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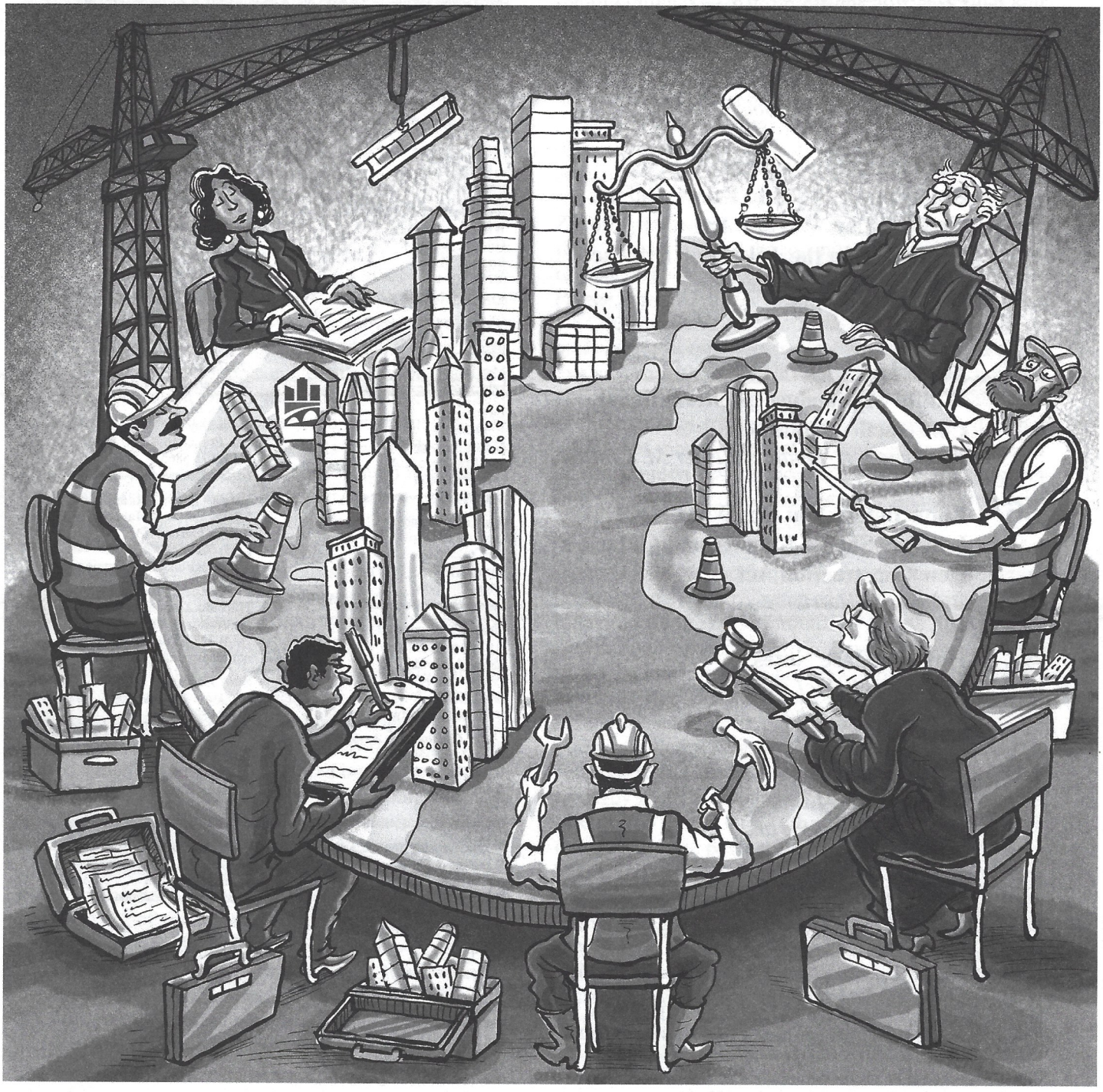


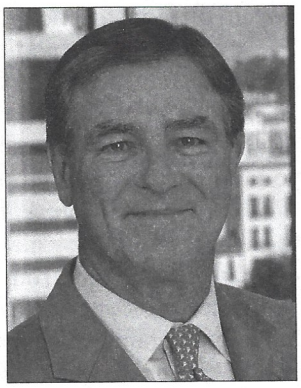
International Construction

Illustration: Chad Crowe

Emergency Relief in Domestic and International Construction Arbitration

By Kate Krause and Joseph M. Matthews

Kate Krause



Joseph M. Matthews

The options available when a party to a construction dispute needs emergency relief, like most areas of commercial dispute resolution, depend on some decisions that are made at the time a contract is formed and some that are made at the time a dispute relating to that contract arises. The first involves negotiating and drafting skills, good judgment based on knowledge of potentially available substantive and procedural law, available judicial and arbitral forums, and some clairvoyance. The second involves analytical and strategic thinking, advocacy skills, and good judgment, and depends in large part on the clairvoyance of the people who negotiated and drafted the contract.

This article offers assistance to those involved in negotiating and drafting construction contracts, domestic to the United States and international, to better anticipate how and when disputes that require emergency relief are likely to arise, and to provide for them in the contractual dispute resolution clause. It will also help those parties faced with the need to seek emergency measures by trying to clarify the prospects for success or failure of some of the options that are likely to be available to them.[1] Finally, this article will explore and recommend best practices for the conduct of emergency procedures and for emergency arbitrators in the hope that they will continue to develop and provide meaningful alternatives for parties and counsel in construction disputes.

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Common Situations Requiring Emergency Relief in Construction Disputes

There are, of course, many situations that might cause one party to a construction contract to believe that emergency relief is necessary and proper. Although no attempt to list them all will succeed, it is possible to list some common ones:

- A dispute arises during the course of construction and the contract contains mutual obligations on one party to perform and the other to pay for that performance. Either party may escalate the dispute by refusing to either perform or to pay, and the other party may seek emergency relief to alter the balance of power between the parties.
- The contract may include a bond (most commonly a performance bond will give rise to requests for emergency relief), and the party obligated to perform seeks emergency relief to prevent the payor from calling on the performance bond.
- The contract may have a liquidated damages provision with a right to set off such damages against draws, and the performing party may seek emergency relief to prevent set-off.
- There may be a concern that one or the other party might move assets, such as construction material, towers, etc.
- There may be a concern about the need to protect intellectual property.
- There may be a concern about the need to preserve evidence of a specific construction condition that needs to be corrected but needs to be preserved for purposes of introduction into evidence during a subsequent dispute proceeding.
- One party may have reason to believe that the adverse party will destroy or hide documents that should be produced in discovery.

In all these situations, and many others that may arise in the construction context, serious and potentially irreparable harm may occur prior to the constitution of the arbitral tribunal. Until fairly recently, the only recourse for parties in arbitration was to request interim relief from the courts. To address this gap in available remedies in arbitration, many institutions have adopted procedures to allow for appointment of an emergency arbitrator who can issue emergency relief before the tribunal has been constituted.

INSTITUTION	YEAR ADOPTED	RULE (REVISIONS YEAR)
American Arbitration Association Commercial Rules (AAA Com.)	2013; 2000 (Optional Rules for Emergency Measures of Protection)	R-38 (2013)
American Arbitration Association Construction Rules (AAA Constr.)	2015	R-39 (2015)
Asian International Arbitration Centre (AIAC)	2013	Schedule 3 (2018)
Australian Centre for International Commercial Arbitration (ACICA)	2011	Schedule 1 (2016)
China International Economic and Trade Arbitration Commission (CIETAC)	2015	Appendix III (2015)
Dubai International Arbitration Centre (DIAC)	2018; 2005 (EF)	[Final emergency arbitrator rules not yet released]; Art. 12 (EF) (2007)
Hong Kong International Arbitration Centre [International] (HKIAC)	2013	Schedule 4; Art. 42 (EF) (2018)
International Centre for Dispute Resolution (ICDR)	2006	Art. 6 (2014)
International Chamber of Commerce (ICC)**	2012	Art. 29 & Appendix V (2017)
International Institute for Conflict Prevention and Resolution [Administered (Admin). & Non-Administered (Non-Admin.)] (CPR)**	2013 (Admin.); 2007 (Non-Admin.)	R-14 (Admin. 2013); R-14 (Non-Admin. 2018)
International Institute for Conflict Prevention and Resolution—International [Administered & Non-Administered] (CPR Int'l)**	2014 (Admin.); 2007 (Non-Admin.)	R-14 (Admin. 2014); R-14 (Non-Admin. 2007)
JAMS Comprehensive (JAMS Comp.)*	2014	R-2c (2014)
JAMS International (JAMS Int'l)	2016; 2011 (EF)	Art. 3 (2016); Art. 22 (EF)
London Court of International Arbitration (LCIA)	2014; 1998 (EF)	Art. 9B; Art. 9A (EF) (2014)
Singapore International Arbitration Centre (SIAC)	2010	Schedule 1; Rule 5 (EF) (2016)
Stockholm Chamber of Commerce (SCC)	2010	Appendix II (2017)
Swiss Chambers Arbitration Institution (SCAI)**	2012	Art. 43 (2012)

* The JAMS Engineering & Construction Rules (2014) and UNCITRAL Arbitration Rules do not contain any procedures for appointment of emergency arbitrators or expedited formation of the permanent tribunal.

** Although AAA Commercial, CPR, ICDR, ICC, CPR, JAMS Comprehensive, SCC, and SCAI have rules for expedited arbitration, those rules do not include expedited formation (EF) of the tribunal due to urgency.

History of Emergency Arbitrator Rules

In 2006, the International Centre for Dispute Resolution, the international arm of the American Arbitration Association, adopted the first known opt-out rule by a leading international arbitration forum specifically authorizing the request for and appointment of an emergency arbitrator to consider and decide requests for emergency relief pending the constitution of an international arbitral panel under the ICDR Rules. At the time, three institutions had optional rules for appointment of a pre-arbitral referee or emergency arbitrator.[2] In the years since 2006, most major commercial[3] arbitral forums have adopted rules and procedures for appointment of emergency arbitrators.[4] Several forums also offer an alternative procedure for expedited formation of the permanent tribunal. The table above lists the major organizations that have adopted rules for emergency arbitrator proceedings and, where indicated, expedited formation of the permanent tribunal (EF):

Prior to the adoption of emergency arbitrator rules, uncertain patterns of emergency relief developed both domestically and internationally to meet the needs of parties to contract disputes where the contracts included arbitration provisions. These included interventions by courts in domestic and international disputes as well as interim relief granted by arbitral tribunals, both domestic and international. Domestically in the United States, most courts since the 1970s have concluded that they have the authority to enter injunctive relief in support of arbitration proceedings. Courts around the world have similarly been willing to enter emergency relief prior to constitution of the tribunal. Internationally, arbitral tribunals in commercial and public international disputes have granted provisional relief pending the outcome of disputes.[5]

Reliance on courts to enter emergency relief prior to constitution of the arbitral tribunal has several potential drawbacks. For example, if a primary reason for choosing arbitration was to avoid having a dispute resolved by a particular national court, reliance on the same court for emergency relief prior to constitution of the arbitral tribunal may be unsatisfactory. And it may not be possible to select another national court that is more acceptable if that court will not have effective jurisdiction to enforce its orders. Construction disputes, because they always involve real property that is subject to the jurisdiction of some national court system within which the real property is located, always suffer from this dilemma. Commencing an action in a national court also may involve loss of confidentiality that parties may have valued when they included an arbitration provision in the construction agreement.

With the notable exception of CPR, all the emergency arbitrator rules provide that the Institution makes the choice as to who will serve as the emergency arbitrator.[6] This is a significant loss of the parties' choice of decision-maker that is an inherent attribute of arbitration, particularly international arbitration.

In large infrastructure projects, both domestic and international parties sometimes include Dispute Boards as part of the dispute resolution process. Very generally, Dispute Boards come in two basic flavors—Dispute Adjudication Boards, where the decisions are binding on the parties, subject to subsequent review by a court or arbitral tribunal, and Dispute Review Boards, where the decisions of the Dispute Board are only advisory. In addition, Dispute Boards are generally categorized as "standing" or "ad hoc" in nature.[7] A standing Dispute Adjudication Board that gives the DAB authority to enter emergency relief would perhaps eliminate the need for emergency relief from either a court or arbitral tribunal. However, such Dispute Boards can be extremely expensive and, if the parties include a standing Dispute Adjudication Board in their contract but fail to designate the members of the board, the need for emergency relief from either a court or arbitral tribunal may still arise.

The next two sections briefly describe the operation of the various rules and provide some recent statistics from several of the arbitral institutions regarding applications pursuant to the emergency arbitrator rules.

Mechanics of Current Rules and Statistical Experience How the Rules Function

The rules adopted by the institutions listed in the table above are very similar to each other. With one exception, all these sets of rules apply to arbitration agreements entered into or arbitrations filed on or after the date the procedures were adopted, unless the parties opt out by written agreement.[8] Most procedures require that a demand for arbitration be filed before or concurrently with the application for emergency relief. However, HKIAC, ICC, SCC, and SIAC rules allow the application to be filed before the demand for arbitration, provided that a demand is filed within between seven and 30 days after the application, subject to extension by the emergency arbitrator. The rules generally provide that upon application by a party, notice to the other party,[9] and payment of the required fees, the institution will appoint a sole arbitrator within a specified number of days. However, some rules allow the institution to act as a gatekeeper, requiring it to make an initial determination as to whether the application should be accepted.[10] The fees required to accompany the application for emergency relief vary considerably, ranging from US$2,000 (CPR administrative fee, plus deposit for emergency arbitrator fees) to US$40,000 (ICC).[11]

The schedule contemplated by each set of rules varies slightly, but all are intended to move quickly considering the emergent nature of the proceedings. Most require appointment of the emergency arbitrator within one business day of receipt of the application. The emergency arbitrator must promptly (usually within two business days) establish a schedule for consideration of the application. Most of the rules require that each party be given a reasonable opportunity to be heard on the application, except for the CPR and JAMS rules, which require that such opportunity be provided "whenever possible" or "taking into account the nature of the relief sought." Many of the rules specify a time limit within which the emergency arbitrator must rule on the application, ranging from five days (SCC) to fifteen days (AIAC, CIETAC, SCAI) from the date the emergency arbitrator received the file, subject to extension by agreement of the parties or the institution in appropriate circumstances.[12]

Most of the rules require that the application for emergency relief contain some showing of urgency. For example, the HKIAC rules require that the applicant set forth "the reasons why the applicant needs the Emergency Relief on an urgent basis that cannot await the constitution of an arbitral tribunal." ICDR Article 6(1) requires that the application contain "the reasons why such relief is required on an emergency basis. . . ." The LCIA rules provide: "The application shall set out, together with all relevant documentation: (i) the specific grounds for requiring, as an emergency, the appointment of an Emergency Arbitrator; and (ii) the specific claim, with reasons, for emergency relief."

To obtain an award granting emergency relief, the ACICA rules require that the applicant prove irreparable harm in the absence of the relief, that such harm substantially outweighs the harm to the adverse party if the relief is granted, and that there is a reasonable likelihood of the applicant's success on the merits. The HKIAC rules provide that the emergency arbitrator may consider those three factors in deciding the request. The AAA and JAMS rules require a showing of "immediate and irreparable loss or damage," whereas the other rules provide no guidance to the emergency arbitrator on the standards to be applied in granting or denying emergency relief.

The specific language regarding the scope of relief an

emergency arbitrator may enter varies slightly, but all sets of rules allow the emergency arbitrator to issue an award maintaining the status quo and/or granting affirmative relief. In almost all cases, the emergency arbitrator may require security for issuance of the emergency relief and may apportion the costs and fees associated with the application among the parties. In addition, all rules provide that any order or award entered by an emergency arbitrator is subject to review, affirmation, reversal, or modification by the arbitral tribunal appointed in the case.

A few institutions offer an alternative avenue for obtaining emergency relief by providing a procedure for the expedited appointment of the permanent tribunal. DIAC and LCIA have rules specifically allowing for expedited formation of the tribunal upon a showing of exceptional urgency. HKIAC, JAMS International, and SIAC rules allow the institution, in its discretion, to abridge any period of time upon a showing of "exceptional urgency," including the time period for formation of the permanent tribunal.[13] Given that the normal procedures for appointment of and challenge to tribunal members would still apply, although the time periods would be shortened, it is unlikely that the permanent tribunal could be appointed as quickly as an emergency arbitrator. This delay would have to be weighed against the potential cost savings and the advantage of having a single tribunal determine all aspects of the case.

Statistical Experience

The ICDR has administered ninety-one emergency arbitration applications since the adoption of Article 6 in 2006. Of those, forty-two cases resulted in decisions granting relief (in whole or in part) to the applicant, twenty cases resulted in decisions denying relief to the applicant, fifteen cases were settled without decision, twelve cases were withdrawn, one case was administratively closed, and one case was pending as of October 2018.[14]

The ICC has administered ninety-two emergency arbitration applications since Article 29 and Appendix V were adopted in 2012 through November 2018, resulting in eighty-nine emergency arbitrator appointments and seventy-nine orders issued. There were two applications received in 2012, six in 2013 and 2014, ten in 2015, twenty-five in 2016, twenty-one in 2017, and twenty-two in 2018 through November. Of the 78 cases accepted by the Secretariat through April 2018, eight were withdrawn, one resulted in a consent award, 19 were rejected in whole or in part on grounds of jurisdiction or admissibility, 36 entirely rejected the relief requested, 15 partially granted relief, and only eight fully granted the requested relief.[15]

The HKIAC reports a total of twelve proceedings in which an emergency arbitrator was appointed between 2014 and 2018. One application was dropped, and one involved an agreement that predated the emergency arbitrator provisions. The HKIAC appointed an emergency arbitrator in the remaining ten cases, of which two resulted in consent awards, one resulted in a cost award after the claimant withdrew the request, one is pending, and the remaining six resulted in emergency awards.[16]

SIAC has had fifty-seven emergency arbitrator cases through 2017. Of those, twenty-nine were granted in whole or in part, sixteen were rejected, ten applications were withdrawn or a consent award entered, and two were pending at the time of the report.[17] JAMS reports that since the emergency relief procedures became available, JAMS has appointed an emergency arbitrator in approximately nineteen cases. Of those, emergency arbitrators issued orders in twelve cases.[18]

Recommendations for Drafting of Arbitration Provisions with an Eye Toward Emergency Relief

Professionals engaged in negotiating and drafting dispute resolution provisions in construction contracts might consider developing a matrix of factors to consider in selection of the law, forum, and rules impacting the potential for emergency relief from an arbitrator in the event of a dispute. The importance of drafting a carefully considered arbitration clause cannot be overstated because the specific terms of such a clause may be a contributing, if not the decisive, factor in the court's determination of the propriety of an emergency relief order.[19] These matrices will necessarily be incomplete when initially developed, but they can be improved over time as experience with actual disputes is included in the decision-making matrix and applied to future projects.

The specific language regarding the scope of relief an emergency arbitrator may enter varies slightly, but all sets of rules allow the emergency arbitrator to issue an award maintaining the status quo and/or granting affirmative relief.

Following is a very preliminary example of the kinds of factors that might be included in an initial matrix for making some choices as to what a dispute resolution provision might include: (1) What is the citizenship/nationality of the parties to the contract? (2) Where is the property or the subject matter of the contract located? (3) What potential national civil justice systems, in addition to the jurisdiction where the project is located, are available to resolve contract disputes? (4) Are there critical third parties to the contract such as lenders and/or surety bond companies? If so, what are their citizenships/nationalities and what other national courts might have jurisdiction over them? (5) Do the parties have relationships outside the boundaries of the subject contract that might impact their performance of the subject contract?

If so, what are the nature and geographic center of those outside relationships and what other national courts might have jurisdiction over them?

Of course, there are additional questions that should be considered, but once they have been identified, it is possible to compile a matrix that puts a value on the key options. For example:

1. Place a value between one and ten on the desirability of each potential national judicial system that might be available for purposes of obtaining emergency relief should it become necessary, including the jurisdiction where the project is located and any other where a party to the contract may be subject to personal jurisdiction. As an example, the judiciary of Singapore might be viewed as highly desirable with efficient, well-compensated, and high-quality judges who are generally knowledgeable and reasonably accessible and might be given a value of ten, whereas the judiciary of another country might be viewed as inefficient, corrupt, or generally incompetent and might be given a value of one. Even if the property that is the subject of the contract/project is not located in Singapore, it might still make sense to consider designating the courts of Singapore for purposes of emergency relief should it become necessary.
2. Place a value between one and ten on the desirability of the emergency arbitrator procedure provided by each set of rules under consideration for inclusion in the dispute resolution provision of the contract. As an example, the ICDR rules might be considered favorably due to its extensive experience with Emergency Rule 37, the first such rule adopted in 2006, and might be given a value of seven. The ICC Court in its structure for emergency arbitrator procedures includes the court in its supervisory role, and this could be viewed favorably or unfavorably depending on the need for speed in the emergency proceeding. They might be given a value of five.
3. Included in the valuation of each set of institutional rules needs to be an assessment of the pool of potential emergency arbitrators for each forum. ICDR, like the AAA, does not make its panels public. This might cause ICDR's favorability rating to be reduced from seven to five. LCIA lists members but specifically warns that it does not vouch for the quality of members as potential arbitrators. The LCIA Court considers applications for appointment of an emergency arbitrator and it will make the appointment if it deems the application proper. The ICC has established councils and other groups to advise the Secretariat in selecting arbitrators, subject to approval and appointment by the court. The different ICC councils around the world appear to have different procedures for advising the Secretariat. For example, the USCIB, which serves as the ICC Council for the United States, has established a database of potential arbitrators on the USCIB website, and the Nominations Committee considers the arbitrators in the database when it makes recommendations for appointment, including emergency arbitrators.[20] The HKIAC publishes on its website a list of the arbitrators from whom it will appoint an emergency arbitrator pursuant to its rules.[21] JAMS lists all arbitrators on its website and this may give JAMS a favorable rating. It would be beneficial if each forum provided a list of the arbitrators from whom it will appoint emergency arbitrators and describe the procedure that will be employed in the appointment, such as rotation, random, geographic, or other factors like expertise. Transparency is increasing, and as it does, the valuation process will improve.
4. Once the above evaluations have been completed, consider the pros and cons of using an available national court versus an emergency arbitrator procedure established by one of the established international arbitral forums. For example, a choice to use a national court may require abandonment of confidentiality of the proceedings. This may or may not be significant to the contracting parties. A choice to rely on an emergency arbitrator procedure contained within one of the established sets of rules for international arbitration may limit the availability of certain remedies, particularly if they include possible non-parties to the contract, such as bonding companies, funders, suppliers, or subcontractors. On the other hand, the orders and judgments of domestic courts have limited authority beyond their own jurisdictional limits, whereas there may be a better chance of an order/award of an emergency arbitrator being enforceable in multiple jurisdictions.
5. The LCIA is an interesting forum in this regard. Located as it is in London, most general counsel or other transactional lawyers deciding what rules and forum to include in the dispute resolution provision contained in a contract involving parties from different countries are likely to value the courts of the UK very highly. The prospect that former high court or commercial court judges are likely to be appointed as emergency arbitrators by the LCIA may well cause it to be valued highly also. On the other hand, if the most likely court that will need to enforce an emergency order/award is in London, it is hard to argue that a party should intentionally incur the additional cost of an emergency arbitrator rather than simply going to court for the emergency relief in the first instance. Given recent UK case law regarding the impact of emergency arbitrator rules on the continued right to seek court intervention, the draftsperson may want to ensure that the right to seek relief in court is specifically preserved.

Developing the matrix discussed in the preceding paragraphs is a good start and may lead to some general propositions that could help those drafting arbitration

clauses in international construction contracts. After that, the person drafting or negotiating the arbitration clause will want to consider the circumstances that are specific to the contract at hand and that are likely to bear on the decisions regarding emergency relief. For example, if the real and/or personal property involved in the contract is located in a country with an acceptable (highly valued) judiciary, it is likely that counsel asked to seek emergency relief on behalf of a party will be grateful for and likely utilize the right to seek emergency judicial relief simultaneous with commencement of the arbitration. No matter how good the emergency arbitration rules and procedure and no matter how qualified the arbitrator appointed to conduct it, it is likely preferable to go directly to court.

Similarly, if there is a critical third party, such as a surety, supplier, or subcontractor who cannot be pressed into the contractual dispute resolution procedure, it is likely that direct court access will be preferable. If, however, the critical third party is not subject to the jurisdiction of the court of primary jurisdiction under the New York Convention, then it may be preferable to use an emergency arbitrator proceeding so that the order/award of the emergency arbitrator has a better chance of being enforceable in a court where that party is subject to personal jurisdiction, as an award under the New York Convention.

If an arbitral forum's rules specifically authorize *ex parte* applications for emergency relief (currently only permitted by SCAI), this could be a very significant factor in deciding whether to select that forum's rules in the dispute resolution clause of a contract. Further, the more transparent each forum becomes with respect to the panel of potential emergency arbitrators and the procedure for their appointment, the more likely that forum's emergency arbitrator rules will be viewed favorably.

There will be other general propositions that could help guide in the drafting of dispute resolution clauses. However, the usefulness of such a matrix can only increase as the draftsperson gains greater experience with and knowledge of the institutional rules and developing domestic and international laws governing emergency arbitrator procedures.

Proposals for Emergency Relief Procedures and Standards

This section discusses three important issues relating to emergency relief: whether applicants should be entitled to seek *ex parte* relief, the continued availability of court-ordered emergency relief, and the standards that should be adopted by emergency arbitrators for issuance of emergency relief.

Ex Parte *Applications for Emergency Relief*

Ex parte injunctive relief, which does not require prior notice to the opposing party, is available in federal and state courts throughout the United States and in many foreign countries. In addition to establishing the elements for issuance of a temporary injunction, the applicant must generally show that it will suffer irreparable harm before the adverse party can be heard in opposition, and the resulting order will usually expire within a short time unless a noticed hearing has been held and a preliminary or permanent injunction issued.[22]

In contrast, only SCAI currently allows *ex parte* applications for emergency relief.[23] However, there is no logical basis for precluding the parties from seeking *ex parte* emergency relief in arbitration when such relief is available from the courts. The types of emergency relief likely to be requested, such as injunctions to preserve assets or evidence, often depend for their success on the absence of notice to the adverse party, such that requiring advance notice may effectively defeat the purpose of the application. By selecting institutional rules that contain emergency arbitrator procedures allowing for *ex parte* applications, the parties will have consented to the issuance of emergency relief without prior notice, thereby effectively waiving the right to equal treatment of the parties in this limited situation. In contrast, the parties have not consented to the issuance of *ex parte* injunctive relief from the courts, yet such relief is routinely granted in contravention of their express agreement that all disputes be subject to arbitration. In addition, limiting the time period that the order is effective should mitigate any harm the adverse party may suffer before the noticed hearing can be held. Allowing *ex parte* applications for emergency relief in arbitration supports the intent of the parties by not forcing them to turn to the courts whenever notice to the other parties would potentially diminish or eliminate the effectiveness of requested relief.[24]

It must be recognized that there are questions as to the enforceability of *ex parte* arbitral orders in international proceedings, under both the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration.[25] However, because anecdotal evidence indicates there is a high degree of voluntary compliance with arbitration orders,[26] this should not preclude arbitral institutions from making *ex parte* applications for emergency relief available.

Ex parte applications for emergency relief in arbitration should therefore be permitted, subject to similar requirements and procedures as those applicable in court. The *ex parte* applicant should be required to show that it would likely suffer irreparable harm either (1) before a noticed hearing could be held or (2) as a result of providing advance notice to the adverse party. If the other elements for issuance of a preliminary injunction are established, the requested relief should be granted by order effective for a period not to exceed two weeks, at which time the adverse party must be given an opportunity to be heard, although the adverse party can request an earlier hearing. If institutions are initially hesitant to adopt provisions allowing for *ex parte* emergency relief, they could make such provisions applicable only if the parties opt in, thereby ensuring the parties have made an informed decision to allow *ex parte* emergency arbitrator proceedings.

Continued Availability of Emergency Relief from the Courts

Virtually all the domestic and international institutional rules provide that a request for interim or emergency measures to a court is not incompatible with the arbitration agreement or the institution's rules.[27] However, only the ACICA, ICC, HKIAC, and LCIA rules address the impact of the emergency procedures on the availability of interim measures from a court, providing generally that the emergency arbitrator procedure is not intended to prevent any party from seeking interim or conservatory measures from a competent authority at any time.[28] The LCIA rules add that the emergency arbitrator procedure "shall not be treated as an alternative to or substitute for the exercise of such right."

It must be recognized that there are questions as tothe enforceability of *ex parte* arbitral orders in international proceedings, under both the New York Convention and the UNCITRAL Model Law onInternational Commercial Arbitration.

Despite the clear intent of these rules, the issue has arisen as to whether courts continue to have the authority to grant emergency relief if the institution's rules include an emergency arbitrator procedure and, if so, whether that authority is somehow limited by the availability of such procedure. On this issue, the case of *Gerald Metals SA v. Timis*[29] is instructive. In an arbitration under the English Arbitration Act and the LCIA rules, Gerald Metals sought appointment of an emergency arbitrator seeking a freezing injunction preventing the Timis Trust from disposing of assets. In response to the application, the Trust provided certain undertakings ensuring the assets would not be disposed of except under specified conditions. Finding the undertakings sufficient, the LCIA Court rejected Gerald Metals' application for an emergency arbitrator, at which point Gerald Metals applied to the English High Court of Justice for the requested injunction. In denying relief, the court relied on Section 44(5) of the Arbitration Act, which provides that a court can grant urgent relief only if or to the extent that the arbitral tribunal "has no power or is unable for the time being to act effectively." Because the tribunal in this case (the LCIA Court) had the power to act within the necessary time period but found that there was insufficient urgency to grant the requested relief due to the undertaking provided by the Trust, the High Court found that it did not have the authority to act under Section 44(5). The court acknowledged that LCIA Rules Paragraph 9.12 stated the emergency arbitrator procedures were not intended to prejudice a party's right to seek interim relief from the courts but found that it did not prevent the powers of the court from being limited by the existence of such procedures.

In a case under the English Arbitration Act and the ICC Rules that presented in a different procedural posture, *GigSky ApS v. Vodafone Roaming Services S.A.R.L.*,[30] the High Court of Justice found that the existence of an emergency arbitrator process did not prevent the High Court from granting injunctive relief. Vodafone had terminated an agreement to provide network services to GigSky. The day before filing a notice of arbitration, GigSky sought and obtained, without notice, an interlocutory injunction from the Court requiring that Vodafone reinstate the service. The Court rejected Vodafone's challenge to its jurisdiction, finding that if GigSky had invoked the ICC emergency arbitrator facility on the date it sought the injunction, "there would have had to have been an appointment and then a hearing, and . . . that would have taken at least another 11.5 days or so."[31] As such, under Section 44 of the Arbitration Act, there was "no other tribunal empowered to act when the injunction was sought," and the Court therefore had jurisdiction to issue the injunction.[32]

Although the *Gerald Metals* and *GigSky* cases were decided under the English Arbitration Act, the same rationale might be applied by U.S. courts in considering applications for emergency injunctive relief. The four-prong test for issuance of a preliminary injunction to preserve the status quo pending arbitration includes the requirement that the movant prove with reasonable certainty that it will be irreparably injured if the requested relief maintaining the status quo is not granted.[33] If emergency arbitrator procedures are available under the circumstances presented, a court might conclude that the requested relief should not be granted by the court because there can be no irreparable harm in denying the relief because the applicant could request appointment of an emergency arbitrator.

Although most federal circuit courts in the United States allow courts to issue preliminary injunctive relief in cases subject to arbitration, the Eighth Circuit does not, and the Eleventh and D.C. Circuits have not stated their position.[34] If those two circuits or the circuits that follow the majority position decide to adopt the English approach that there is no irreparable harm in denying injunctive relief if the arbitral institution provides emergency arbitrator procedures, parties to arbitrations under institutional rules that provide emergency arbitrator procedures would no longer have access to the courts for emergency relief, notwithstanding any provision in those rules that the emergency arbitrator provisions are not intended to replace court-ordered emergency relief. The emergency arbitrator procedures should therefore ensure that the parties can obtain relief from the emergency arbitrator in as many of the same situations

as were previously available from the courts. Time limits for appointment of the emergency arbitrator, scheduling of any hearing, and issuance of the order must be short enough to ensure relief can be obtained in the same time frame as from a court.[35] The cost of obtaining relief from an emergency arbitrator should be reduced to more closely approximate the cost to obtain court-ordered relief.

There are currently several situations in which a court can grant emergency relief that an emergency arbitrator cannot. The most common situation is where there is a "without notice" or *ex parte* application for emergency measures, which is currently only allowed under SCAI rules. As discussed above, there is no reason why *ex parte* applications should not be permitted in emergency arbitration, and allowing them would eliminate the need to resort to the courts in circumstances where notice may prevent the emergency measures from being effective. Another situation in which a party can obtain emergency relief only from the courts is when the emergency measures are directed to a third party. There appears to be no basis upon which an emergency arbitrator can render an enforceable order of emergency relief against a third party, such that this will remain one circumstance in which the parties will be required to seek relief from the courts. Finally, if the relief involves real or personal property within the jurisdiction of an acceptable court, seeking relief from the court can further streamline the process. Thus, there are many situations in which a party may prefer to seek emergency relief from the courts rather than an emergency arbitrator.

Another consideration is the comparative enforceability of court orders versus arbitral emergency relief orders. If a party refuses to comply with an emergency arbitrator's order, the arbitrator's lack of coercive powers means the arbitrator can only impose sanctions in the form of either adverse inferences or an award of costs and damages arising from the failure to comply. Because the threat of sanctions may not suffice to ensure compliance, the requesting party will have to resort to the courts to obtain enforcement, which will delay obtaining the urgent relief that was needed. In addition, issues have arisen as to whether an order or award of an emergency arbitrator is "final" for purposes of court enforcement, both domestically and under the New York Convention.[36]

Based on the numerous situations in which court-ordered emergency relief may be preferable to an emergency arbitrator proceeding, and the clear intent of the arbitration rules that those procedures not limit a party's right to seek interim relief from a court, the better view is for courts to continue to grant interim relief in appropriate circumstances even if the requesting party could otherwise seek such relief from an emergency arbitrator.

Criteria for Issuance of Emergency Relief

None of the emergency arbitrator procedures provide meaningful guidance concerning the standards to be met for issuance of emergency relief. Some of the rules specify that there must be a showing of "immediate and irreparable loss or damage" (AAA, JAMS Comprehensive) or "immediate loss or damage" (JAMS International). The ACICA and HKIAC rules list three factors to be considered by emergency arbitrators: irreparable harm in the absence of the relief, whether such harm substantially outweighs the harm to the adverse party if the relief is granted, and whether there is a reasonable likelihood of the applicant's success on the merits. The remaining rules do not delineate any standards to be applied by the emergency arbitrator.

Although there are few reported cases indicating the standards currently used by emergency arbitrators, the Stockholm Chamber of Commerce (SCC) publishes summaries of emergency arbitrator decisions rendered under its procedures that indicate significant variation in the standards applied in granting or denying interim relief.[37] It further appears that emergency arbitrators set a fairly high bar for granting emergency relief, as applicant success rates range from thirty-one percent to fifty-two percent.[38]

In developing standards to be satisfied for granting emergency relief, consideration should be given to the factors adopted for court-ordered injunctive relief and for interim relief in arbitration. In the United States and internationally, courts and arbitrators look to some or all of the following factors, some of which are included in the few institutional rules that specify any standards: (1) jurisdiction, (2) the likelihood of success on the merits, (3) urgency, (4) irreparable harm, (5) the balance of hardships, and (6) whether the relief requested is in the public interest.[39]

The first factor requires that the applicant demonstrate a *prima facie* case that the tribunal has jurisdiction over the substantive claim. It is generally sufficient if the applicant shows that an arbitration agreement exists that arguably covers the substantive claim—in essence, if there is not a manifest lack of jurisdiction, this requirement will be satisfied.[40]

"Likelihood of success on the merits" has been framed in different ways by courts and arbitrators, following a continuum from a *prima facie* case on the merits to a probability or strong likelihood of success on the merits.[41] There are several reasons why emergency arbitrators (and courts, for that matter) should require only a *prima facie* showing of a reasonable possibility of success on the merits. First, determining the relative merits of the case should remain, as far as possible, the province of the permanent tribunal. Further, given the urgent nature of the emergency application, and the complex nature of most merits determinations in construction cases, it is unlikely that an emergency arbitrator will have the time or information necessary to make a well-reasoned evaluation of the merits of the parties' positions. In addition, if, as recommended above, institutions allow *ex parte* applications, the emergency arbitrator will only have a *prima*

facie case presented for consideration. Finally, using the sliding-scale approach discussed below, the emergency arbitrator can and should use higher standards for the remaining factors if the proof of success on the merits is relatively weak, while also requiring security to ensure that the responding party is not prejudiced if the applicant is subsequently unable to prove its case before the permanent tribunal.

The "urgency" factor is sometimes viewed as an aspect of irreparable injury because a showing of irreparable injury if the relief is denied would presumably suffice to establish the urgency of the requested relief. However, it is not difficult to imagine a situation in which the applicant will suffer irreparable injury in the absence of interim relief, but such injury will not occur until sometime in the near future. If the injury will not arise until after the permanent tribunal can be constituted, an emergency arbitrator should deny the requested relief, notwithstanding that the applicant has made a showing of irreparable harm, because the emergency arbitrator procedures were adopted solely to address those situations where relief is needed before the permanent tribunal can consider the application. It is thus particularly important in the emergency arbitrator context to consider urgency as a separate factor, and to place a high burden on the applicant to establish that the requested relief must be granted immediately to avoid irreparable harm. In fact, urgency should be the threshold factor to be considered because a failure to show urgency—defined as a showing that the alleged harm will probably arise before the permanent tribunal can be constituted—should result in an immediate denial of emergency relief without the need for considering the likelihood of success on the merits, irreparable harm, or any other factor.

The standard for establishing irreparable harm for injunctive relief in the United States, which had been the subject of considerable disagreement among the courts, was clarified in 2008 as requiring that the applicant demonstrate a *probability* of irreparable harm if interim relief was denied, rather than just a *possibility*.[42] Some international procedures require a showing that irreparable harm is *likely* to result if the interim measure is not ordered.[43] It is recommended that the minimum standard should be a reasonable possibility of irreparable harm, with a higher standard required if the other factors do not weigh heavily in favor of the requested relief.

"Irreparable harm" is generally defined as injury that cannot be compensated by damages.[44] Some courts have held that the harm is irreparable if it is compensable by damages but the responding party might not be in a financial position to pay such damages.[45] In addition, proof that the potential economic loss is so great as to threaten the continuing existence of the moving party's business has been held sufficient to establish irreparable harm.[46] These criteria provide a reasonable basis for a finding of irreparable harm and should be adopted by emergency arbitrators.

The "balance of hardships" factor is also referred to as the proportionality standard and requires a comparison of the harm to the applicant that would be avoided by granting the requested relief to the harm the relief would cause the responding party. If granting the relief would cause relatively greater harm to the respondent or to third parties, the relief may properly be denied.[47] This factor is properly considered in ruling on an application for emergency relief, while the emergency arbitrator should always consider whether requiring security or narrowing the requested emergency relief may be sufficient to mitigate the potential harm to the respondent.

Finally, the "public interest" factor considers whether the requested relief is in the public interest or, instead, violates public policy.[48] Although this factor may only apply in a limited number of cases, the emergency arbitrator should ensure that the parties address whether this factor is implicated by the emergency relief application.

A majority of courts apply a sliding-scale approach in applying the criteria for issuance of interim relief, wherein the various factors are balanced against one another such that a strong showing of one factor may overcome a lesser showing of another factor.[49] Under this approach, also known as the "serious questions" test, a strong showing of irreparable harm may overcome a finding that there were serious questions as to the likelihood of the moving party's success on the merits.[50] The sliding-scale approach is particularly appropriate for emergency arbitrator proceedings in light of the extremely short time limits for determination of applications for emergency relief and the ability to grant relief based upon a more flexible analysis consistent with the equitable nature of arbitration.

Based on the foregoing, the following factors should be considered in ruling on an application for emergency relief: (1) urgency, (2) *prima facie* showing of jurisdiction, (3) p*rima facie* showing of a reasonable possibility of success on the merits, (4) reasonable possibility of irreparable harm, (5) balance of hardships, and (6) public interest. The emergency arbitrator should first determine whether the applicant has established that the requested relief is urgent by demonstrating that the alleged harm would probably arise before the permanent tribunal can be constituted. If urgency is not established, emergency relief should be denied. Assuming the applicant has made a satisfactory showing of urgency, the remaining factors should be considered, using a sliding-scale approach. For example, if the applicant demonstrates a strong probability of irreparable harm, emergency relief may be appropriate even if the balance of hardships is only slightly in favor of the applicant. Similarly, a showing that the applicant will probably succeed on the merits may require only a reasonable possibility of irreparable harm for emergency relief to be granted.

Adoption of these standards will result in consistent and supportable decisions on applications for emergency relief, while providing emergency arbitrators with the flexibility to adapt such relief to protect the interests of all parties.

Conclusion

Given the rapid increase in emergency relief applications in arbitration since the adoption of the first emergency arbitrator provisions, there is a clear need for such relief to be available outside the courts. Clients and their attorneys negotiating dispute resolution clauses in construction contracts would be well-advised to develop a matrix of considerations to evaluate in drafting arbitration clauses to best adapt those clauses to the particular needs of each project. Clients and their attorneys who will be participating in the arbitration of disputes would be well-advised to educate themselves on the availability and the advantages and disadvantages of emergency relief from courts and emergency arbitrators so they will be prepared to take decisive and effective action when seeking or opposing emergency relief. Emergency arbitrators would be well-advised to have an intimate and immediate understanding of the rules and standards to be applied in deciding applications for emergency relief, as they will not have the time to obtain such understanding after they have been appointed. And finally, institutions would be well-advised to consider a number of changes to their policies and procedures regarding emergency relief, including publishing their rosters of potential emergency arbitrators and describing the factors that will be considered in selecting the emergency arbitrator, allowing *ex parte* applications, ensuring that time limits and costs of emergency procedures are relatively comparable to court-ordered emergency relief, and setting forth the specific factors to be considered by emergency arbitrators in deciding applications for emergency relief. If all stakeholders adopt these practices, emergency arbitrator procedures will mature into a process that furthers the purposes and protects the integrity of the arbitration process itself.

Endnotes

1. One commentator has observed that lawyers drafting dispute resolution provisions are often tricked by their unconscious bias into making jurisdiction and choice of law decisions without an analytical framework. Gustavo Moser, *Choice of Law, Brexit and the "Ice Cream Flavour" Dilemma*, Kluwer Arb. Blog (Nov. 14, 2018). *See also* Gustavo Moser, *Cognitive Errors and Thinking Aids: Rationalising Choice of Law and Arbitration Clauses*, Kluwer Arb. Blog (Jan. 28, 2019).

2. In 1990, the ICC adopted an optional pre-arbitral referee procedure, followed by similar optional referee rules of the European Court of Arbitration (1997) and the Netherlands Arbitration Institute (1998).

3. Although there are many international construction projects that end up in investor-state treaty-based arbitration and they might benefit from emergency arbitrator procedures, this article does not attempt to address such procedures in the context of investor-state disputes, which have unique characteristics owing to their treaty origins. For an analysis of emergency arbitration in the context of investor-state treaty arbitration, see Janice Lee, *Is the Emergency Arbitrator Procedure Suitable for Investment Arbitration?*, 10(i) Contemp. Asian Arb. J. 71 (2017).

4. For a comprehensive analysis of the history of emergency relief, see Ali Yesilirmak, Provisional Measures in International Arbitration, at 51–86 (2003) (Ph.D. dissertation, Queen Mary College, University of London), *available at* https://core.ac.uk/download/pdf/30695829.pdf.

5. For a review of the standards employed by international investment tribunals to decide whether interim relief should be granted, see Joe Matthews & Karen Stewart, *Time to Evaluate the Standards for Issuance of Interim Measures of Protection in International Investment Arbitration*, 25 Arb. Int'l 529 (2009). *See also* Marc Goldstein, *A Glance into History for the Emergency Arbitrator* 40:3 Fordham Int'l L.J. 779 (2017).

6. Under the CPR domestic and international rules, the parties can jointly designate the emergency arbitrator, but in some cases only if agreed to within one business day of the application.

7. For a good general description of Dispute Boards, particularly in connection with standard form construction contracts prepared by the *Fédération Internationale des Ingénieurs Conseils*, now known as the International Federation of Consulting Engineers (FIDIC), see Mark Goodrich, *Dispute Adjudication Boards: Are They the Future of Dispute Resolution?*, White & Case (Sept. 2, 2016), https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution. It is beyond the scope of this article, but a negotiator/draftsperson of a construction contract might consider proposing that the parties identify a specific person acceptable to both to serve as an emergency arbitrator and to reference that person in the dispute resolution clause of the contract. Essentially, this would be a streamlined and far less expensive alternative to the use of a Dispute Board.

8. The SCC Emergency Arbitrator Rules apply retroactively to any arbitration agreement referencing the SCC Arbitration Rules, and not just those entered on or after January 1, 2010, the date the procedures were first adopted.

9. Only the Swiss rules allow *ex parte* applications for emergency relief, as discussed in more detail elsewhere in this article.

10. *E.g.,* AIAC, CIETAC, HKIAC, ICC, SCC, SIAC.

11. ICDR does not charge an administrative fee for emergency arbitrator proceedings, but it does not publish the amount of the deposit for emergency arbitrator fees required upon filing. Only AIAC, HKIAC, CPR, LCIA, SIAC, and SCIA publish the amount of the fee required at the time of filing.

12. HKIAC reports that as of 2016, most emergency arbitrations were concluded within fourteen days, with some being resolved within a single weekend. 5 ICDR Int'l Arb. Rep. (Fall 2016).

13. Most of the other institutions have expedited procedures, but they are generally aimed at smaller cases and do not provide for expedited formation of the permanent tribunal based upon urgency.

14. Correspondence with ICDR representative (Oct. 18, 2018) (on file with the authors).

15. ICC Commission Report on Emergency Arbitrator Proceedings (2019), at https://iccwbo.org/publication/emergency-arbitrator-proceedings-icc-arbitration-and-adr-commission-report / Correspondence with ICC representative (Nov. 16, 2018) (on file with the authors). One-half of the applications were related to construction, engineering, and energy sectors.

16. Correspondence with HKIAC representative (Oct. 23, 2018) (on file with the authors).

17. SIAC, http://www.siac.org.sg/2014-11-03-13-33-43/

facts-figures/statistics.

18. Correspondence with JAMS representative (Feb. 1, 2019) (on file with the authors). The authors were not able to obtain statistics from other institutions by the deadline for publication.

19. *See, e.g.*, Nexteer Auto Corp. v. Korea Delphi Auto. Sys. Corp., 2014 WL 562264 (E.D. Mich. Feb. 13, 2014) (based on a "carve out" clause in the parties' arbitration agreement providing that the parties were not precluded from applying for any preliminary or injunctive relief, the court held that it had jurisdiction to hear plaintiff's preliminary injunction motion).

20. SICANA, Inc., is the U.S.-based affiliate of the ICC in New York that provides ICC dispute resolution services in North America. At the Annual Arbitration Committee Luncheon held January 28, 2019, representatives of SICANA and the ICC court provided an annual report regarding the business of the ICC court, including the number of cases administered and updates to rules and procedures. In response to a question, Marek Krasula, Counsel for SICANA, explained that when applications for an emergency arbitrator are received, SICANA staff and the Nominations Committee review the application and identify potential emergency arbitrators and, because the timetable for appointment is so short, inquiries are immediately sent to potential emergency arbitrators, who are asked to respond immediately regarding their availability and to run conflict-of-interest checks. Such appointments are made by the president of the court rather than the entire court and, as a practical matter, most appointments made are the first potential emergency arbitrator for any case who responds with adequate time and no conflicts.

21. HKIAC, http://www.hkiac.org/content/panel-emergency-arbitrators.

22. *See, e.g.,* Fed. R. Civ. P. 65 (upon a showing of imminent and irreparable harm to the movant before a noticed hearing can be held, a temporary restraining order can be issued without notice to the adverse party for a period of fourteen days); H.K. Judiciary Practice Direction 11.1 (Ex Parte, Interim and Interlocutory Applications for Injunctions) (the *ex parte* order should contain a return date when the adverse party can appear and present arguments for the lifting of the order).

23. In an excellent article on emergency arbitration, the commentators concluded that Swiss Arbitration Article 26, which allows *ex parte* applications for interim relief in exceptional circumstances, applied equally to an emergency arbitrator, based upon the provision in the emergency arbitrator Article 43 that the emergency arbitrator's decision shall have the same effects as a decision on interim measures. Grant Hanessian & Alexandra Dosman, *Songs of Innocence and Experience: Ten Years of Emergency Arbitration*, 27 Am. Rev. Int'l Arb. 215, 222–23 (2016). It appears that at least one *ex parte* application for emergency relief under the Swiss rules has been accepted by the SCAI. *See* Vanessa A. Liborio Garrido de Sousa, *Emergency Relief in International Arbitration* (2016), at Liborio_Vanessa-Emergency_relief_in_international_arbitration.pdf. The UNCITRAL Model Law, Articles 17B and 17C, also allows *ex parte* interim relief to be granted in the form of a preliminary order, not enforceable in court, that will expire in twenty days unless an interim measure is granted after the adverse party has been given notice and an opportunity to be heard. It is not clear whether those provisions apply to emergency arbitrators. Further, due to the controversial nature of *ex parte* interim relief, these provisions were omitted from the 2010 and 2013 UNCITRAL Arbitration Rules.

24. Another commentator supporting *ex parte* emergency relief is Ali Yesilirmak, as discussed in his doctoral thesis, *supra* note 4, at 284–87. *But see* Mika Savola, *Interim Measures and Emergency Arbitrator Proceedings*, 23 Croat. Arb. Yearbook 73, 79–81 (2016) (*ex parte* emergency relief infringes the principle of equal treatment of the parties and should not be permitted).

25. *See* discussion in Hanessian & Dosman, *supra* note 23, at 223.

26. *See* Gary B. Born, *Chapter 26: Recognition and Enforcement of International Arbitral Awards*, *in* International Commercial Arbitration 3394, 3410–16 (2d ed. 2014); Chiann Bao, *Chapter 14: Developing the Emergency Arbitrator Procedure: The Approach of the Hong Kong International Arbitration Centre*, *in* Interim & Emergency Relief in International Arbitration 265, 282 (Jurisnet 2015).

27. AAA R-39; CPR Admin. R-14; ICDR art. 6(7).

28. ICC Rules, art. 29.7; HKIAC Schedule 4, ¶ 20; LCIA Rules, para. 9.12.

29. [2016] EWHC 2327 (Ch) (Eng.).

30. [2015] EWHC 4047 (Comm) (Eng.).

31. The Court's estimate of the time required to obtain an order from an ICC emergency arbitrator is not unreasonable, as the ICC Rules indicate an average of two days to appoint the emergency arbitrator, plus as much as fifteen days for a hearing and issuance of the order. ICC Rules, app. 5, arts. 2, 5, 6. The precise estimate likely was drawn from the 2014 ICC Dispute Resolution Statistics, which noted that the time for an emergency arbitrator to make her order averaged eleven and one-half days.

32. *See* Seele Middle East FZE v. Drake & Scull Int'l SA CO [2014] EWHC 435 (TCC) (Eng.) (where ICC emergency arbitrator rules were not yet in effect, the Court had jurisdiction to issue injunctive relief).

33. *See, e.g.,* Ortho Pharm. Corp. v. Amgen, Inc., 882 F.2d 806 (3d Cir. 1989).

34. *See* Todd Rosenbaum, *Powers of a District Court to Grant Interim Relief After Compelling Arbitration of All Claims Before It*, Mintz Insights (Apr. 3, 2017), https://www.mintz.com/insights-center/viewpoints/2196/2017-04-powers-district-court-grant-interim-relief-after-compelling; Bruce E. Meyerson, *Interim Relief in Arbitration: What Does the Case Law Teach Us?*, 34 Alternatives to the High Cost of Litig., no. 9, Oct. 2016, at 131; Joel Rosen, *Seeking Emergency Relief Pending Mandatory Arbitration Subject to the Federal Arbitration Act,* presented at AABA Forum on the Constr. Indus. Meeting (2008); Ava Borrasso, *Overview of U.S. Treatment of Interim Measures in Support of International Arbitration*, 7 Young Arb. Rev., no. 31, Oct. 2018, at 57.

35. For example, the ICC's time limit of fifteen days from the emergency arbitrator's receipt of the file to issuance of the order appears excessive, and was in fact the basis for the court in *GigSky* finding it had jurisdiction to issue emergency relief.

36. *Compare* Yahoo! Inc. v. Microsoft Corp., 13 CV 7237 (S.D.N.Y. 2013) (award of emergency arbitrator appointed under the AAA Emergency Measures of Protection enjoining Yahoo from refusing to proceed with the transition to Bing Ads was deemed "final" and therefore confirmed under the Federal Arbitration Act), *with* Chinmax Med. Sys., Inc. v. Alere San Diego, Inc., 10 CV 2467 (S.D. Cal. 2011) (interim order of emergency arbitrator appointed

under ICDR rules limiting defendant's communications and requiring document production was not a "final" order and not subject to review by the court because the ICDR rules provide that the permanent tribunal may reconsider, modify, or vacate the interim award or order, and the interim order stated it was issued to facilitate any consideration by the full panel of conservancy). To address this concern, several jurisdictions have adopted statutes specifically providing that emergency arbitration decisions are enforceable in court, such as the Hong Kong Arbitration Ordinance (Sections 22A and 22B) and the Singapore International Arbitration Act (Section 12(6).

37. *See, e.g.*, Anja Havedal Ipp, *SCC Practice Note, Emergency Arbitrator Decisions Rendered 2015–2016* (June 2017). *See also*, Edna Sussman and Alexandra Dosman, *Evaluating the Advantages and Drawbacks of Emergency Arbitrators*, TDM 6 (2015).

38. *Supra* note 23.

39. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008). In the U.K., Canada, and other commonwealth countries, the factors for determining whether a court should grant injunctive relief are (1) a serious issue to be tried (often satisfied by proof of a possibility of success at trial), (2) irreparable harm, and (3) balance of convenience. *E.g.*, Am. Cyanamid Co. v Ethicon Ltd., [1975] AC 396 (Eng.); Google Inc. *v.* Equustek Solutions Inc., 2017 SCC 34 (Can.). In Germany, the applicant must provide *prima facie* evidence of (1) its entitlement to the claim and (2) the urgency of the claim. Landgericht Düsseldorf (Regional Court of Düsseldorf), GRUR-RR 2011, 358. Like ACICA and HKIAC, the Permanent Court of Arbitration Rules (2012), Article 26, allow interim relief to be granted upon proof of irreparable harm, proportionality, and a reasonable possibility of success on the merits, although the tribunal has discretion to consider these factors as it deems appropriate. The UNCITRAL Arbitration Rules (2013) are the only other rules that set forth specific standards an applicant for interim relief must satisfy: (1) harm not adequately reparable by an award of damages is likely to result if the relief is denied, (2) such harm substantially outweighs the harm to the other party if the relief is granted, and (3) there is a reasonable possibility that the applicant will succeed on the merits of its claim (Article 26).

40. *See* Goldstein, *supra* note 5, at 780–85.

41. *See, e.g.*, Toyo Tire Holdings v. Cont'l Tire N. Am., 609 F.3d 975 (9th Cir. 2010) (claimant must show he is "likely" to succeed on the merits); Nexteer Auto. Corp. v. Korea Delphi Auto. Sys. Corp., 2014 WL 562264 (E.D. Mich. Feb. 13, 2014) (required a "strong likelihood" of success on the merits); Barton-Reid Can. Ltd. v. Alfresh Beverages Can. Corp. (2001) OJ No. 4116 (SCJ) (Can.) (applicant must show a "strong *prima facie* case," demonstrating that it is almost certain to be successful at trial); *Am. Cyanamid Co.* [1975] AC 396 (the court must be satisfied that the claim is not frivolous or vexatious; i.e., that there is a serious question to be tried). The UNCITRAL Model Law on Commercial Arbitration (2006), Section 17A, requires proof that there is a "reasonable possibility" that the requesting party will succeed on the merits. The highest standard applied by the 2015–2016 SCC emergency arbitrators was "reasonable possibility of success on the merits," and the most common standard was a *prima facie* showing of a reasonable possibility of success on the merits. Ipp, *supra* note 37.

42. *Winter*, 555 U.S. 7.

43. *See, e.g.*, UNCITRAL Model Law, sec. 17A.

44. *See, e.g.*, RJR-McDonald Inc. v. Canada (1994) 1 SC 311 (irreparable harm includes harm that cannot be quantified in monetary terms and harm that cannot be cured).

45. See, e.g., *Am. Cyanamid Co.* [1975] AC 396.

46. Performance Unlimited v. Questar Publishers, 52 F.3d 1373 (6th Cir. 1995); Guttenberg v. Emery, 26 F. Supp. 3d 88, 102 (D.D.C. 2014).

47. *See, e.g.,* Nexteer Auto. Corp. v. Korea Delphi Auto. Sys. Corp., 2014 WL 562264 (E.D. Mich. Feb. 13, 2014) (the extreme consequences that granting the interim relief would wreak on innocent third-party manufacturers weighs strongly in favor of denying injunctive relief). The UNCITRAL Model Law, Section 17A, requires a showing that the harm to the requesting party if the interim measure is denied "substantially outweighs" the harm to the responding party if the measure is granted.

48. *See, e.g.,* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008) (requested interim relief was contrary to the Navy's public interest to continue their training exercises); CE Int'l Res. Holdings v. S.A. Minerals Ltd. P'ship, No. 12 Civ. 8087, 2012 WL 6178236, at *1 (S.D.N.Y. Dec. 10, 2012) (interim security ordered by an arbitrator was valid even though not available if the action had been brought in court because it was not contrary to New York public policy to enforce the terms of an agreement entered into by sophisticated parties; the *Mareva*-style injunction restraining the defendant's assets was also upheld, even though both federal and New York courts cannot issue such injunctions, due to the public policy favoring the confirmation of arbitral awards).

49. *See, e.g.*, Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011) (serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are met); Hoosier Energy Rural Elec. Co-op, Inc. v. John Hancock Life Ins. Co., 582 F.3d 721 (7th Cir. 2009) (the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting preliminary relief); Del. River Port Auth. v. Transamerican Trailer Transp., Inc., 501 F.2d 917 (3d Cir. 1974) (when considerable injury will result from either the grant or denial of a preliminary injunction, greater significance must be placed on the likelihood of success on the merits); Series 5 Software Ltd. v. Clarke [1996] 1 All ER 853 (Eng.) (the court retains flexibility as to which factors to consider and what weight should be given to each factor). *But see* Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342 (4th Cir. 2009) (holding that the circuit's prior test, which permitted "flexible inter-play" among the elements, may no longer be applied after *Winter*), *vacated on other grounds*, 130 S. Ct. 2371 (2010).

50. *Alliance for the Wild Rockies*, 632 F.3d 1127.