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# Urgent! Emergency Arbitrators Are Here (And Counsel Should Know About It)

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**A trend finding its way into international arbitration rules is the Emergency Arbitrator procedure. Arbitration Rules like those of the International Chamber of Commerce have made this procedure a default. The status of measures that these Emergency Arbitrators issue and indeed the status of these arbitrators themselves are only beginning to be explored. Regardless of their status, since this procedure exists, it is important for counsel who practice in international arbitration to turn their minds to this emerging procedure.**

## Introduction

Emergency Arbitrator (EA) procedures are a new – some say welcome – advance in international commercial arbitration. The EA procedure is an answer to one of arbitration's downsides: obtaining immediate interim or conservatory measures before an arbitral tribunal is in place.

Appointing arbitrators and finally empanelling them takes time, sometimes months. Many arbitral institutions have worked to streamline the process, but it remains difficult to empanel arbitral tribunals quickly enough.. The danger is that, before the panel has its first meeting, the claimant may be irreparably harmed in a manner that makes any ultimate award meaningless or empty. The EA procedure tackles this head on. Within days, emergency arbitrators may be appointed, and could issue protective orders to safeguard final awards.

Today, many international arbitration institutions include rules for emergency arbitrators, in one form or another. This article focuses on the ICC's rules, because the ICC is one of the better-known institutions and precedents incorporating the ICC Rules, are common. Emergency arbitrators can enhance the arbitral process. But the road from possibility to reality is often bumpy. This article charts some of these bumps.

## Are Emergency Arbitrators (EAs) really arbitrators?

No definitive practice has yet emerged equating EAs to "usual" arbitrators. Differences do exist. Under the ICC Rules, for example, parties do not appoint EAs. The ICC appoints them. And although appointing authorities have always unilaterally appointed arbitrators when parties could not agree, parties could still put forward nominees. The EA procedure denies parties even this. Some commentators maintain that no rational difference exists between EAs and traditional arbitrators. Whether these commentators are correct is secondary to how courts and legislators will approach the question.

The most direct legislative example, Singapore's international arbitration act, subsumes "emergency arbitrator" within the definition of arbitral tribunal. Moreover, the amendment's effect makes orders from EAs enforceable in the same way as measures from arbitral tribunals. In Singapore, at least, this seems to have put the distinction to rest.

Arguably, agreeing to the 2012 ICC Rules of Arbitration means the parties agree to forgo any right to appoint EAs. That perspective reconciles the fact that EAs are not appointed by the parties, with the concept of party autonomy, a principle on which arbitration is based and to which it is devoted.

**Should courts enforce EA orders?**

What is the status of EA orders? ICC article 29(3) explains that EA orders do not bind arbitral tribunals and arbitral tribunals may even modify, terminate or annul EA orders. Arbitral tribunals appear to serve as the review body to EA orders. This raises perplexing questions. For example, may parties seek immediate court enforcement of an EA order before an arbitral tribunal reviews the order? If the answer is no, then the purposes of EA procedures seem undermined. On the other hand, if parties may seek immediate court enforcement, this creates the strange prospect that an arbitral tribunal may annul the same order that a national court has already enforced!

US courts, on this point, have not been consistent. One decision found no functional difference between orders from EAs and other arbitrators and confirmed an EA order. Another decision held the opposite, and declined to review an EA's order since the arbitration rules chosen called for the arbitral tribunal to review these orders (just like the ICC Rules).

**A word of caution to those who use precedents**

The ICC's EA procedures apply only to contracts entered into after 1 January 2012, the date the new ICC Rules of Arbitration came into force. This detail is important because article 6 of the ICC Rules explains that an arbitration is governed by "*…the Rules in effect on the date of commencement of the arbitration*". Unless otherwise stated, the rules in force on the date the ICC receives a request for arbitration (the commencement date) determines which rules apply to the dispute.

Since the EA procedure requires parties to opt-out rather than to opt-in, the possibility of opting out avoids ensnaring parties into a process to which they never agreed. But traps still abound for drafters who "recycle" arbitration agreement precedents. Lawyers learn early on to use tried and true precedents when these do the job. Using a precedent that adopts the standard "ICC Rules of Arbitration" formulation, however, may not reflect what is intended. The ICC exception offers no relief to precedents drafted before 2012 that find their way into contracts signed after 2012, because the exception does not apply to *when* the arbitration agreement was drafted, but to *when* it was inserted into a signed contract. Consequently, even careful drafters may unwittingly find that the ICC EA procedure is in play.

**Conclusion**

EA procedures, a relatively new addition to arbitral rules, raise novel questions for courts and legislators. Since this process has now found its way into many institutional rules, the ICC being but one example, counsel who draft arbitration clauses should acquaint themselves with it and understand how the scheme works, within the arbitration rules to which they will bind their clients.

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