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WORLD MARITIME UNIVERSITY

Malmö, Sweden

**THE REGIME OF EMERGENCY ARBITRATION
IN MARITIME AND COMMERCIAL DISPUTE
RESOLUTION**

By

MOHAMED SHAWKI EL KHADRAWI

Egypt

A dissertation submitted to the World Maritime University in partial fulfillment of
the requirements for the award of the degree of

MASTER OF SCIENCE

In

MARITIME AFFAIRS
(Maritime Law and Policy)

Class of 2017

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Dissertation Declaration Form

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

(Signature): **MOHAMED EL KHADRAWI**

(Date): **19/09/2017**

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Institution/organization: **World Maritime University**

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ABSTRACT

Title of dissertation: **The Regime of Emergency Arbitration in
Maritime and Commercial Dispute Resolution**

Degree: **Master of Science**

When parties seek urgent protection of their substantive rights, prior to the commencement of arbitral proceedings or before the constitution of the arbitral tribunal, they would have no alternative but to resort to the national courts. By reason of the limited capability of national courts to act expeditiously for the granting of interim relief in transboundary maritime trade disputes, parties recoiled away from national courts, in order to preserve their confidentiality and privacy and to avoid consumption of time and cost. That is why emergency arbitrator mechanism started looming in sight imposing itself on the international arena.

Yet, there are some unclear questions regarding: Does emergency arbitration differ from its counterparts of other types of arbitration such as fast or small arbitration procedures, what are the types of these interim measures, what are the criteria for granting these emergency reliefs and how they could be enforced by the state courts?

This contribution targets at shedding light on the answer to the above-mentioned questions. To this end, it first presents the importance of emergency arbitration and clarifies the most important differences between the diverse species of arbitration. Additionally, it examines the various approaches of emergency arbitration in several international arbitral institutions. It then delves into the types of interim measures and the conditions and criteria for granting them. Finally, it discusses what is the form of emergency arbitrator's decision before presenting a proposal for the mechanism of implementing an emergency arbitration decision, which might enhance the effectiveness of the enforceability of this embryonic arbitral instrument.

Keywords: *Emergency Arbitration, Emergency Arbitrator, Pre-arbitral interim measures, Types of interim measures, Conditions and criteria for granting interim measures, Form of emergency arbitrator's decision, Force of res judicata, Implementation of the decision of emergency arbitration.*

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LIST OF ABBREVIATIONS

| | |
|-----------------|---|
| AAA | American Arbitration Association |
| EMAC | Emirates Maritime Arbitration Centre |
| FALCA | Fast and Low Cost Arbitration |
| LCIA | London Court of International Arbitration |
| LMAA | London Maritime Arbitrators Association |
| SMA | Society of Maritime Arbitrators in New York |
| ICC | International Chamber of Commerce |
| ICCA | International Council for Commercial Arbitration |
| ICDR | International Center for Dispute Resolution |
| ICSID | International Centre for the Settlement of Investment Disputes |
| CIA | Chartered Institute of Arbitrators |
| CMAC | China Maritime Arbitration Commission (CMAC) |
| SCC | Stockholm Chamber of Commerce |
| SIAC | Singapore International Arbitration Centre |
| UNCITRAL | Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 |

Chapter 1

General Introduction

Prologue/Preface

Aim and objectives of the study

Questions of the study

Scope of study

Chapter 1

General Introduction

Arbitration is, indeed, 'not for the impatient'

Koh Swee Yen

1.1 Prologue/Preface

Countless contemporary research on arbitration regimes commences with the irrefutable fact that there has been a significant upsurge in a number of arbitration disputes in the last half-century. Is an arbitrator more litigious? Is a national court less law-abiding? Probably, the answer to both of these questions is "no". What has varied is how the mission is proceeding.

In general terms, arbitration can be described as the most popular manner of dispute settlement particularly when the res litigious is related to maritime trade. In spite of this popularity there are some weaknesses; in particular, the difficulties of the constitution of the tribunal and the delay in procedures pending an award, which adversely affect the overwhelming desire for arbitration (Gregori, 2015).

At the same time, the matter conceivably is per se so urgent that a litigator needs to apply for interim relief afore the arbitral tribunal is properly constituted (The Chartered Institute of Arbitrators (CIArb), 2015). In other words, what is the solution if interim measures are required though the arbitral tribunal is not yet constituted?

Typically, interim measures granted through an arbitral tribunal require that the tribunal has already been constituted. In situations where the tribunal has not yet been established, parties traditionally turn to national courts to apply for interim measures (Roth, 2012).

In order to decrease the time of the procedures, some commercial arbitral institutions adopted abridged, quicker and relatively inexpensive proceedings. Nevertheless, the most effective remedy against such delay and the absence of the tribunal is the intervention of the emergency arbitrator expressly when the issue is extraordinary urgent and cannot wait for even the fast track constitution of the tribunal or the sluggish pace of state courts, particularly where the relief may be required before the notification of arbitration is filed (Yen, 2016).

These measures have been rendered under diverse names, e.g. interim measures of protection, preliminary measures, conservatory measures, provisional remedies, interlocutory orders, provisional and protective measures. Yet, whatever the titles presented to these measures, they are granted by the emergency arbitrator.

Emergency arbitration may be defined as “pre-arbitral relief” or “interim procedures before the arbitration”. Essentially, the emergency arbitration system is designated by the interim measures, whence the well-known description according to which “emergency arbitration is generally represented by an interim measure if the party applies for an urgent relief” (Shalaan, 2013).

Emergency arbitration belongs to the genus of Commercial Arbitration; nonetheless, it is somehow “exceptional”. It differs from the classic model of arbitration in various ways; from the time speed for the appointment of emergency arbitrator, to the limited authority of the emergency arbitrator, to the provisional nature of emergency relief. Though, *prima facie*, it appears analogous to the fast/short/small arbitration, they are not equivalent whatsoever (Lörcher, Pendell, & Wilson, 2012).

Compared to the urgent national litigation, emergency arbitration is worth praising by the litigants and it remains the most favorable remedy by the reason of its remarkable advantages over litigation.

1.2 Aim and Objectives of the Thesis

This research aims, generally, at shedding light on the gap between the commencement of the dispute and the constitution of the tribunal. Thus, the aim of this dissertation particularly is to analyze the causes of why there is a need to adopt an innovative approach with the so-called emergency arbitrator or pre-arbitral interim relief, which is sought in practice, and the main features of such proceedings.

The probability of obtaining and requesting urgent interim relief or conservatory actions is of great practical significance to the maritime community. Great efforts have been made to re-evolve these procedural niceties to create a more viable system of maritime commercial arbitration, which will be result-oriented. Thus, the research will seek to cover the following key objectives:

- A.** Explore how several different sets of international arbitration procedures discourse the issues associated with interim relief.
- B.** Examine the legal precedents under the various sets of procedures in different supposed scenarios, where a party may resort to the interim relief.
- C.** Determine, based on critical analysis, the practical challenges for the implementation of Emergency Arbitration.

1.3 Questions of the Study

For achieving the above-mentioned aim and objectives the following questions will be delved in the thesis:

- 1- What is the necessity for the urgent interim measures, in particular, at the inception of a dispute before the constitution of the tribunal?
- 2- What are the types of the interim measures and the conditions through which the application should be included in emergency arbitration?
- 3- How could those interim reliefs be enforced?

1.4 Scope of the Study

Arbitration is a broad topic and has several stages which are not all subject to this study. However, this research will restrict its focus on this period which falls between the inception of the disputes and the appointment of the arbitrator. This sensitive period when urgent interim relief should be taken by the arbitrator, while in due course, there is no arbitrator appointed. Therefore, the above mentioned period will be the subject of the study, as shown in Figure 1.

Flow Chart for the Arbitration Stages

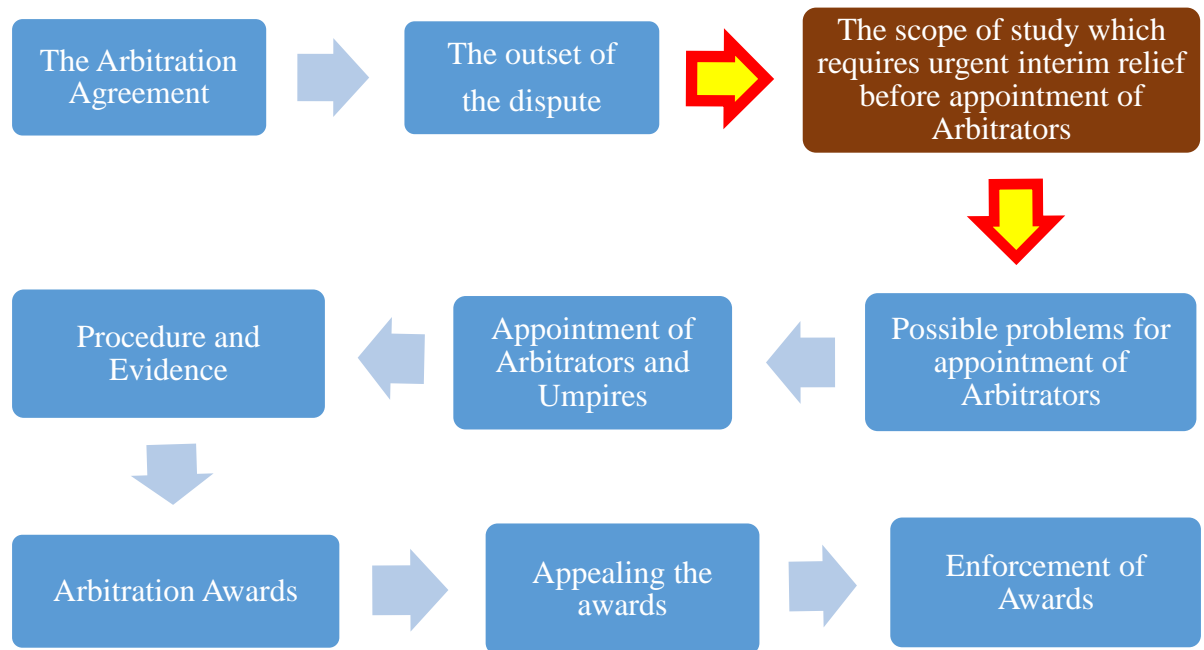


Figure 1: Source: elaborated by the author

Figure 1 shows the various stages in the arbitration process and the scope of this study, which deals with the sensitive period between the inception of a dispute and the appointment of an emergency arbitrator, during which period parties may face an irresistible need for emergency relief.

Chapter 2

Current arbitration and the need for new model

Current traditional arbitration and the need for new model

The downsides of the current arbitration systems and the importance of emergency arbitration.

Comparison between the various types of arbitration

Emergency arbitration in the modern world

The different approaches of emergency arbitration in commercial arbitral institutions

The advantages of emergency arbitration over urgent state litigation

Chapter 2

Current arbitration and the need for a new model

If I'm not back in five minutes just wait longer!

ACE VENTUKA, PET DETECTIVE

2.1 Current traditional arbitration and the need for a new model

Most conventional evidence indicates that the arbitration procedures have started in Egypt in the prehistoric ages, when some Pharaonic documents, which were similar to the arbitration procedures, have been discovered. However, the first instance of the arbitration of maritime disputes has occurred in ancient Greece (Gregori, 2015).

The emergence of commercial and maritime disputes is generally related to global trade; therefore; it is considered a situation per se inevitable. At present, arbitration has become widespread international practice, particularly in the maritime industry. The reason being most maritime transactions and contracts include the arbitration clause due to its advantages, which are unobtainable in the courts, including confidentiality, specialization, flexibility and the parties' sole discretion for selecting the procedures governing the dispute (Ambrose, Maxwell, & Parry, 2009).

2.1.1 The downsides of the current arbitration systems and the importance of emergency arbitration.

Notwithstanding, these undeniable advantages of maritime and commercial arbitration, there are many constraints and flaws because of its nature.

One of the most important disadvantages of the cases of maritime and commercial disputes is **the delay of arbitral procedures**. That is because of many factors, mainly the arbitration clause of the contract, which may be incomplete or confusing or lack the correct selection of the rules governing the dispute, appointment of arbitrators or the method of this appointment.

In some cases, this delay of procedures is due to the arbitrators themselves. In the fact, the increasing number of international maritime and commercial disputes with the small number of the qualified and trusted experienced arbitrators have led to the accumulation of cases and sometimes to the delay of the arbitral procedures.

Furthermore, apart from the delayed procedures, there are other problems due to **the arbitration process itself**, such as the arbitrators lack of coercive power by which they can enforce the arbitration awards. Consequently, they resort to courts or need an intervention of national justice to enforce the arbitral decisions, specially the interim procedures, collection of evidence and hearing the witnesses (Ismail, 2011).

Despite all the aforementioned, arbitration still has its own benefits which are unavailable in ordinary litigation but can be rendered useless because of these problems. To continue the leading role of the arbitration in the resolution of commercial and maritime disputes, international arbitration institutions should seek to change their traditional arbitration rules, or they ought to at least adopt an innovative system to catch up with the fast increase of the maritime trade and the increase in resorting to arbitration as a means of resolution of commercial and maritime disputes (Bose & Meredith, 2012).

By 2006, the emergency arbitration procedures began looming on the horizon at the level of the international leading commercial arbitral institutions in the form of “**interim procedures before the arbitration**” or “so called pre-arbitral relief”. Emergency arbitration was among the proposed solutions, which some international arbitration institutions started to adopt, in order to fill the time gap between the emergence of the dispute and the formation of the arbitration tribunal. Such novel mechanism enables the parties to apply for interim relief in the framework of the arbitration during this critical phase before the establishment of the arbitration tribunal which will discuss the subject matter of the dispute later (Santacroce, 2015).

According to Fabio, this interim procedure is awarded by a third party called “the emergency arbitrator”, whose decisions are obligatory until the formation of arbitration tribunal. Following this logic, the emergency arbitrator’s mission commenced serving as the adequate solution for the previous problems relating to the delay of conventional arbitration procedures, whether these problems were due to of the appointment of arbitrators, which may sometimes take several months, or due to the arbitrators themselves, as shown previously.

Though emergency arbitration is considered one species of maritime commercial arbitration; nonetheless, it differs from the other types of arbitration whether it is the classic model of arbitration or the fast/short/small arbitration for various causes.

2.1.2 Comparison between the various types of arbitration

Table 1 highlights the major differences between the three prominent systems of arbitration, namely emergency arbitration, typical arbitration, and the fast/short/small arbitration. It could be concluded that emergency arbitration has its own uniqueness owing to its nature per se, which treats merely the urgent situation.

Table1: Comparison of the major differences **between the various types of arbitration**

| | Pre-agreement | Amount of the claim | Time for Application | Parties' discretion to name Arbitrator | No. of Arbitrators | Issues which are handled | Time for Appointment of Arbitrators | The Oral hearing | Power of Arbitrators | The Decision |
|-------------------------------------|--|--|---|--|--|--|--|---|---|---|
| Traditional Arbitration | Always parties express agreement to the arbitration clause | Unlimited | At any time | Always the parties have the freedom of choice or name their arbitrators | A sole or more arbitrators as the parties agreed beforehand. | All substantive issues before the arbitrators | sometimes take several months. | Typically oral hearing | Unlimited powers | Always final Award. Provisional decision may be obtained. |
| Fast/Short/Small Arbitration | The parties may agree in advance on a monetary limit for short/fast procedures | Often limited with the amount of the claim | At any time | Parties often has the freedom of choice their arbitrators | Often a sole arbitrator | All substantive issues while often dealing with small claims | Speed/Brief procedures more than Traditional Arbitration | No oral hearing unless in exceptional circumstances | All powers as tribunal | Often render a final Award. |
| Emergency Arbitration | It is NOT allowed for advance agreement | Unlimited | Just, Prior to the institution of the tribunal | Could choose the institution. But, NOT allowed to name the arbitrator. | Always a sole arbitrator | Merely, the urgent matters. | As short a time as possible, normally within one or two days. | Depending on the arbitrator's discretion | Limited power just for issue interim relief. | Solely, Provisional decision valid until the constitution of the tribunal. |

Source: elaborated by the author

In general, it has been noted that there is more probability for the parties, through traditional arbitration, to determine every aspect of the procedure in accordance with their desire (Santacroce, 2015). Yet, this opportunity decreases gradually in the fast/short/small arbitration. However, it could be said that the arbitration institution, instead of the parties, chooses the emergency arbitrator in emergency arbitration because the parties could not agree in advance to name this arbitrator related with an emergency situation.

It is noteworthy that emergency arbitration, due to its intrinsic nature, has its own peculiarities. It differs from typical arbitration from several aspects. Perhaps the most important of these differences are;

- the time for the application,
- the time speed for the appointment of emergency arbitrator,
- the limited authority of the emergency arbitrator, and
- the provisional nature of emergency relief (See Table 1).

Moreover, although emergency arbitration *prima facie* seems akin or analogous, the fast/short/small arbitration procedure, it is not equal due to various reasons, perhaps, the most important of these variances the following two reasons;

First, the fast/short/small arbitration procedure is often limited to the amount of the dispute. As in the LMAA Small Claims Procedure, which is designed to provide a quicker and cheaper way of dealing with small claims, it is currently suggested for use where neither the claim nor the counterclaim exceeds \$50,000 (excluding interest and costs). Likewise, the FALCA rules, which stands for “Fast and Low Cost Arbitration”, which were adopted in London in the Arbitration Act 1996, involve claims up to \$250,000 (Ambrose, Maxwell, & Parry, 2009). In contrast, the emergency arbitration does not limit the amount of the claim at all because it is designated to treat it in an impermanent and urgent situation irrespective its amount.

Second, it has been suggested that any agreement between the adversaries upon the emergency arbitration becomes invalid because the jurisdiction of the emergency arbitrator is considered an exceptional jurisdiction that is related to the urgent situation, so the parties cannot agree in advance.

2.2 Emergency arbitration in the modern world

2.2.1 The different approaches of emergency arbitration in commercial arbitral institutions

Most procedures of ad hoc arbitrations are conducted according to the terms of the London Maritime Arbitrators Association (LMAA), as well as according to the rules of the International Centre for Dispute Resolution (ICDR) of New York, which is considered the international arm of the American Arbitration Association (AAA) and of the International Chamber of Commerce (ICC) (Santacroce, 2015).

Although today about 70% of world maritime arbitrations are still conducted in London under the auspices of London Maritime Arbitrators Association center, it is unjustifiable to deny the role of the regional arbitral centers competition of Asian arbitral institutions, such as Singapore Chamber of Maritime Arbitration (SIAC), the China Maritime Arbitration Commission (CMAC) and the Emirates Maritime Arbitration Centre (EMAC) in Dubai. The latter is considered the most recent in the international arena (established in 2016) which is supposed to look beyond the mere conservation of existing systems (Gregori, 2015).

The first appearance of the emergency arbitration track at the international level was in 2006 by the International Centre for Dispute Resolution Arbitration Rules (ICDR Rules), Emergency Measures of Protection, thereafter followed by the Arbitration Institution of the Stockholm Chamber of Commerce since 2010. It has, since then, generally been welcomed as a 'positive' and 'necessary' step in the growth of international arbitration. Evidence of this is plentiful, for example Singapore International Arbitration Centre Arbitration Rules (SIAC Rules) since 2010, the International Chamber of Commerce Arbitration Rules (ICC Rules) since 2012 (Yen, 2016).

Table 2 compares the time set out for emergency arbitration at different institutions; mainly (ICC), (LCIA), (SIAC), (SCC), (ICDR), and (EMAC). Table 2 illustrates the following: the time set out for Application, Appointment of Emergency Arbitrators, Schedule of Emergency procedures, the Render Emergency Decision and Relief Ceasing.

The key references which used to the comparison between arbitration rules:

- ICC (International Chamber of Commerce) **2012**
- LCIA (London Court of International Arbitration) 1 October **2014**
- SCC (Stockholm Chamber of Commerce) Expedited Arbitrations Rules 2010 with the amendment **2017**
- ICDR (International Centre for Dispute Resolution) Arbitration Rules (2009) with the amendment June 1, **2016**
- SIAC (Singapore International Arbitration Centre) Arbitration Rules (2013) with the amendment **2016**
- EMAC (the Emirates Maritime Arbitration Centre) Arbitration Rules **2016**

It should take into account that information modified until the date of writing the thesis, which may be changed in the future.

Table 2: Comparison of Time set out for Emergency Arbitration at Different Institutions

| The Institution | Time of Application | Appointment | Schedule of Emergency procedures | Rendering of Emergency Decision | Relief Ceasing |
|-----------------|--|---|--|--|---|
| ICC | prior to the file being transmitted to the tribunal Art.29(1) . | As short a time as possible, normally within two days Appendix V: Art 2(1) . | As soon as possible or within two business days of appointment Appendix V: Art 5(1) . | As short a time as possible, no later than 15 days from transmission of file Appendix V: Art 6(4) . | No provision |
| LCIA | Before the formation of the Arbitration Tribunal Article 9.4 | Within three days of the Registrar's receipt Article 9.6 | No provision. | No later than 14 days following of appointment Article 9.8 | No provision |
| SCC | Before "the case has been referred to an Arbitral Tribunal" Appendix II: Art 1 (1) . | within 24 hours of receipt of application Appendix II: Art 4 (1) . | No provision. | No later than five days from referral to emergency arbitrator Appendix II: Art 8 (1) . | In 90 days where case not referred to tribunal or in 30 days where arbitration not commenced Appendix II: Art 9 (4) |
| ICDR | Before the constitution of the arbitral tribunal Article 6(1) . | In one business day Article 6(2) . | As soon as possible or within two business days of appointment Article 6(3) . | No provision. | Power ceases after tribunal is Constituted Article 6(5) . |
| SIAC | prior to the constitution of the tribunal Article 30.(2,3) . | within one day 3, Schedule 1 . | within two days 7, Schedule 1 | Within 14 days from the date of appointment 9, Schedule 1 | In 90 days if no tribunal is constituted 10, Schedule 1 |
| EMAC | at any time prior to the formation of the arbitral tribunal Article 12(1) . | No provision. | No provision. | As soon as possible, and no longer than 14 days following the appointment Article 12 (1) (f) . | No provision. |

Source: elaborated by the author

By the foregoing comparison among those lustrous international arbitration institutions around the world, which provided the emergency arbitration track within their rules, it could be concluded that:

1. Though there are various differences related to the time set out for emergency arbitration to some extent, the vision is almost the same especially when it comes to the time of the application. All of them provide to apply to grant the emergency relief prior to the constitution of the tribunal.
2. Every institution is very keen to determine the time for the appointment for the emergency arbitrator as short a time as possible; starting from **24 hours** of receipt of the application as is clear in the text of Article 4 (1) Appendix II of the SCC Rules and Article 3, Schedule 1 of the SIAC rules and then **one business day** according to Article 6(2) of the ICDR.
3. The Article 2 (1) Appendix V of the ICC Rules chose to have a sufficient time for appointing the emergency arbitrator. At the same time, the ICC sent a comforting message to the party by saying that will happen within two days. Article 9.6 of the LCIA Rules extended its time, though, the emergency situation may not have the ability to sustain three days for waiting for the appointment of the emergency arbitrator by the LCIA.
4. The ICC, the ICDR and the SIAC are keen to motivate the emergency arbitrator to place a schedule of emergency procedures within **two days** after the appointment.
5. Each of these institutions includes within its rules a strict time limit for the issuance of the emergency decision. It is almost the same period, i.e. **14 days**, apart from the ICDR Rules which prefers to be silent on this issue. Undoubtedly, this will lead to the vision being clear for the litigants, not to mention giving a sense and maintaining the momentum of the emergency situation. Therefore, the SCC had a uniqueness between all these institutions regarding this issue, when stating that the emergency decision will render no later than **5 days** from referral to the emergency arbitrator.

- At the end, there are common grounds in the midst of all of these prominent international arbitration institutions. It is obvious that the three major traits among them are concentrated on the following:
1. The time speed for the appointment of the emergency arbitrator,
 2. The limited authority of the emergency arbitrator, and
 3. The provisional nature of emergency relief.

The reason for the abovementioned ascribes to the nature of the emergency arbitration per se. However, it could be noted that their approaches to emergency procedures are varying to some extent from one institution to another and none of them cover every aspect of this system.

2.2.2 The advantages of emergency arbitration over urgent state litigation

Whereas it is noted that the emergency arbitrator's role is identical to the national judge's role with respect to the awarding of the interim procedures (Santacroce, 2015), yet many litigators rather choose emergency arbitration through the arbitration institutions as an urgent mechanism to settle the disputes than the urgent litigation through the national courts due to many reasons.

First - the simplicity of the emergency arbitration procedures

It is clearly evident that the emergency arbitrator has a wider freedom than the summary judge in the national court, with respect to all litigation procedures, such as announcements, organization of sessions, submission of data and communication with the parties to the dispute (Shafiq, n.d). Undoubtedly, the emergency arbitration, as much as possible, stays away from the formal procedures, which take, in most cases, a long time before the courts (Santacroce, 2015). Consequently, the normal result is that the emergency arbitration's decision is issued significantly faster than if the same dispute is processed by the summary judge.

Second – the confidentiality of the emergency arbitration procedures

In general, the arbitration procedures are originally confidential among the disputing parties and their representatives. It can be said that such confidentiality is deemed one of the arbitral customs, which must be considered whether in an international or a local arbitration. In contrast with the litigation procedures, as a general principle, anyone can attend these sessions (Scherer, Richman, & Gerbay, 2015). It is worth noting that traders and employers often prefer confidential rather than public procedures in order to preserve the confidentiality of their transactions, related different details and involving persons' names as much as possible. Besides, some of these transactions require strict confidentiality due to their nature or because one of the relevant parties is from a country which prohibits these transactions; in that case, if there is a dispute between the parties of the contract, they favor the amicable settlement, or at least, through the arbitration (Born, 2014).

Third – Specialization

Most national courts in several different countries are not specialized in commercial maritime cases. Therefore, the national judge sometimes lacks the sufficient knowledge of maritime laws and related general principles, particularly in the summary justice court, which does not deeply examine the documents. As a result, the national judge reluctantly has to depend on the national laws, which may be outdated and are not in line with contemporary issues, particularly in the commercial and maritime disputes (Gregori, 2015). In contrast, the emergency arbitration allows the parties to select arbitrators who have not only perception and balanced sense but also the specialized experience and skills in the maritime commerce sector (Santacroce, 2015).

Forth – Freedom in selecting the arbitration institution

When a dispute arises in the country of one of the parties, this party has an extra advantage as he/she knows the local laws and legislations, which may lead to the opposite party's fear of biased treatment. On the other hand, the option to select the arbitration institution provides the parties with some kind of safety and psychological relief as the person contributes in selecting the judge who will consider the dispute (Diana & Christine, 2017). The arbitration institution often selects efficient arbitrators with the jurisdiction of the contract, which is the subject matter of the dispute. Conversely, resorting to the national court that is composed of the state's official judges who are appointed without any intervention from the parties. Furthermore, in some cases, perhaps all parties are foreigners to that national judicial system (The Chartered Institute of Arbitrators (CI Arb), 2015).

Fifth: The wider authority to use the contemporary technology means

The unlimited emergency arbitrator's power to use modern technology means such as electronic announcement, submitting documents via e-mail, online pleading or video conference for hearing witnesses. There is no doubt that these modern mechanisms contribute to accelerating the procedures and minimizing the time and cost on the parties. However, apart from a few countries, the state judge cannot, unfortunately, utilize them because he/she is bound by the framework of national legal rules during all litigation proceedings (Hendi, 2009).

SUMMARY

The composition of the arbitral tribunal usually takes a long time, which may result in prejudice to the rights of the disputants or one of them before the establishment of this body. In order to fill the gap between the period of the dispute and the completion of the composition of the arbitral tribunal, international arbitration institutions have created an emergency arbitrator track whereby an effective remedy is presented via an “emergency arbitrator” when urgent relief is needed and it cannot await the constitution of an arbitral tribunal.

Yet, the question is whether the emergency arbitrator is entitled to take any decision whatsoever or not. Are all the measures on the table in front of the arbitrator? Probably, the answer to both of these questions is “no”.

Chapter 3

The regime of Interim measures in Emergency Arbitration.

Types of interim measures according to the purpose.

Maintain or restore status quo

Preservation of assets

Preservation of evidence

Protection of the arbitral process itself

Interim measures according to the type of emergency demand.

Emergency request to prove the case

Disputes between ship-owners and charterers

Emergency request to hear a witness

Chapter 3

The regime of Interim measures in Emergency Arbitration.

*Passive interim measures are geared to preserve the status quo,
whereas active interim measures are to compel a party to a
certain activity*

Hansjörg Stutzer

3.1 Types of interim measures according to the purpose.

Considering the rules of the arbitration institutions which have started to adopt the emergency arbitration system particularly in commercial disputes, it is obvious that they provide the emergency arbitrator with the same authorities and powers as the arbitration tribunal has in this regard (Santacroce, 2015).

Thus, the types of interim measures that may be issued by the emergency arbitrator are the same that the arbitration tribunal decides (Shalaan, 2013). However, it should be taken into consideration that there is only one exception: the need for such procedure is very urgent, to the extent that it cannot wait till the constitution of the arbitration tribunal (The Chartered Institute of Arbitrators (CI Arb), 2015).

Accordingly, the interim measure is any temporary measure issued by the emergency arbitrator before the final judgment on the dispute. These interim measures vary according to the purpose of this emergency request (Caron & Caplan, 2013). In this context the amended UNCITRAL Model Law on International Commercial Arbitration has categorized the interim measures by their aim in article 17(2);

- a) Maintain or restore the status quo pending determination of the dispute.
 - b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself.
 - c) Provide means of preserving assets out of which a subsequent award may be satisfied.
 - d) Preserve evidence that may be relevant and material to the resolution of the dispute.
- (UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006)

In line with the trend of UNCITRAL Model Law on International Commercial Arbitration, the interim measures can be classified as to the urgent purpose to be achieved, as follows:

3.1.1 Maintain or restore status quo

Maintaining the status quo is the most common and acceptable interim measure in the different legal systems, as it is one of the core objectives when urgent procedures are applied in emergency arbitration. Such procedure can be in two forms as follows:

- a- The emergency arbitrator orders a party to make a certain procedure. A case in point, to obligate the adversary to continue his contractual commitments, such as to continue the building of a ship or the shipment of the goods, till the merits are resolved by a final award (Lawrence & Siddharth, 2015).
- b- The arbitrator prevents a party from making a certain procedure, for instance preventing the termination of the agreement or prohibiting the sale of properties relating to the subject matter of the dispute. However, it may be perceived that the emergency arbitrator could authorize a party to sell perishable goods and keep their value under guarantee (Savola, 2016). As well as on the same logic, the emergency arbitrator could give a permission for sale if the adversary asks for such procedure, provided that a temporary financial guarantee for the sale completion is presented till the merits are resolved.

The emergency arbitrator may face a potential problem while making the procedure to maintain the status quo. The dilemma is that this procedure may partially or entirely result in the same essence of the final decision upon the resolution of the merits; such procedure is called the “advance enjoyment”. As a result, high levels of evidence should be asked from the applicant of the urgent interim procedure. It could be said that this problem can also be mitigated by considering this procedure as interim and not essential or permanent like the final award, so it can be later nullified or modified by the arbitration tribunal (Yesilirmak, 2005).

3.1.2 Protection of the arbitral process itself

According to UNCITRAL Model Law on International Commercial Arbitration article 17(2) (B), the arbitration tribunal is entitled to order a party to make any procedure or to prevent it from any action which may prejudice the arbitration process. In another sense, the tribunal is entitled to prevent it from any procedure that may result in the breakdown of the arbitration process or making it useless in the future.

In practice occasionally, it could be seen that one of the parties may intentionally commit or abstain from a certain act to the extent that the dispute is completely finished. In this case, the emergency arbitrator can take any urgent procedure which prevents this mala fide party from realizing its objective of burying the dispute before it arrives at the subject matter court.

It has been suggested by some commentators that one of those measures under this category is the issuance of anti-suit injunctions. The anti-suit injunctions mean the interim measures by which the arbitration authority orders that party not to continue the proceedings of parallel trials or other separate legal procedures in the same regard (Bose & Meredith, 2012). The author's impression is that the issuance of anti-suit injunctions may impair, to some extent, the principle of parties' freedom to litigate. Those parallel or separate prosecutions are legal methods to reach the merits, particularly that the emergency arbitrator just prima facie examines the case without in-depth study of the origin of the dispute.

3.1.3 Preservation of assets

As is clear in the text of article 17(2) (C) of UNCITRAL Model Law on International Commercial Arbitration, the arbitrators can order a party to provide means to preserve the assets which can be a subject of a later decision or a subject of the execution. This category comprises a group of different measures, such as the payment guarantees, the interim payment where the other party is obliged to cover the damages that may harm to the claimant due to the disposal of the assets relating to the subject matter of the dispute (Yesilirmak, 2005).

It is noteworthy that the arbitrator is like the judge but he has not the power to execute his awards or decisions by coercive force. Nevertheless, the arbitrator can order the defendant to take alternative procedures, such as paying an amount to ensure implementation till the issuance of the final award. However, some oppose this opinion as they see that the procedures or measures which prejudice the final award must be left to the subject matter court, particularly if or when the emergency arbitrator's decisions may be unenforceable.

3.1.4 Preservation of evidence

Article 17(2) (D) of UNCITRAL Model Law on International Commercial Arbitration has entitled the arbitration tribunal to make an interim decision to preserve the evidence which will be later used to prove or dispose the dispute. By analogy to the aforementioned article, the emergency arbitrator has the power to take some urgent procedures to preserve the evidence (Shalaan, 2013).

Some brief examples are that the emergency arbitrator can assign an appraiser to estimate the value and condition of goods that may be damaged, or to designate a specialist to perform certain tests or to monitor the process of manufacturing or repair, or take pictures or samples to be later used upon the decision on the merits (Born, 2014).

This category of procedures may also comprise the attachment or custody of some properties. However, it should be borne in mind that this later procedure may greatly harm the other party. To avoid that end the emergency arbitrator should pay special attention while taking such procedure or replacing it with another one such as the advance inspection (Han, 2017).

3.2 Interim measures applications according to the type of emergency demand.

Although the conditions and types for the emergency reliefs in maritime disputes may be similar to those interim measures which are ordered by the normal arbitrator or tribunal, the extra necessity for these reliefs must be so urgent that it cannot delay or wait for the appointment of the arbitrator or the constitution of the tribunal. Thus, this exception must be taken into consideration (Lörcher, Pendell, & Wilson, 2012).

It is observed that international and regional arbitration laws do not limit the cases in which the arbitrator exercises his state power to make emergency measures or interim verdicts. Accordingly, the emergency arbitrator, without limitation or determination, has the right to grant these interim measures whenever he considers it necessary. In line with this trend, the interim measures applications, according to the type of emergency which is demanded, could be included, but not limited to the following;

3.2.1 First Application: Emergency request to prove the situation:

The application for this procedure aims at preparing the evidence to be later used in the substantive case if there is a fear of the loss or change of the features of the physical effects to be proven over time. A case in point is the request to prove the damages of a ship which needs some reparations and may be a subject of an objective dispute between the parties in the future. Another example is the demand to prove the amount or volume of a petroleum spill by an oil tanker as a result of an accident.

In these cases, the emergency arbitrator may inspect by himself then prepare the minutes confirming what he has seen in the inspection, or he may delegate an expert to describe the existing status. What should be borne in mind here is that, once the existing status is described, the application for the emergency arbitration must end (Ismail, 2011).

Generally, it is possible for the arbitrator to discuss with the expert after presenting his report. Nevertheless, if it is deficient or needs to be completed, it may end up with the assignment of another expert or the same expert to continue his work (Savola, 2016). However, it is provided that the application should stop anyway because it is limited to the preparation of the evidence. Thus, the emergency arbitrator should decide on the expiration of the application after finishing the expert's report (Shalaan, 2013).

The key object to remember when proving the situation in the emergency request is that the presence of urgency is required. This means that the features of the facts are changing over time. Whereas if the features are already removed or if they are fixed and are not removed over time and the running of time does not cause the loss of an interest or a right, the urgency will no longer be present. This leads to the fact that the related application will be out of the emergency arbitrator's jurisdiction.

3.2.2 Second application: Disputes between ship-owners and charterers

These disputes can be within the emergency arbitrator's jurisdiction in many cases where "Harm" or "Urgency" is present. To demonstrate, some examples are given to show which party can resort to the emergency arbitrator to obtain an interim relief.

Supposing a rented ship needs necessary repairs which are within the owner obligation according to their contract but the owner refuses to make these restorations. The charterer submits a request for emergency arbitration in which he asks for an authorization to make the repairs at the owner's expense in order to avoid the damage, or vice versa, in case the ship is in need of repair and the charterer refuses to deliver it to the owner to repair it. The lessor submitted a request for emergency arbitration in which he asks to be enabled to make these repairs as long as such repairs require that the ship is delivered to the lessor or perhaps, he will ask for the eviction of the charterer till completing these repairs.

Another case in point, assuming the owner desires to return the leased ship from the charterer due to any reason, such as; the expiry of the agreed-upon lease term, the delayed payment of the rental value, considering there is an explicit termination condition, the use of the leased ship in a way harmful to it or to others, or modifications therein made by the charterer without the lessor's consent. The same logic applies if the owner wants to restore the leased ship from the original charterer who seeks to lease it to a sub-charterer but the original charter contract does not allow "the sub-lease" or "waiver of rent" (Wali, 2014).

Further, the owner of the ship sometimes needs an authorization to sell the ship's cargo owned by the charterer which is perishable and whose market prices may change if the purchaser does not deliver it on the due date. All of these previously mentioned situations will need an urgent remedy to avoid extra harm, thus it is preferable to resort to the emergency arbitration.

3.2.3 Third application: Emergency request to hear a witness

If there is dispute likely to happen between parties that requires hearing the witnesses, for instance, hearing the testimony of a seafarer or one of the crew, while, it seems that one of the witnesses suffers from a serious disease, has a life-threatening accident, or is about to travel on a long-term remote trip. Therefore, the party, who wants to cite this witness, may request from the emergency arbitrator to hear this witness. Then, the minutes recording of this testimony are kept to be later submitted as a document in the subject matter case. Thus, the emergency request ends at this point.

Summary

After the previous brief illustration of the types of interim measures by considering their aim, it clearly seems that one of the challenges faced by the emergency arbitrator is to select the adequate procedure. Especially since the arbitration rules and the local laws rarely state or provide the guidance about the exact manner of treatment and the interim measures in certain circumstances. This leads to providing the arbitrator with the wide freedom to select the procedure suitable for each dispute without limiting a certain type of interim measures.

The question posed now is whether the emergency arbitrator is restricted within some criteria to include the dispute under the umbrella of the regime of interim measures or not. Are there any criteria controlling the classification of the dispute and should that application be considered as an urgent dispute or not?

probably, the answer to each of these questions is "yes". It is not reasonable to say that any dispute is considered as an emergency situation as long as the party applied for interim relief.

Chapter 4

Conditions and criteria for granting interim measures

Formalities condition:

Interest and legal capacity

Urgency and irreparable harm

The objective conditions

Interim or reservation procedure

Prohibition to prejudge/without prejudice to the merits

Proportionality

Likelihood of success on merits

Chapter 4

Conditions and criteria for granting interim measures

Indeed, emergency arbitration proceedings are strictly designed for situations where the relevant harm is so imminent

Fabio G. Santacroce

There is no precise definition of emergency arbitration in commercial and maritime laws. In other words, the emergency arbitration means resolving the disputes which are at the risk of running out of time, whether by an interim order or award which does not prejudice to the merits. This order or award will only be decided to take a temporary procedure to preserve the existing situations or respect an apparent right, or by maintaining the interests of both adversaries.

Due to the novelty of the emergency arbitration system at the international and regional levels, and its difference from the conventional arbitration system which is based on the litigants' agreement in normal circumstances, the conditions of the emergency arbitration is still controversial and under study.

Although the conditions and types for the emergency reliefs in maritime disputes may be similar to those interim measures which are ordered by the typical arbitrator or tribunal, the extra necessity for these reliefs must be so urgent that it cannot delay or wait for the appointment of the arbitrator or the constitution of the tribunal. Thus, this exception must be taken into consideration (Roth, 2012).

More specifically, the application should identify (1) the right(s) to be protected; (2) the nature of the measure(s) that the party is seeking; and (3) the circumstances that require such a measure (Caron & Caplan, 2013). Arbitrators considering an application for interim measures should be satisfied with the information before them that the applicant has a reasonably arguable case (The Chartered Institute of Arbitrators (CI Arb), 2015).

Sometimes applications for interim measures may be used as a delaying tactic or to harass the opposing party. In such cases, if the arbitrators see that an application for interim measures has not been made in good faith, they should reject it promptly (The Chartered Institute of Arbitrators (CI Arb), 2015).

Due to the latter issue, it has been suggested that the dispute be considered as an urgent case, which needs an emergency arbitration and specific requirements should be met. These requirements for the "Emergency Arbitrator Provisions" can be broken down into the following;

- **FORMALITIES CONDITION:**
 - **INTEREST AND LEGAL CAPACITY**
 - **URGENCY AND IRREPARABLE HARM**
- **THE OBJECTIVE CONDITIONS**
 - **INTERIM OR RESERVATION PROCEDURE**
 - **PROHIBITION TO PREJUDGE/WITHOUT PREJUDICE TO THE MERITS**
 - **PROPORTIONALITY**
 - **LIKELIHOOD OF SUCCESS ON MERITS**

4.1 Formalities Condition

4.1.1 Interest and Legal Capacity

The applicant for an emergency arbitration shall have a legal interest or benefit from his request. Moreover, accepting his request requires that this interest is already existing and current. This means that the applicant's right is actually aggrieved. In addition, the claimant himself or his legal representative is the holder of a right that needs to be protected by these interim measures (Shalaan, 2013).

However, applications for emergency arbitration may be exceptionally accepted even if the interest is not current, to ward off an imminent harm or authenticating a right which is at risk of losing during the dispute thereof. Thus, the emergency case may be accepted to be proven; however, the substantive dispute has not arisen yet. Running out of time and waiting for the sluggish progress of the appointment of the arbitrator will lead to the loss of the characteristics which are needed to be proven.

To check the availability of legal capacity and interest, the emergency arbitrator should only consider the apparent matters which indicate the fulfillment of this prerequisite, without going through the core of the dispute (Interim, conservatory and emergency measures in ICC arbitration, 2012). Accordingly, if the apparent examination made by the emergency arbitrator leads to the absence of the claimant's legal capacity and interest, the request for interim emergency relief will be inadmissible. For that reason, the emergency arbitrator differs from the subject matter tribunal which assesses the documents deeply in order to reach a decisive judgment on the dispute.

4.1.2 Urgency and Irreparable Harm

The urgency is a legal status arising from the risk out of the delay or running out of time before obtaining the substantive judicial protection. This risk generates the imperative necessity for an urgent judicial protection, under which the harm to rights or legal positions to be preserved are avoided. This risk arises whenever the running out of time causes an irreparable harm (Ambrose, Maxwell, & Parry, 2009).

The definitions of “Urgency” are numerous. It has been defined as “the necessity which cannot be delayed or the direct risk which cannot be faced by just filing a regular case even if the related time is shortened”; some have defined it as “the real imminent risk to the right to be preserved, such harm must be prevented in a fast way which is not normally provided by the ordinary litigation even if the related time is shortened”; and others have said that “urgency” exists whenever the delay of the interim measure leads to a missed interest and a lost right as well as the loss of the features (Uff, 2014). Moreover, the “urgency” has been defined as “an application for an interim measure justified by a great risk or a potential harm which is impossible or difficult to be removed, in case that the adversaries resort to the courts through the ordinary dispute procedures” (Caron & Caplan, 2013).

Genuine urgency is considered one of the main standards in order to avoid abuse of the Emergency Arbitration Provisional its scope has been narrowed to situations where a party seeks relief that truly cannot wait for the constitution of an arbitral tribunal (Bose & Meredith, 2012). This principle is captured explicitly in Article .29(1): “A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal (“Emergency Measures”) may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V”.

(Interim, conservatory and emergency measures in ICC arbitration, 2012)

As can be seen these definitions refer to the urgency as a risk; however, the definition of “Urgency” as a risk is inaccurate and contains some confusion between the reason, and the result as the risk is the reason for urgency, and the urgency is the result of the risk.

Though the requirement of risk should be considered as the major trait of the emergency arbitration; however, it is believed that there is an exception depending to a great extent on the facts of the case and the type of interim measure which is sought. For instance, requests for measures to preserve evidence may not need to satisfy the requirements for irreparable or serious harm (The Chartered Institute of Arbitrators (CI Arb), 2015). According to this situation, the emergency does not directly relate to the risk, but it is related with the fear of running out of time, which will lead to irreparable harm.

The fear of running out of time could have one of two guises:

First, the fear of losing the features: An obvious example of this is a collision of two vessels. One of them is loaded with petroleum which leaked because of the other ship’s fault. The owner of the oil carrier ship wants to immediately prove all details of this situation in order to prove where the fault was. It is apparent that the running out of time could lead to the loss of the related features and topographies which the owner of the ship wants to invoke in a future claim for compensation.

Second, the fear of missing the vested interest or losing the right: A brief example is when the charterer leaves the rented ship after causing its ruins and damages. Indeed, in this case, the related features are not lost over time; yet on the other hand, the slow determination of this condition causes the loss of the owner’s right to the usufruct of his ship or rent it to others. For this reason, the owner needs an instant interim measure without retardation. Consequently, such dispute is defined as an urgent case.

Significantly, there are two notes about “urgency”;

1. The urgency arises from the nature of the litigious right or the surrounding circumstances, neither from the litigants’ will or their desire to obtain an urgent judgment nor from their agreement upon the emergency arbitrator’s jurisdiction.
2. If the urgency is no longer present while examining the dispute, it will be more likely that the emergency arbitrator’s jurisdiction shall be eliminated.

4.2 The Objective Conditions

4.2.1 Interim or Reservation Procedure

The applicants for an emergency procedure should bear in their mind that the measure, which will be requested, must be interim or reserved. It seems obvious that the requirement of this condition is attributed to the purpose of the emergency arbitration itself. The reason for this is that the philosophy of the trend to the emergency arbitration is not intended to resolve the dispute by a definitive judgment but to take an appropriate procedure as quickly as possible until the constitution of the tribunal takes place.

Due to this issue, if the urgent dispute includes an objective request such as deciding on a debt or property or the nullity or termination of one of the maritime contracts, the emergency arbitrator is not competent at all or, at least for the objective request. Nonetheless, in case that the objective request submitted to the emergency arbitrator which is out of his jurisdiction, the emergency arbitrator may change the proposed requests related to the dispute in order to fit his jurisdiction if he thinks that the objective request includes an interim request within his jurisdiction (Diana & Christine, 2017).

Proponents of this view emphasize that the emergency arbitrator's power to modify the opponents' request in that way means that the emergency arbitrator has the power to alternate "requests" as an exception from the principle of arbitrator neutrality. According to the principle of neutrality, the arbitrator must be bound by the requests submitted to him by the litigants. However, the jurisprudence decides on authorizing the emergency arbitrator due to the special nature of his work and in line with the intended objectives of this kind of arbitration. Particularly, the emergency arbitration only leads to an interim procedure and does not decide on the merits of the dispute.

4.2.2 Prohibition to Prejudge/Without Prejudice to The Merits

The decision of the emergency dispute must not be prejudiced to the merits which are claimed by one of the parties. As has been noted, without prejudice to the merits is a condition of the emergency arbitrator's jurisdiction and, at the same time, a limit to his power.

In this respect, if one of the parties asks for urgent requests with harm to the merits, the emergency arbitrator should determine the non-jurisdiction (Roth, 2012), for example, the owner of the ship request an interim measure to prove the forgery or manipulation of the ship rent contract, such application is objective and harms to the merit. Taking this scenario into consideration and by the former logic, the arbitrator shall determine the request is out of the jurisdiction. Nevertheless, he may determine a notice for suspension of contract dealings or the seizure of the contract under the allegation of forgery, until the court rules by definitive virtue, as long as his decision is an interim procedure within his jurisdiction.

It is believed that the emergency arbitrator's jurisdiction is limited to the case and must determine the non-jurisdiction. In this context, supposing a case, which is characterized by urgency or harm and aiming at an interim or reservation procedure, is referred to the arbitrator. But, before the emergency arbitrator takes his decision, a serious dispute has arisen, and at the same time, the disposition in the interim procedure depends on the ruling of this objective matter. For the previous reason, the likelihood is that the emergency arbitrator is not competent for this emergency dispute because it is related to the objective request.

The previous opinion may be objected to because if the emergency arbitrator is competent at the beginning, his jurisdiction may not be eliminated due to an occasional cause happened after the dispute filing or during its consideration. However, from the author's point of view, such objection is challenged since the emergency arbitrator's jurisdiction is determined in **two phases**;

In the first phase, the jurisdiction is limited to the consideration of the dispute, but in the second phase, it is determined by the judgment of the dispute.

Whenever the emergency arbitrator's jurisdiction is no longer present in the first phase, it is not obviously moved to the second phase. However, if the consideration of the dispute is within his jurisdiction, it will be moved to the second phase which is the phase of the awarding jurisdiction; otherwise, the arbitrator shall stop the dispute and determine the lack of jurisdiction.

That aforementioned statement, within lacking the emergency arbitrator's jurisdiction during the consideration of the dispute, **takes place in two circumstances**;

First case: If the condition of "Urgency" or "Harm" is no longer present, even if, it was present at the beginning of the application of emergency arbitration, the arbitrator's jurisdiction shall be eliminated. An obvious example of this situation is that the charterer paid the costs of the ship reparation to its owner during the consideration of the latter's urgent request for proving the fact of the damages upon receiving the ship. Accordingly, the harm to the owner's rights is no longer present.

Second case: If an objective dispute arises during the consideration of the emergency request, providing that this objective dispute is serious and needed to be resolved to enable the decision on the request for emergency arbitration, hence, the same logic will apply.

Forms of non- prejudice to the merits:

To put it briefly, what is demonstrated is that non-prejudice to the merits as a condition of the emergency arbitrator's jurisdiction is represented in various positions as follows:

First: **The requests submitted to the arbitrator.** These requests must not be objective (the objective requests are the ones which relate to the merits such as the requests for judgment concerning indebtedness, property, nullity, termination, clearance from liability or like so).

Second: **The examination of documents:** The emergency arbitrator prima facie decides. He is not entitled to deeply study the documents, give a decisive opinion or interpret them. As he decides occasionally; in other words, he only examines them apparently.

Third: **Causation of the emergency award or order:** The emergency arbitrator must not build his decision on the evidence or denial of the merit. He must limit his decision to the preponderance of likelihood without determining the merits; otherwise, he exceeds his jurisdiction. Since he trespasses the objective arbitrator's jurisdiction, there is no point left to be determined.

The prevalence trend indicates to that, the origin of merit is valid and protected while both litigants are claiming it before the subject matter court without being effected by the emergency award. It appears that it will result in considering the evidence of the emergency award as interim and proportional i.e. it does not effect on the subject's judgment.

Forth: The wording of the emergency award or order: It is not allowed to the emergency arbitrator to bind any party through an emergency decision depending on the evidence or denial of the merit. He is only entitled to take an interim measure which remains provisional, just to prevent the urgent harm shown to the emergency arbitrator, leaving the origin of merit complete.

4.2.3 Proportionality

The principle of proportionality is usually required particularly in emergency arbitration which needs choosing a fair procedure and avoids unnecessary delay. A balance between conflicting interests should be considered, and the relief should be proportionate to the detriment caused to the opposing party. A common practice in international arbitration, to protect the interests of the other party, is to establish conditions for granting of interim measures in the event that ordinary measures or measures are found to be unnecessary or inappropriate (The Chartered Institute of Arbitrators (CI Arb), 2015).

Thus, the emergency arbitrators need to **take into consideration two matters;**

- a) On the one hand, any damage expected to be caused to the counterparty if the interim measure was granted. On the other hand, any harm resulting from the temporary measure against potential harm to the applicant should be assessed if this measure is not granted (UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006). Thus, the key circumstances of the case should be taken into the arbitrator's consideration to realize whether the causes for the relief grant outweigh the reasons for the rejection of relief or vice versa (The Chartered Institute of Arbitrators (CI Arb), 2015).

- b) The financial situation of the litigants should also be carefully assessed and pondered in order to confirm that the opposing party will not suffer from greatly depreciating in a case of granting the precautionary measure. The likelihood of this status quo is that the emergency arbitration will be discarded (The Chartered Institute of Arbitrators (CI Arb), 2015).

It should be noted that the major trait of the emergency arbitration is to release the reasonable measures for both parties. As a matter of fact, deliberating the inconvenience damage by the antagonist compared to the advantage for the claimant should be borne in mind. In this context, the emergency arbitrator should ex officio see to that the precautionary measure is proportional in addition to the allegation of the plaintiff's right versus opponent's endangering actions.

4.2.4 Likelihood of success on merits

The “**likelihood**” of the right or the legal position to be protected or of its abuse is required for the consideration of the arbitration request before the emergency arbitrator. Under this condition of likelihood two matters are required:

- a- A legal rule which protects the claimant's request, especially upon filing the substantive case. In other words, the right claimed by the applicant of the emergency arbitration shall be of the type which is protected by law; otherwise, the request shall be refused.
- b- The facts of the emergency application must indicate that there may be an effective substantive protection, so the claimant, in the emergency arbitration, is not asked to prove the legal facts. On the contrary, the applicant of emergency arbitration is only asked to illustrate, among other things, what would refer to the likelihood of risk or harm to that right or legal position (The Chartered Institute of Arbitrators (CI Arb), 2015).

Therefore, the party who applies for an interim measure **shall persuade the emergency arbitrator** to:

First: It is likely that there is an irreparable harm – which is enough to grant compensations unless the measure is taken. Such harm to the claimant is much more than the harm that may have an effect on the other party if that urgent measure is applied against him.

Second: There is a reasonably likelihood that the applicant of emergency arbitration wins the substantive case, considering that this emergency measure shall not later have an effect on the arbitration tribunal's estimation about any subsequent decision upon considering the subject.

It is observed that any of these conditions of the emergency arbitrator's jurisdiction does not obviate the other as they are all needed. Consequently, if "urgency" and "harm" are present but with prejudice to the merits, the emergency arbitrator will not be competent regardless the harms and vice versa.

For the same approach, if the arbitrator is asked for an interim procedure without prejudice to the merits but there is no urgency, he will not be competent. It is worth mentioning that only the parties' agreement upon the emergency arbitrator's jurisdiction is not enough for this purpose because his jurisdiction is not generated from the will of the parties but the nature of the litigation or conflict and its required procedure.

Common to all of these grounds is the fact that, the application for the interim measures should provide sufficient details to enable the other parties to respond to it and for the emergency arbitrators to make their decision (The Chartered Institute of Arbitrators (CI Arb), 2015).

SUMMARY:

In order to consider the dispute as an emergency matter, some conditions are required. Therefore, an emergency arbitrator shall be determined at the request of one or both of the litigants in order to take insistent interim measures required by the nature of the dispute without prejudice to the merits of the dispute. But what comes next? How could the parties enforce the decision rendered by the emergency arbitrator?

Chapter 5

Enforcement mechanisms.

the form of emergency arbitrator's decision

Force of res judicata (adjudged matter)

Implementation of the decision of emergency arbitration

Mechanisms for implementing an emergency arbitration decision

Procedures for obtaining an execution order

Depositing the arbitration award

Submit a request to implementation

Chapter 5

Enforcement mechanisms

*The emergency arbitrator may be considered a full-fledged
arbitrator rendering an enforceable decision*

Fabio G. Santacroce

The implementation of the emergency arbitrator's decision is the most important stage of the entire arbitration process. The arbitral award is supposed to be implemented by the parties amicably; however, one of the parties may fail to implement the award, which makes the other party resort to coercive enforcement through a request submitted to the competent judicial authority and follows the procedures provided by national law. For the natural judge then to extend its control to the arbitration decision and to make sure not to contravene the rule of public order, before ruling whether to accept or reject the application of the forced execution, until the stage of appeal against the decision of the judge by the party concerned.

5.1 The form of emergency arbitrator's decision

Schools of jurisprudence have controversy about the form of the arbitral decision rendered by emergency arbitrator; **is it deemed an arbitral award or interim order?**

Some of these commentators see that emergency arbitrators may follow the special method of summary actions where they proceed, after being filed, according to the regular system namely the actions are heard in open sessions where both parties present to plead and confront each other. The proceedings are then terminated with a reasoned award. Accordingly, one team see that the emergency arbitrator's decision must be in the form of a substantiated **award**, due to the related practical problems with recognition and enforcement of awards containing an interim award under the New York Convention.

The ICC Commission reached a conclusion in ICC Case 14287 that “decisions on requests to issue an interim measure should not be taken in the form of **arbitral awards**” (ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, (2011) p. 79).

However, Article 6 (1) of the ICC 2012 Rules Appendix V is most telling: Pursuant to Article 29(2) of the Rules, the emergency arbitrator's decision shall take the form of **an order** (the “Order”).

On the other hand, the other team sees that the emergency arbitrator's resolution must be in the form of **an interim order** without substantiation.

UNCITRAL Report of the Working Group on Arbitration on the work of its thirty-sixth session claims the following:

One suggestion was that the words “arbitral award” should be replaced by the words “**partial or interim award**”. In support to that proposal it was stated that the words “arbitral award” were often understood as referring to the final award in the arbitration proceedings, whereas an order of interim measures, even if issued in the form of an award, was typically an interlocutory decision. Some support was expressed for that proposal, although most speakers objected to the use of the words “partial award”, since those words typically referred to a final award that disposed of part of the dispute, but would not appropriately describe an interim measure.

UN Doc. A/ CN.9/508 (12 April 2002), para. 66.

While there is a third approach combining the two former teams; the LCIA 2014 Rules as the Article 9.8 reads: “(...) The Emergency Arbitrator may make **any order or award** which the Arbitral Tribunal could make under the Arbitration Agreement (...).”. As well as the Article 6 (4) of the ICDR 2016 Rules went in the same way stating: “(...) The emergency arbitrator shall have the power to **order or award** any interim or conservancy measures that the emergency arbitrator deems necessary (...).”.

To resolve this conflict, it should be initially known that the job of the emergency arbitrators is deemed a combination of the job of interim judges and summary judges. Notwithstanding the aforementioned, jurisdiction of both types of judges is substantially different. Interim judges have a competent jurisdiction while summary judge have a judicial jurisdiction. The decisions issued by interim judges are called "Order" while decisions issued by summary judges are called "Judgment" that must be substantiated.

In addition, there is another difference between the proceedings in both cases;

Interim judges to whom parties concerned recourse in order to submit petitions reviewed thereby in privacy without summoning litigants; making confrontations there between; pleading; discussing; or confronting, undersign the request either to approve; reject; or grant part of the rights thereof according to judge's point of view without any reasons or public court session. The judge's signature at the bottom of the petition is not deemed judgment; it is an order issued by the interim judge based on judge's competence jurisdiction.

As for summary judges, the dispute is submitted thereto in a form of an action whose bill of particulars is served to the adverse party and reviewed by the judge in an open court session attended by litigants where they plead and confront each other with documents and evidence. However, litigants are at least allowed the means through which they plead and discuss pleadings of their adversaries.

As concluded from the foregoing, there are two types of jurisdiction:

Firstly, **Judicial Jurisdiction** (i.e., jurisdiction to resolve disputes; establish rights; oblige debtors or breaching parties to perform such rights to holders thereof).

Secondly, **Competence Jurisdiction** (i.e., jurisdiction to issue orders on the ground that the judge or arbitrator is one of the magistrates who in their capacities are entitled to issue orders and in turn must be met by obedience and loyalty of individuals).

It is clear now that the emergency arbitrator, while practicing his powers, orders some measures or procedures to be taken he finds essential to maintain interests of the parties. He should respect their status quo and secure their positions not on basis of applying certain texts in law regarding each case, but on basis of appropriateness and assessment of existing circumstances, pending the dispute is referred to substantive arbitration determining disputes through realizing rights to holder thereof and obligating the adverse party to perform such rights by force of law (Lawrence & Siddharth, 2015).

It is noted that the power of emergency arbitrator relies, in fact, on the procedure he is requested which requires in its nature abruptness or else the purpose of such procedure may have lapsed. Therefore, the emergency arbitrator's decision is a blend of a summary judgment and an interim order. In other words, it could be said that the emergency arbitrator's decision is a combination of the order and the award.

Yet whatever the form of the emergency decision is, it is recommended in all cases that the arbitrator should state the grounds of his decision, whether an order or an award, because there is no reason whatsoever that may prevent substantiation thereof in order to allow parties to the dispute to understand the legal grounds upon which the arbitrator relied his decision. Thus, the emergency arbitrator should give reasons in either case.

It is worth mentioning that the emergency arbitrator's decision, whether an order or an award, differs from interim orders and summary judgments in terms of ways of appeal thereon that could not be addressed here in detail due to the limit of the dissertation.

5.2 Force of *res judicata* (adjudged matter) / Conclusiveness

Emergency arbitration does not mostly depend on the idea of complete justice, but it depends on emergency protection which does not award certain right and nor waste it. The emergency arbitrator, thus, is entitled to take any measure he may find valid even if it is possible to result in any harm to either party. All he has to do is to leave it to the court of merits; either an arbitration panel or judicial court to adjudicate on the matter in dispute (Bose & Meredith, 2012).

Measures taken through emergency judiciary may result in irremediable harm to either parties, which make it difficult for the tribunal of merits to reverse by a later ruling. In view of that, the wide range and significant power of the emergency arbitrator is shown a power that he is required to use with very due care because he might seek to change or amend a measure he has taken if new facts appear.

There is a controversy about whether disputants may request a new award contrary to the ex-ante award

It is believed that because the conclusiveness of the emergency arbitrator's award is provisional, it stays effective as long as circumstances have not changed. In case circumstances changed, conclusiveness would be limited, namely it would not extend beyond the context of emergency/interim matters nor would it rest pending non-change in circumstances.

As noted from the above, the emergency arbitrator may change his opinion through amending the award or issuing a new one contrary to such ex-ante award. Because when the emergency arbitrator works according to his competence jurisdiction, he does not judge nor does he render a final judgment but he renders an order based on competence jurisdiction (Yen, 2016).

Therefore, emergency orders are not as conclusive as judgments, and they do not constrain the arbitrator from changing his opinion whenever he finds the purpose of the ex-ante order has expired, new facts have appeared, when the ex-ante order has been issued on basis of an error in reality or law or due to change in circumstances in general.

A question might be raised on whether the emergency arbitrator's award eliminates the need to resort to the tribunal of merits for settlement of dispute, in other words, does interim relief tantamount to final award?

Generally, the emergency arbitrator is keen on rendering an award or an order including only an interim measure that do not prejudice the right. But sometimes the emergency arbitrator, when determining legal protection through an interim formula, put disputants at a futile situation after resorting to the tribunal of merits. Accordingly, provisional legal protection granted by the emergency arbitrator is, in fact, the ultimate protection that can eliminate the need to recourse to the tribunal to adjudicate on the matter in dispute (Roth, 2012).

The Chartered Institute of Arbitrators stated an instance, wherever the merits of the dispute between the parties pertaining to the storage charges of a warehouse where goods are kept, the main claim requests also a transfer of such goods to a different place. An interim relief having the same effect namely transfer of the goods, will be tantamount to a final award because it will involve a decision on one of the main claims(The Chartered Institute of Arbitrators (CI Arb), 2015).

5.3 Implementation of the decision of emergency arbitration

5.3.1 Mechanisms for implementing an emergency arbitration decision

As the arbitration is a special system, it primarily depends on the parties' will in all its phases from the arbitration authority and the selection of the arbitrator to the issuance and enforcement of the arbitral award. Thus, the rule is that the arbitral award is enforced according to the parties' discretion. However, one of the parties, particularly the sentenced party, may fail to enforce the arbitral award. Since the arbitrator does not have the power to enforce his award, the other party resorts to implement it by coercive enforcement through the national court. Therefore, the party has to follow a certain mechanism and procedures as per prescribed by the competent authority in order to obtain an enforcement order for the arbitrator's award (Lawrence & Siddharth, 2015).

In this regard, it could be noted that the nations' legislation may be per se different, with respect to the procedures and mechanism of the enforcement of the arbitral award, but there are some common rules to be followed in order to enforce the arbitration of the authority's award or decision. That is what led to the emergence of international conventions which sought to set the rules to be followed by the approving countries, such as the New York Convention, which has given attention to the recognition and enforcement of foreign arbitral in another countries other than the issuing one (Caron & Caplan, The UNCITRAL arbitration rules: a commentary, 2013).

5.3.2 Procedures for obtaining an execution order

Typically, both the ordinary arbitrator's award and the emergency arbitrator's decision are issued by the arbitration authority who is not considered one of the state's judicial authorities; accordingly, it has not a permanent jurisdiction. Hence, it is noted that the arbitral awards have their own peculiarities that distinguish them from the court's judgments. One of these characteristics is the need for the judicial surveillance on the arbitrators' awards and decisions after being issued, once they are up to the binding force of a decision or the compulsory execution. Obtaining the enforcement order requires two conditions; filing the arbitral award at the competent state court and submitting a request for enforcement.

5.3.2.1 Depositing/Filing the arbitration award

To start enforcing the national or foreign arbitral award, the relevant party shall first file the original arbitral award at the national court in the country of the enforcement., As general principle, the arbitral award should be filed by the winning party. Since without filing it, no enforcement order can be issued nor can the judge monitor that award, so the judge cannot issue the compulsory execution. Moreover, some national laws provide to apply for the implementation during limited period otherwise this arbitral award will be ceased. For that reason, some arbitral institutions include the time set for the award ceasing such the Arbitration Rules of the Stockholm Chamber of Commerce (SCC), as mentioned in chapter 2 (Bose & Meredith, 2012).

5.3.2.2 Submit a request to implementation

Just filing the arbitral award has no effect on its enforceability whereas the arbitral award cannot be executed forcibly just because it has been filed. It should be followed by a procedure of submitting a request for enforcement within the statutory deadline. It should be borne in mind that without this request, the enforcement order cannot be issued in accordance with the principle of "the judge's impartiality" and the of "the judicial claim" considering that that request shall be preceded by announcing the arbitral award to the sentenced party in order to start counting the timeframes for challenge.

It is noted that those previous procedures required for the enforcement must be followed; either the arbitration follows the ordinary procedures or is issued by an emergency arbitrator. Indeed, the filing of the emergency arbitration decision makes that decision under the discretion of the courts of the country which is required to enforce such decision, in order to enable the adversaries to access it and the judge to monitor it before it will be forcedly executed by the public authority (Bose & Meredith, 2012).

The Gordian knot that may be raised, is how the state's judicial authorities approve or issue an order to enforce an interim arbitral decision that is not up to the binding force (force of *res judicata*) like the final enforceable judgments as these interim decisions do not finally resolve the dispute. This problem arises specially in most of the countries where the legislation does not have emergency arbitration system because it is still relatively new.

However, from the author's point of view, this predicament can be overcome by considering the emergency arbitrator's decision like its counterparts of the orders on petitions and urgent judgments, issued by the summary judge, which are enforceable due to their urgent nature though they are interim and do not finally resolve the merits of the dispute. From the foregoing, it is recommended for the countries whose national legislation has the arbitration system that they should provide a faster way to issue the enforcement orders for the emergency arbitrator's decisions due to their urgent nature, and to treat them the same as the urgent judgments during the enforcement procedures.

Summary

Whatever the form of the emergency decision is, it is recommended in all cases that the arbitrator should state the grounds of his award in the emergency arbitrator's decision, whether an order or an award. In order to enforce the emergency arbitrator's decision, if one of the parties fails to implement the award, the other party resorts to coercive enforcement through a request submitted to the competent judicial authority. The procedures provided by national law always require two conditions; filing the arbitral award at the competent state court and submitting a request for enforcement.

Chapter 6

Conclusions and Recommendations

Conclusion

Finding and Recommendations

Limitation of study

Further research

Chapter 6

Indeed, Slow Justice is Injustice

*A 'click of a mouse' from anywhere in the world is sufficient
today*

Ali, Yesilirmak

Conclusions and Recommendations

6.1 Conclusion

The requirement for arbitration as the most proper manner to settle disputes, particularly in the maritime commercial sector, has been augmented mainly due to the drawbacks of court proceedings. However, it should be considered that a corollary of this delays of the arbitral procedures could be a gradual loss of the desirability of arbitration.

With a view to shun the postponement of inefficient arbitration procedure and protect its prominent role, some alternatives have emerged in the international arbitration institutions. The most significant of these mechanisms is the interim measures under the auspices of the emergency arbitrator, who provides parties with the effective provisional protection until the final decision is rendered by arbitral tribunals. It may be said that, in a sort of metonymy, the emergency arbitrator acts as a 'summary judge'.

This paper has presented the position that the interim measures by an emergency arbitrator or co called “pre-arbitral” has various benefits. Particularly, in cases when the courts cannot be trusted for whatever reason, it may present invaluable to a party in need of obtaining quick interim relief.

Though its novelty and youth, the emergency arbitration mechanism has illustrated an admirable ability to handle the urgent situation before the constitution of the tribunal. But not surprisingly, augmented this said device gives international dispute settlement mechanisms more significant than ever. Regardless of the sophistication of any national legal system, emergency arbitration is especially well-suited to adjudicating such urgent disputes.

As it has been demonstrated, the approaches of international arbitration institutions, toward emergency procedures, are varying to some extent from one institution to another. However, there are common grounds in the midst all of them. Mainly, the three major traits among them are;

1. The time speed for the appointment of the emergency arbitrator,
2. The limited authority of the emergency arbitrator, and
3. The provisional nature of emergency relief.

That foregoing ascribes to the nature of the emergency arbitration per se. This intrinsic emergency nature is what led the SCC to issue its emergency resolution no later than **5 days** from referral to the emergency arbitrator.

At the end of the day, emergency arbitration is defined by the interim measures and one of the most challenges faced by the emergency arbitrator is to select the adequate procedure. Especially since the arbitration rules and the local laws rarely state or provide the guidance about the exact manner of treatment and the interim measures in certain circumstances. This leads to providing the arbitrator with wide freedom to select the procedure suitable for each dispute without being limited themselves to a certain type of interim measures.

The deliberation of this paper provided an answer to a question of paramount importance: Is emergency decision ripe for enforcement? That has been demonstrated, after it delved into the phase of enforcing the emergency arbitration decision and also focused on the form of this decision and its force of *res judicata*.

However, the Gordian knot has not been completely untied so far. Would the national courts accept to enforce an emergency arbitrator's decision pursuant to the New York Convention on the recognition and enforcement of foreign arbitral awards, particularly in the countries where their legislation does not have emergency arbitration mechanism?

In fact, there are as yet some ambiguous questions, which may be subject to future studies as will be suggested, such as;

- Does the emergency arbitrator have the ability to modify his own orders?
- Could the emergency arbitrator's decision be challenged?
- Is the third party entitled to resort to emergency arbitration, whether to object to an emergency arbitrator's decision or to seek protection, similar to the summary judge?

6.2 Findings and Recommendations

From the foregoing analysis it appears that:

It is often considered that arbitrators are better equipped to award interim measures than national courts due to their superior skills and capability of the case. The jurisdiction of the emergency arbitrator is considered an exceptional jurisdiction that is related to the urgent situation, so the parties cannot consent in advance.

The emergency arbitration measures are mere interim measures or provisional procedures where it does not include judicial determination or judicial adjudication nor resolves the matter in dispute (that is to say, there is no conclusive judgment on disputed matter). Therefore, conclusiveness of the emergency arbitrator's award is temporary.

In addition, the emergency arbitrator's awards do not have the effect of res judicata before tribunal deciding on the merit or before the competent judicial authority. Accordingly, the tribunal of merits may decide contrary to the emergency arbitrator's award for the same disputants on emergency dispute related to the matter of the lawsuit and this is not deemed prejudicial to the principle of res judicata.

Although emergency arbitration is one of the best solutions to the pre-arbitration problems, the arbitration sector should give more responsibility towards this mechanism. Additionally, for the homogeneity and uniformity of the emergency arbitration rules, a synergy between the international arbitration institutions around the world will ideally be needed.

6.3 Limitations of the study

As expected, any study has its limitations and this research is not different.

1. The comparison between the international arbitration institutions around the world, which provided the emergency arbitration track within their rules, is very narrow by the reason of the limitation of words of the dissertation.
2. The resources are relatively restrained and still scattered because of the novelty of this regime in the international arena in addition to the lack of a system for classification of the arbitral awards.

6.4 Further research

Further investigations ought probably to focus on a comparison of more details between the international arbitration institutions that adopted the regime of emergency arbitration; thereby, helping to examine the efficiency of interim measures in arbitration. Accordingly, that perhaps supports legislators in attaining an obvious vision of the classifications of the interim measures in emergency arbitration that would be accepted, and those ought to be avoided.

Additional study can also be conducted at the challenge of interim measures rendered by the emergency arbitrator. This research will improve the current study because it perhaps helps in attaining a complete vision of to what extent the judicial power to examine the emergency arbitration's decision, in addition to the causes and effects of the nullity of the emergency arbitration's decision.

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Note; No discretionary to use the proper references system, limit to use the APA system only and the fetters to not use footnotes for references, as provided within the guidelines for dissertations of the WMU, which may be not the most suitable for legal research.

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