compliant party may be held in contempt.
Form of the order	> EA order may be issued in the form of an award.			**Power to award damages in case of non-compliance with EA's order**	YES	No information
Limits	> No information			**Possibility to draw adverse inference from non-compliance with EA's order**	Unlikely The non-compliance with an emergency arbitration order and the non-compliance with an order will not impact the findings of the AT on the merits or on costs.	NO
				Power to take into account non-compliance with EA orders in deciding the costs	Unlikely The non-compliance with an EA order and the non-compliance with an order will not impact the findings of the AT on the merits or on costs.	NO

ICC COMMISSION ON ARBITRATION AND ADR

The Commission on Arbitration and ADR brings together experts in the field of international dispute resolution from all over the globe and from numerous jurisdictions. In its research capacity, the Commission produces reports and guidelines on legal, procedural and practical aspects of dispute resolution. The Commission also discusses and contributes to the drafting of proposed revisions to the ICC Rules of Arbitration and other arbitration rules and drafts and approves the ICC Mediation Rules, Expert Rules and Dispute Board Rules.

The Commission currently has over 850 members from some 100 countries. It holds two plenary sessions each year, at which proposed Reports and other products are discussed, debated and voted upon. Between these sessions, the Commission's work is often carried out in smaller task forces. The Commission's products are made available at www.iccwbo.org and http://library.iccwbo.org/.

The Commission aims to:

- Provide guidance on a range of topics of current relevance to the world of international dispute resolution.
- Propose tools for efficient and cost-effective settlement of international disputes by means of arbitration, mediation, expertise and dispute boards to enable ICC dispute resolution to respond effectively to users' needs.
- Create a link among arbitrators, mediators, experts, academics, practitioners, counsel and users of dispute resolution services and provide them with a forum to exchange ideas and experiences with a view to improve dispute resolution services.

ICC Commission on Arbitration and ADR
www.iccwbo.org/commission-arbitration-ADR
arbitration.commissionADR@iccwbo.org
T +33 (0)1 49 53 30 43

Emergency Arbitrator Proceedings is a Report of the ICC Commission on Arbitration and ADR.

The Task Force Emergency Arbitrator Proceedings was co-chaired by James Hosking, Marnix Leijten and Diana Paraguacuto-Mahéo, with significant drafting contributions from Cecilia Carrara, Olivier Caprasse and Fernando Mantilla-Serrano. The analysis of the first 80 ICC Emergency Arbitrator cases has largely been conducted by Dr. Hélène van Lith, Secretary to the ICC Commission on Arbitration and ADR.

Members of the Task Force:

Jean-Michael Ahrens, Josephine Akinwunmi, Essam Al Tamimi, David Arias, Ignacio Arteaga, Christian Aschauer, Hans Bagner, León Barriola, Niuscha Bassiri, Fred G. Bennett, Laura Bergamini, George A. Bermann, Sébastien Besson, Michael Black, Christopher Boog, Alexander Brabant, Stavros Brekoulakis, David Brynmor-Thomas, José J. Caicedo, Olivier Caprasse, Juan Pablo Cardenas Mejia, Cecilia Carrara, Philippe Cavalieros, Stephanie Cohen, Juan Pablo Correa Delcasso, Shane Daly, Coralie Darrigade, Nadia De Araujo, Andrew De Lotbinière Mcdougall, Aimery De Schoutheete, Hernando Diaz Candia, Gediminas Dominas, Stephen Drymer, Caroline Duclercq, Philip Dunham, Stuart Dutson, Nelson Eizirik, Jalal El Ahdab, Nils Eliasson, Marcelo Roberto Ferro, Miriam Giselle Figueroa, Alejandro Flores Patiño, Costas Frangeskides, Valeria Galíndez, Manuel García Cobaleda, Barry H. Garfinkel, Fabien Gélinas, Eduardo Damião Gonçalves , Francisco González De Cossío, Mariana França Gouveia, Sarah Grenfell, Sergiy Gryshko, Jean-Pierre Harb, Wulf Gordian Hauser, Clifford Hendel, Marko Hentunen, Axel Benjamin Herzberg, Denys Hickey, Peter Hirst, Lothar Hofmann, Pascal Hollander, Jean-Christophe Honlet, James Hosking, Hermes Marcelo Huck, Benjamin Hughes, Julianne Hughes-Jennett, José Luis Iriarte, Sigvard Jarvin, Dyala Jimenez, Jean E. Kalicki, Mark A. Kantor, Charles Kaplan, Minas Khatchadourian, Rania Khoury, Brian King, Jennifer Kirby, Jan Kleinheisterkamp, Christian Konrad, Benoît Le Bars, Christian Leathley, Christine Lecuyer-Thieffry, Marnix A. Leijten, William K.W. Leung, Maximiliano Londoño, Esteban López Moreno, Irene Loreto González, Fernando Mantilla Serrano, Giacomo Marchisio, Nathalie Meyer Fabre, Albert Monichino, Mark Morril, Anne Marie Mürrle Rojas, Karim J. Nassif, Lawrence W. Newman, Christopher Newmark, Carmen Nuñez-Lagos, Oladipo Okpeseyi, Felipe Ossa, Dan M. Öwerström, Diana Paraguacuto-Maheo, Patricia Peterson, Vivian Ramsey, James Rogers, Victor Manuel Ruiz, John Rundell, Aníbal M. Sabater, Pedro Saghy, Mika Savola, Erik Schäfer, Jan K. Schäfer, Lawrence S. Schaner, Rogier Schellaars, Maxi Scherer, Sven Schilf, Andreas Schregenberger, Anthony Shanil Fernando, Daniel H. Sharma, Shai Sharvit, Hrvoje Sikiric, Gordon Smith, Victor James Smith, Gabriel Stefanescu, Erica Stein, Christoph Stippl, Franz X. Stirnimann, Hansjörg Stutzer, Edna Sussman, Stamatios Tsetos, Willem H. Van Baren, Melanie Van Leeuwen, Filipe Vaz Pinto, Marc Veit, Ricardo Velez, Gaetan Verhoosel, Deva Villanúa, Fabian Von Schlabrendorff, Andrew Wilson, Fan Yang, Sebastian Yanine, Rabab Yasseen, Ariel Ye, Galina Zukova

ICC Publication 895-0 ENG
ISBN 978-92-842-0540-0