Emergency Arbitration in Investment and Construction Disputes: An Uneasy Fit?

Lars MARKERT* & Raeesa RAWAL**

This article examines the compatibility of emergency arbitration with (1) investment treaty disputes and (2) construction disputes, respectively. The article begins by giving a brief synopsis of the evolution of emergency arbitration, following which its suitability to investment treaty disputes and construction disputes is considered. The authors provide critical analysis of the compatibility of the emergency arbitration procedure with pre-arbitral requirements in both of these categories of disputes. The authors conclude that the practices surrounding emergency arbitration need to be developed further, and specifically, the issues surrounding enforcement need to be resolved.

Keywords: Emergency Arbitration, Construction Arbitration, Investment Treaty Arbitration, Enforceability, Third Parties, Dynamic Interpretation of Consent, Cooling-off Clauses, Multi-Tiered Dispute Resolution Clauses

Over the past decade, emergency arbitration has become one of international arbitration's biggest success stories.[1] It is arguable that no other new arbitral mechanism has found such widespread acceptance in recent revisions of institutional arbitration rules. In recent years, almost every arbitral institution which has revised its rules has incorporated provisions on emergency arbitration.[2] Its arrival has been received with praise and commentators applaud it as 'an avenue for fast and uncomplicated interim protection' under an arbitral mechanism that 'appropriately balances opposing parties' rights and interests'.[3]

* *Maîtrise en droit* (Université d'Aix Marseille III), LL.M. (Georgetown), Dr. iur. (Cologne) is a foreign law partner in the international dispute resolution team at Nishimura & Asahi, Tokyo. Email: l_markert@jurists.co.jp.

** LLB/BCom (Monash University) is an associate in the International Dispute Resolution Group at Debevoise & Plimpton LLP, London. Email: rrawal@debevoise.com.

1 Patricia Shaughnessy, *Chapter 32: The Emergency Arbitrator*, in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* 340 (Patricia Shaughnessy & Sherlin Tung eds, Kluwer Law International 2017).

2 *Ibid*. *See* Charles N. Brower, Ariel Meyerstein & Stephan W. Schill, *The Power and Effectiveness of Pre-Arbitral Provisional Relief: The SCC Emergency Arbitrator in Investor-State Disputes*, in *Between East and West: Essays in Honour of Ulf Franke* (Kaj Hobér, Annette Magnusson & Marie Öhrström eds, JurisNet 2010), 62 for an exemplar sample.

3 Brower, Meyerstein & Schill, *supra* n. 2, at 64.

Markert, Lars & Rawal, Raeesa. 'Emergency Arbitration in Investment and Construction Disputes: An Uneasy Fit?'. *Journal of International Arbitration* 37, no. 1 (2020): 131–142.

In this article, the authors review the premise of emergency arbitration and the purpose it seeks to serve (1). It is through this purview that the article considers the use of emergency arbitration and its issues of compatibility in investment arbitration (2) and construction disputes (3). The analysis will show that both fields of arbitration face similar issues when confronted with emergency arbitration proceedings. As the use of emergency arbitration continues to grow, practitioners will need to understand both, where it can be beneficial and where its boundaries will inevitably be tested.

1 A SHORT OVERVIEW OF EMERGENCY ARBITRATION

Emergency arbitration allows a disputing party to apply for urgent interim relief before an arbitral tribunal has been formally constituted. Once an application is received by an arbitral institution, it appoints an emergency arbitrator to decide on the application within a period that typically ranges from a couple of days to one or two weeks. As such, emergency arbitrators should have the ability to quickly understand the issues, organize fair and efficient procedures, and 'wisely make snap decisions that may have significant consequences'.[4]

The landscape of international arbitration has changed,[5] and 'classical' arbitration rules often do not contain the tools necessary for obtaining timely relief prior to the constitution of an arbitral tribunal. Not allowing such relief may frustrate the original purpose of the arbitration or even render the arbitration futile.[6] The proliferation of emergency arbitration shows that there has been a practical need to obtain interim measures, e.g. for the preservation of evidence or the factual status quo, the freezing of assets, or preventing the unjustified calling of a bond, within the confines of the arbitral process.

Under most modern arbitration laws and arbitration rules, an arbitration agreement does not prevent an application to courts for interim measures. However, the confidentiality of proceedings, the subject matter expertise of the emergency arbitrator, the unwillingness to litigate in the official local court language and, in certain cases, mistrust in the neutrality or expertise of the courts, has led to the alternative of emergency arbitration being particularly attractive.[7] This has resulted in most arbitral institutions (such as the Singapore International Arbitration Centre (SIAC), the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and more recently, the Hong Kong International Arbitration Centre (HKIAC)) amending their rules to incorporate provisions relating to emergency

---

4 Shaughnessy, *supra* n. 1, at 340.
5 Brower, Meyerstein & Schill, *supra* n. 2, at 62.
6 Shaughnessy, *supra* n. 1, at 340.
7 *Ibid*.

arbitration. In keeping with the global rise in the use of emergency arbitration, in 2018 the Beijing Arbitration Commission (BAC) administered the first emergency arbitration proceeding in mainland China (and the award was immediately enforced in Hong Kong).[8]

Arbitral tribunals are free to uphold or reverse any order issued by an emergency arbitrator,[9] and in fact are not bound by any emergency arbitrator decision.[10] Frequently, however, the emergency arbitrator's preliminary assessment of the particular strengths and weaknesses of the parties' respective cases can lead to an early settlement.[11] Where this is not the case, the emergency arbitrator's decisions are very often complied with voluntarily as losing parties typically fear that non-compliance may give the subsequently constituted arbitral tribunal a bad impression,[12] which in turn could negatively affect the final award.

As a relatively new mechanism, emergency arbitration is not without teething problems. For instance, the application for emergency arbitration does not preclude a party from seeking urgent interim relief before a competent judicial authority,[13] but nonetheless may render relief sought through such route inaccessible or ineffective. In *Gerard Metals S.A. v. Timis*,[14] the English High Court declined to grant a freezing injunction under the Arbitration Act 1996 (the 'Act'), because the applicable LCIA Rules contained a provision for emergency arbitration. The court held that, under section 44(5) of the Act, a court can act only if or to the extent the arbitral tribunal has no power or is unable to act effectively. Emergency arbitration is an exclusive remedy and a court can only retain jurisdiction where equivalent relief could not be obtained from an emergency arbitrator or expedited tribunal.[15] As such, parties that seek to preserve full access to courts may consider 'opting out' of emergency arbitration provisions.

Further, unlike in court proceedings, interim measures sought from emergency arbitration usually cannot be granted *ex parte*,[16] and will not be binding on

---

8 Sun Wei, *First Emergency Arbitrator Proceeding in Mainland China: Reflections on How to Conduct an EA Proceeding from Procedural and Substantive Perspectives*, http://arbitrationblog.kluwerarbitration.com/2018/09/01/first-ea-proceeding-mainland-china-reflections-conduct-ea-proceeding-procedural-substantive-perspectives/ (accessed 1 Sept. 2018).

9 Jason Fry, *The Emergency Arbitrator – Flawed Fashion or Sensible Solution?*, 7(2) Disp. Resol. Int'l 179, 184 (Nov. 2013), citing ICC Rules (2012), App. V, Art. 6(6)(8); Int'l Centre Disp. Resol. Rules (2010), Art. 37(6); Austl. Centre Int'l Com. Arb. Expedited Arb. Rules (2011), Sch. 2, Art. 4.1; Nat'l Chamber Com. Mexico City Rules, Art. 50(5) (2010).

10 Brower, Meyerstein & Schill, *supra* n. 2, at 72.

11 Shaughnessy, *supra* n. 1, at 343.

12 Fry, *supra* n. 9, at 197.

13 *See* e.g. ICC Rules, Art. 29(7).

14 *Gerard Metals S.A. v. Timis* [2016] EWHC 2327 (Ch).

15 Ann Levin, James Doe & Robin Wood, *Emergency Arbitrators and Expedited Tribunals in Construction Disputes – Some Recent Experience*, Inside Construction and Infra, 16, https://www.herbertsmithfreehills.com/latest-thinking/inside-construction-and-infra (accessed 1 May 2017).

16 For an exception, *see* e.g. Swiss Rules of International Arbitration, Art. 26(3), 43(1).

third parties. However, these limitations are inherent to arbitral proceedings and not a specific problem of emergency arbitration. More important is the fact that a later arbitral tribunal can reverse or amend an emergency arbitrator's decision.[17] This raises doubts about the 'final and binding' nature necessary for its enforcement under the New York Convention.[18] While some courts have considered emergency arbitrator decisions enforceable, and progressive arbitral jurisdictions have passed laws explicitly stipulating their enforceability,[19] the questionable enforceability of emergency arbitrator decisions has been considered the Achilles' heel of the mechanism and has shaped much of the debate about the pros and cons of emergency arbitration.[20] This has distracted attention away from the fact that with its increasing popularity, the emergency arbitration mechanism is expanding into areas within which it may experience issues of compatibility. The following sections will explore how emergency arbitration is pushing boundaries with respect to international investment and construction disputes.

2 EMERGENCY ARBITRATION AS APPLIED IN INVESTMENT DISPUTES

The last couple of years have seen several instances in which the emergency arbitrator mechanism has been invoked in investment disputes, i.e. arbitrations between a foreign investor and a state in which the investment was made.[21] This may seem surprising, as investment disputes are usually initiated on the basis of international investment treaties and governed by arbitration rules that are not known to include such emergency arbitration mechanisms.

A closer look at the arbitration rules used in investment disputes shows that, while emergency arbitration may not become the norm, it should not be ignored. Most investment arbitration cases are initiated under the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) or of the

---

17 Brower, Meyerstein & Schill, *supra* n. 2, at 71–72.

18 Elizabeth Kantor, *Emergency Arbitration of Construction Disputes – Choose Wisely or End Up Spoilt for Choice*, http://kluwerarbitrationblog.com/2017/02/15/emergency-arbitration-construction-disputes-choose-wisely-end-spoilt-choice (accessed 15 Feb. 2017).

19 Both Hong Kong and Singapore have amended their respective arbitration statutes to provide for the recognition of emergency arbitrator orders. Hong Kong amended its Arbitration Ordinance by inserting Part 3A, which allows the recognition and enforcement of '[a]ny emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules'. The Singapore International Arbitration Act has expanded the definition of 'arbitral tribunal' in s. 2 of the Act to include an emergency arbitrator.

20 Fry, *supra* n. 9, at 180.

21 Kyongwha Chung, *Emergency Arbitrator Procedure in Investment Treaty Disputes: To Be or Not To Be*, J. World Inv. & Trade 98 et seq. (2019); Koh Swee Yen, *Use of Emergency Arbitrators in Investment Treaty Arbitration*, 31(3) ICSID Rev. – Foreign Inv. L.J. 534 et seq. (2016); Joel Dahlquist Cullborg, *Emergency Arbitrators in Investment Treaty Disputes*, http://kluwerarbitrationblog.com/2015/03/10/emergency-arbitrators-in-investment-treaty-disputes/ (accessed 10 Mar. 2015).

United Nations Commission on International Trade Law (UNCITRAL), neither of which provide for the use of an emergency arbitration mechanism.[22] While the ICC Arbitration Rules 2012 do provide for emergency arbitration, Article 29(5) of these Rules is understood to exclude the mechanism in the case of investment disputes based on investment treaties.[23] The SIAC Investment Arbitration Rules 2017 require an express opt-in by both disputing parties,[24] which may be rare in investor-state disputes. The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules introduced an emergency arbitrator mechanism in 2010 without making a distinction between commercial and investment arbitrations.[25] It is in fact the SCC Rules which have been the platform of all known investment emergency arbitrations to date.[26] Having been included as arbitration rules in about sixty Bilateral Investment Treaties (BITs), and importantly in the Energy Charter Treaty, the SCC Rules form the basis for 5% of all investment disputes.[27] The publicly known investment emergency arbitrations under the SCC Rules have tested the boundaries of emergency arbitration in two particular ways: the scope of the states' consent to arbitration and procedural prerequisites to initiating arbitral proceedings.

The SCC Rules provide that parties choosing the SCC Rules shall be deemed to have agreed on the SCC Rules in force on the date of the filing of an application for the appointment of an emergency arbitrator.[28] Can investors thus avail themselves of emergency arbitration even where the investment treaty containing the choice of SCC Rules was concluded (long) before the introduction of the mechanism (i.e. 2010), as, e.g. is the case for the Energy Charter Treaty from 1994? In fact, most investment treaties, in which states have expressly consented to arbitration, were concluded long before the very concept of emergency arbitration came into being.[29] The argument could be made that an emergency arbitration was not foreseeable at the time the state parties included the SCC Rules in their investment treaty, and therefore it should not be covered by their consent to

---

22 Dahlquist Cullborg, *supra* n. 21.

23 Koh, *supra* n. 21.

24 Same: BAC/BIAC Rules for Emergency Arbitrator in International Investment Arbitration, App. D, rule 1(1). Similar, but less clear: CIETAC Emergency Arbitrator Procedures for International Investment Arbitration, App. II, Art. 1(1) ('based on the applicable law or the agreement of the parties').

25 *Ibid*.

26 For known cases, *see TSIKInvest LLC v. Moldova*, SCC EA No. 2014/053; *Griffin Group v. Poland*, SCC EA No. 2014/183; *JKX Oil & Gas, Poltava Petroleum Co. v. Ukraine*, SCC EA No. 2015/002; *Evrobalt LLC v. Moldova*, SCC EA No. 2016/82; *Kompozit LLC v. Moldova*, SCC EA No. 2016/95; *Puma Energy Holdings (Luxembourg) SARL v. Benin*, SCC EA No. 2017/092; *Mohammed Munshi v. Mongolia*, SCC EA No. 2018/007; *Okuashvili v. Georgia*, SCC EA (case no. unknown).

27 UNCTAD, *IIA Issues Note, Special Update on Investor-State Dispute Settlement: Facts and Figures* 5 (Nov. 2017).

28 *See* Preamble to the SCC Rules 2010 and 2017.

29 Dahlquist Cullborg, *supra* n. 21.

arbitration.[30] The SCC Rules do not provide any guidance on how this issue is to be resolved.[31] It is questionable whether the SCC Rules would be the appropriate interpretative basis for a state's consent to arbitration in any event, since such consent is better interpreted by reference to public international law.[32]

So far, emergency arbitrators, if they considered the issue at all, seem to have followed a dynamic interpretation of the state's consent and considered the emergency arbitration mechanism to be included.[33] The emergency arbitrator in *Evrobalt LLC v. Moldova* pointed to the contracting states' presumed knowledge that the SCC Arbitration Rules, even in their prior version, applied as of the commencement of the arbitration pursuant to the version extant at the time.[34] Second, the emergency arbitrator held that in light of the term of the applicable BIT of at least fifteen years, the state's offer of consent referring to SCC arbitration should be construed as a dynamic reference.[35]

Commentators agree with the 'dynamic' approach, noting that 'if … [the] rules provide for emergency arbitration, then the parties choosing to arbitrate under … [those] rules are deemed to have agreed to … [those] provisions'.[36] There are, of course, arguments one could advance to counter this characterization of consent. One may be that parties who chose, for example, SCC Arbitration Rules, chose them with a general understanding of what kind of mechanisms they entail. Once a completely new mechanism is introduced that the parties could not expect, such mechanism is not covered by the scope of the parties' consent.[37] However, the prevailing view seems to be that a party who agrees to an institutional arbitration can also be presumed to be aware that the governing rules are subject to change at a later point in time.[38] Another explanation for the fact that this issue seems not to have played a more significant role in emergency arbitrator decisions could be that host states were not able to timely file objections to the investor's application for an order by the SCC emergency arbitrator.[39]

---

30 Brower, Meyerstein & Schill, *supra* n. 2, at 68; Qian Wu, *Jurisdiction of Emergency Arbitrator in Investment Treaty Arbitration*, http://arbitrationblog.kluwerarbitration.com/2019/06/28/jurisdiction-of-emergency-arbitrator-in-investment-treaty-arbitration/ (accessed 28 June 2019).

31 Brower, Meyerstein & Schill, *supra* n. 2, at 69.

32 *Evrobalt LLC v. Moldova, supra* n. 26, para. 27.

33 Koh, *supra* n. 21, at 544.

34 *Evrobalt LLC v. Moldova, supra* n. 26, para. 29. Similarly *Kompozit LLC v. Moldova*, SCC EA No. 2016/95, *supra* n. 26, para. 38.

35 *Evrobalt LLC v. Moldova, supra* n. 26, para. 30.

36 Shaughnessy, *supra* n. 1, at 342, noting that the ICC Rules do not apply retroactively to arbitration agreements entered into prior to the adoption of emergency arbitration provisions, while others such as the SCC do apply retroactively.

37 Brower, Meyerstein & Schill, *supra* n. 2, at 69; Wu, *supra* n. 30.

38 *Ibid.*, at 70; *Evrobalt LLC v. Moldova, supra* n. 26, para. 29; *Kompozit LLC v. Moldova, supra* n. 26, para. 39.

39 Lars Markert, *Efficiency and Investment Arbitration – New Developments and the Need for a Multi-Dimensional Approach*, Transnat'l Disp. Mgmt. 28 (Sept. 2018).

The second issue pertains to pre-arbitral prerequisites to emergency arbitration in investment treaties. Investment treaties commonly contain 'cooling off' or 'waiting' clauses,[40] providing that an investor has to undertake efforts towards an amicable resolution of the dispute for a period of three to six months before it may initiate arbitration. In the majority of investment cases, the investors needed interim measures urgently and therefore did not comply with the applicable waiting periods. This raises the question whether non-compliance with the waiting period can be seen as an obstacle to initiating emergency arbitrator proceedings, given that pursuit of such proceedings would constitute non-compliance with express prerequisites of the investment agreement.[41] Up until now, emergency arbitrators have answered the question in the negative.[42] Either they have found that forcing an investor to comply with the waiting period in light of (*prima facie*) imminent harm would defeat the purpose of the emergency arbitration mechanism,[43] or they held that compliance with the waiting period would obviously be futile, considering that the state had not made the required efforts towards an amicable settlement.[44] Chung points out that the *prima facie* nature of the emergency arbitrator's findings in this respect, and the subsequent possibility of reversal by the arbitral tribunal, generally justify the current emergency arbitrator decisions on this point.[45]

As these examples show, the emergency arbitration mechanism was able to push legal boundaries in investment disputes. However, in the end it all comes back to enforcement.[46] Apparently less concerned than commercial parties about leaving a bad impression with the arbitral tribunal,[47] to date states have generally failed to voluntarily comply with the emergency arbitrator decisions rendered against them. Currently there is only one known case in which an investor was at least initially able to make progress in enforcing such a decision.[48] It is therefore clear that the use of emergency arbitration has to overcome various legal hurdles in

---

40 Dahlquist Cullborg, *supra* n. 21.

41 Koh, *supra* n. 21, at 539 et seq.

42 Dahlquist Cullborg, *supra* n. 21.

43 *TSIKInvest LLC v. Moldova, supra* n. 26, para. 66; *Puma Energy Holdings (Luxembourg) SARL v. Benin, supra* n. 26 (not public), as reported by Jarrod Hepburn, *Analysis: Stockholm Arbitrator Finds Emergency Measures Justified Against Benin Where Entire Investment Faces Extinguishment Due To Alleged Denial of Justice*, Investment Arbitration Reporter (14 June 2017).

44 *Kompozit LLC v. Moldova, supra* n. 26, para. 55; *Evrobalt LLC v. Moldova, supra* n. 26, para. 23.

45 Chung, *supra* n. 21, at 139.

46 Seventy-nine per cent of respondents to a survey considered the issue of enforceability of emergency arbitration decisions as the most important factor influencing their choice between opting for state courts or provisions of emergency arbitrators when seeking urgent relief. *See* Ank Santens & Jaroslav Kudrna, *The State of Play of Enforcement of Emergency Arbitrator Decisions*, 34(1) J. Int'l Arb. 1, 3 (2017), citing the 2015 Queen Mary/White & Case International Arbitration Survey.

47 Kantor, *supra* n. 18; Markert, *supra* n. 39, at 29.

48 *See JKX et al. v. Ukraine*. Cf. Markert, *supra* n. 39, at 29 and 164; Santens & Kudrna, *supra* n. 46, at 7–8. Enforcement was ultimately denied by the Ukrainian Supreme Court in 2018, *see* www.cms-

order to be used in investment arbitration proceedings. It remains to be seen whether emergency arbitration will be the way in which disputes are settled in investment arbitration.[49]

3 EMERGENCY ARBITRATION AS APPLIED IN CONSTRUCTION DISPUTES

Given the breadth of disputes that can fall under the ambit of 'construction disputes', and the varying nature of the urgency of relief required, construction dispute practitioners likely will be among the most frequent users of emergency arbitration.[50] While construction disputes often operate in the commercial sphere, vastly different from the realm of investment disputes, analogous issues may arise in connection with emergency arbitrations.

This will particularly be the case where construction contracts contain arbitration only as a final option within a multi-tiered dispute resolution clause. Such clauses are often found in construction contracts and provide for amicable settlement attempts or interim assessments before arbitration proceedings are to be initiated. The 'first tier' may consist of informal dispute resolution processes, such as commercial negotiations or mediation, potentially in combination with more (preliminarily) binding mechanisms, such as e.g. dispute adjudication boards (DABs)[51] which may render decisions on select issues in an ongoing project. Only once these initial steps have been undertaken, including the timely filing of a notice of dissatisfaction in the case of an adverse DAB decision, will the parties be able to initiate arbitral proceedings.

In construction projects, one can easily recognize that there will be numerous instances where emergency relief is required, and a party will not want to make its way through a possibly lengthy multi-tiered dispute resolution process. Even an expedited constitution of an arbitral tribunal can take up to ten days, and may be considered too lengthy depending on the nature of relief sought.[52] In construction disputes, seeking emergency relief is not uncommon. This can be the case for the calling on a performance bond,[53] either for amounts allegedly owed, or for allegedly defective work; an injunction to prevent a contractor from 'walking off

---

lawnow.com/ealerts/2018/11/ukraine-supreme-court-pulls-the-plug-on-jkx-emergency-award-enforcement.

49 Positive: Brower, Meyerstein & Schill, *supra* n. 2, at 77; sceptical: Markert, *supra* n. 39, at 29–31.

50 Christian Johansen, *The Emergency Arbitrator in Construction Disputes*, Int'l Constr. L. Rev. 266, 267 (11 July 2013).

51 The authors note that the suite of FIDIC books released in 2017 use the nomenclature of Dispute Avoidance and Adjudication Board (DAAB).

52 Barbara Steindl, *The Emergency Arbitrator in International Construction Arbitration*, Contemporary Issues in International Arbitration and Mediation 258, 261 (The Fordham Papers 2012).

53 Kantor, *supra* n. 18.

site'; or interim relief to preserve evidence or assets. The particular expertise of the decision-maker, the confidentiality of the proceedings, or any of the reasons explained above may make an emergency arbitration more attractive than interim relief in state courts.

This at least is the case if there is no need to bind third parties to the relief granted.[54] This scenario is not uncommon in construction disputes involving principals, contractors, and subcontractors. However, the practical reality of the impact of an emergency arbitration on a construction dispute, even where it is between only two parties, is that it will have consequences for other related parties. Due to the inter-dependency of parties within a construction project, emergency arbitration may mean that, for example, an injunction imposed on a contractor has follow-on effects to all other parties involved, such as subcontractors.[55]

To address the issue of binding third parties via emergency arbitration, on large projects with multiple parties involved across numerous contracts, some thought should be given to the use of an umbrella agreement and dispute resolution provisions which apply to all parties. This decreases the risk of inconsistent dispute resolution methods across the various contracts and also enables all parties to have recourse against each other. Of course, the umbrella agreement must be carefully drafted to ensure that the wording in the agreement truly reflects the desired mechanisms agreed among all parties. And the more parties involved, the harder such an agreement may be to reach in the first instance.

Where arbitral emergency relief is required, there may be an inherent tension between adhering to the multi-tiered dispute resolution process agreed to in the construction contract, and the ability of a party to immediately ask for interim measures by an emergency arbitrator. One interpretative approach is to consider prior compliance with all alternative dispute resolution methods as a mandatory condition for the initiation of (emergency) arbitral proceedings. After all, multi-tiered dispute resolution clauses in construction contracts are usually drafted by sophisticated business partners who likely want to adhere to the detailed dispute resolution mechanism that they have negotiated. Yet, this approach may not reflect the practical realities of construction projects, where often parties require immediate action in order to avoid imminent harm and to minimize disruption to the works on site.[56]

The interpretation of such clauses will therefore likely depend on various possible scenarios. Where multi-tiered dispute resolution clauses contain mere amicable settlement or negotiation requirements, emergency arbitrators in

---

54 *Ibid*.

55 Johansen, *supra* n. 50, at 272.

56 *See* Steindl, *supra* n. 52, at 262–263, for an exemplar list of emergency relief that is commonly sought in construction disputes.

construction disputes might take inspiration from similar decisions in the investment arbitration sphere. Should this be the case, they are likely either to conclude that in light of (*prima facie*) imminent harm, holding a party to lengthy negotiations would defeat the purpose of the emergency arbitration mechanism, or – depending on the facts of the case – to consider negotiations obviously futile.

The issue will become more complex where the multi-tiered dispute resolution clauses commonly found in construction contracts provide for mechanisms that potentially compete with emergency arbitration provisions. Where, in an international construction project, a DAB has been established from the outset of the project and is vested with powers to issue interim measures (see e.g. clause 21 of the *FIDIC Red Book* (2017 edition)), certain arbitral rules (e.g. ICC) or emergency arbitrators will consider this to be a binding contractual choice of an already existing interim relief mechanism, potentially precluding emergency arbitral relief.

However, where a DAB is not mandatory and not installed at the time of the application for emergency arbitral relief, the assessment may well differ.[57] Relying on the arguments from the investment disputes sphere, construction emergency arbitrators might consider DAB relief to be futile and, in focusing on speedy and effective interim relief, decide to assume *prima facie* jurisdiction. In any event, commentators have warned that those who opt to include emergency arbitration provisions within their dispute resolution mechanism should ensure that they do not contradict other sections of the mechanism, such as the rights afforded to a DAB.[58]

Conceptually, the entanglement between DABs can be divided into two issues. First, there is potential for parties not to have clarity on the interaction or overlap between DABs (who themselves are also intended to provide interim relief) and the arbitration provisions captured in the specified arbitral rules nominated by the parties; that is, 'which mechanism should be the proper forum to grant emergency relief if the construction contract provides for a DAB decision as pre-arbitral procedure and one party intends to apply for emergency arbitration'.[59] Second, a question arises as to the point at which the parties may avail themselves of the mechanism contained in a multi-tiered dispute resolution clause, in favour of emergency arbitration.

Clear and unequivocal drafting, with these issues in mind, can assist parties in addressing these issues. For example, parties should aim to clearly characterize and divide disputes that can be referred to DABs and emergency arbitrators,

---

[57] Kantor, *supra* n. 18.
[58] Steindl, *supra* n. 52, at 268.
[59] Wei Sun & Adela Mao, *Construction Arbitration in Mainland China and Hong Kong, The Guide to Construction Arbitration*, GAR (2d ed., 2018).

respectively. This may take the form of allocating disputes technical in nature to a DAB, whereas disputes of form (over substance) are referred to an emergency arbitrator. The issue of the jurisdiction of an emergency arbitrator not being enlivened until pre-arbitral steps have been satisfied can also be addressed through clear drafting, but may not need to be. There may be potential to argue that when parties proactively agree to include rules from an institution which contains emergency arbitration procedures, they do so with the full intention to avail themselves of every feature contained within those rules. This would include the emergency arbitration provisions, and it could be argued that they only have utility if parties are able to utilize them immediately, and without the completion of pre-arbitral steps. While this may be an obtuse interpretation of the parties' intentions, it would be peculiar if parties intended for the emergency arbitration provisions to apply, but only after all pre-arbitral steps had been satisfied – a task which can take many months or years. In any event, if the parties' intentions to have these emergency arbitration provisions apply at any point is reflected through clear drafting, then such an issue need not arise.

A recent report on an emergency arbitration under the ICC Rules in relation to a substantial construction project in the Middle-East and North Africa (MENA) region highlights the effectiveness and efficiency of this process in construction disputes.[60] It has been reported that after the claimant issued its application for emergency measures to the ICC, the emergency arbitrator was appointed within forty-eight hours, and despite a request for extension of time for the respondent's reply, the emergency arbitrator took a firm stand to adhere to the original timeline. Complying with the time limit set out in the ICC Rules, the emergency arbitrator issued an order in seven days after the hearing – a total of twenty days after the claimant's application. While on this occasion it appears that the emergency arbitration procedure proved seamless and efficient in resolving the dispute, without publicly available case law addressing the various scenarios in construction disputes discussed in the preceding paragraphs, it remains to be seen whether emergency arbitration will be able to push boundaries and introduce avenues for interim relief that parties had not contemplated when agreeing on arbitral rules in their construction contracts. It will be interesting to observe how emergency arbitration will fare in the construction disputes field, with some commentators already proclaiming that it 'does not seem like a good fit for construction cases',[61] and that those in the field would be doing 'themselves a favour by using the opt-out rules'.[62]

---

60 *See* Levin, Doe & Woods, *supra* n. 15, at 16.
61 Johansen, *supra* n. 50, at 272.
62 *Ibid.*, at 273.

4 CONCLUSION

The enforceability of emergency arbitrator decisions will remain a focus of discussions for some time to come. This should not, however, distract from the fact that there are complex issues that will need to be worked out in the short term when considering the interplay between emergency arbitral relief and investment and construction disputes. Until there is more legal certainty on these matters, parties and states are advised to carefully delimit the boundaries of emergency arbitration when drafting their dispute settlement provisions. While emergency arbitration is becoming more prevalent in most arbitration rules, it presently remains in a 'state of development'[63] and may not always be the best fit for all types of arbitral proceedings.

[63] Shaughnessy, *supra* n. 1, at 346.