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# EMERGENCY ARBITRATOR – AN EFFICIENT MECHANISM FOR COMMERCIAL ARBITRATION DEVELOPMENT?

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**Abstract**

*The emergency arbitrator mechanism, despite its recent establishment, has made certain contributions to the development of international commerical arbitration. However, this mechanism has not been recognized and recorded in the national arbitration laws as well as the rules of procedure of arbitration institutions in Vietnam. In this article, the author aims to describe the operating mechanism and to discuss the benefits and limitations of the emergency arbitrator mechanism. Accordingly, the author will draw some conclusions regarding the recognition of this mechanism into Vietnam arbitration laws with the goal of developing the commercial arbitration arena in Vietnam.*

**Keywords:** *commercial arbitration, emergency arbitration, interim emergency measures*

Emergency interim measures play a considerably essential role in arbitration procedure, not less critical than court proceedings. Although the time for dispute settlement by arbitration, in principle, is shorter than that by court proceedings, it is not necessarily applicable in all cases, especially in international disputes, whereby there are geographical distances between parties in such dispute, together with the difficulties in arranging meetings between arbitrators and lawyers acting for parties in the dispute. In addition, the prolonged arbitration procedure may even be due to parties utilizing "tactics" to lengthen the dispute settlement.[1] At the same time, with the help of advanced technology, assets may be dispersed swiftly.[2] Hence, the arbitration award can only be enforced without avoidance if the interim measures can be applied in an effective and appropriate manner.

The interplay between the arbitration and the court regarding the authority to issue emergency interim measures in arbitration proceedings has always been a controversial issue, and there are some radical differences amid different legal systems in relation to this issue.[3] However, this problem often emerges

1 According to a survey, the average amount of time for dispute settlement at ICC is approximately from 1 to 2 years. See also: Schaefer, J. K. (1998), 'New solutions for interim measures of protection in international commercial arbitration: English, German and Hong Kong Law Compared', *Electronic Journal of Comparative Law*, Vol. 2.

2 Savola, M. (2016), 'Interim Measures and Emergency Arbitrator Proceedings', *Croatian Arbitration Yearbook,* Vol. 23, pp. 96-97.

3 Currently, there are three main trends in the laws of countries around the world on the relationship between the arbitration tribunal and the court regarding jurisdiction to apply interim measures, including: (i) the 1st trend, the application of interim measures subject to the exclusive jurisdiction of the Court, the arbitration tribunal does not have this jurisdiction (such as in Italy, Greece); (ii) the 2nd trend is that the application of interim measures is subject to the priority jurisdiction of the arbitration tribunal (such as in the UK, France); (iii) the 3rd rend, the application of interim measures is shared and coexisted for both the court and arbitration tribunal (as recorded in the Model Law on International Commercial Arbitration of the

after the constitution of the arbitration tribunal, which is usually protracted and depends on the agreement of the disputing parties as well as the applicable arbitration rules; meanwhile, due to the fact that the parties often wish to seek emergency interim measures very early, for example, at the time when their dispute has just arisen.[4] Such limitation has downplayed the arbitrator's role in resolving disputes between the parties, especially with respect to situations in which the parties can only submit a request for emergency interim measures to the court before the establishment of the arbitration tribunal.

Many international arbitration institutions have tried to overcome this problem in numerous ways. In 1990, the International Chamber of Commerce (ICC) issued a "Pre-Arbitral Referee Procedure," but it was not effective.[5] The World Intellectual Property Organization (WIPO) also drafted the "WIPO Emergency Relief Rules" to seek appropriate solutions, but the London Court of International Arbitration (LCIA) rejected this draft in 1997.

Until 2006, a new legal institution related to the implementation of emergency interim measures before the establishment of the arbitral tribunal was created, which was called Emergency Arbitrator. This mechanism was first recognized in the procedural rules of the American Arbitration Association or the International Centre for Dispute Resolution 2014 (ICDR)[6] and has now been adopted in other arbitration rules such as the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) 2010,[7] the Australia Centre for International Commercial Arbitration (ACICA) 2011,[8] International Chamber of Commerce (ICC) 2012,[9] Hong Kong International Arbitration Centre

Commission on International Trade Law of United Nations 1985 (Model Law) and laws of countries such as Germany, Singapore, Vietnam). See also: Robin, G. (2008), 'Conservatory and Provisional Measures in International Arbitration: The Role of State Courts', *International Business Law Journal*, Vol. 2008, No. 3, pp. 319-364.

4 According to one author, "There is a great demand for emergency interim measures prior to the constitution of the arbitral tribunal. The SCC User Survey for 2008 indicates that 82 percent of counsel active in SCC arbitration believe that emergency interim measures should be available from the initiation of the arbitration" (See also: Bergman, L. (2011), 'SCC strengthens its Arbitration Rules', in Falk, K., *Emergency Arbitration - An examination of the SCC solution*. Received from: https://gupea.ub.gu.se/bitstream/2077/24306/1/gupea_2077_24306_1.pdf [accessed 22 July 2020].

5 Since the "Pre-Arbitral Referee procedure" was first introduced in 1990 til 2014, a period of 24 years, only 14 pre-arbitral cases have been filed with ICC. This may due to the fact that the Pre-Arbitral Referee rules are seperate from the Arbitration Rules and the parties must specifically agree to its application, in other words, the parties must "opt-in" to the Pre-Arbitral Referee Rules whether before or after a dispute has arisen, which make it difficult for the parties to comply with such provisions. Meanwhile, the provisions on emergency arbitrators do not require this condition and the parties are automatically entitled to request emergency arbitrators (unless the parties have agreed to exclude this authority). See also: Carlevaris, A. & Feris, J. R. (2014), 'Running in the ICC Emergency Rules: The First Ten Cases', *ICC International Court of Arbitration Bulletin*, Vol. 25, No. 1, pp. 27.

6 Article 6 of the ICDR Rules.

7 Appendix II of the SCC Rules.

8 Appendix I of the ACICA Rules.

9 Article 29 and Appendix V of the ICC Rules.

(HKIAC) 2013,[10] the Singapore International Arbitration Centre (SIAC) 2010[11], the London Court of International Arbitration (LCIA) 2014),[12] the Swiss Chambers Arbitration Institution (SCAI) 2012,[13] etc. This regulation is expected to be more effective and useful than the former version of the ICC in 1990.[14]

Neither Vietnamese arbitration law nor the arbitration rules of arbitration institutions have not yet recognized the emergency arbitrator mechanism. This has limited the arbitration' s jurisdiction and is contrary to the desire of parties to the arbitration agreement. Because of this reason, the first purpose of this article is to describe some major features of the emergency arbitration. Secondly, it aims to analyze the positive and negative implications that the emergency arbitrator mechanism could bring to the international commercial arbitration. Finally, this article will discuss the possibility of incorporating the emergency arbitrator mechanism into the Vietnamese arbitration law with the aim of limiting the unnecessary intervention of the Court in arbitration proceedings in order to develop commercial arbitration in Vietnam

## 1. Operating Mechanism of Emergency Arbitration

Although many arbitration institutions have a wide range of different provisions on emergency arbitrators, such provisions share these following fundamental characteristics:[15]

*First,* the Emergency Arbitration procedure is automatically applied when the parties choose the arbitration rule, which recognizes that procedure unless the parties explicitly agree to waive the application of this clause.[16] For example, Article 29 (6) of the ICC Rules provides that the emergency arbitrator provision shall not be applied if the parties agree not to do so.[17]

*Second*, provisions on emergency arbitration, which are regulated in all procedural rules of arbitration institutions that implement the emergency arbitration proceedings, do not exclude the power of the court to grant emergency interim measures. For example, under Article 29 (7) of the ICC Rules, the provisions on emergency arbitration do not prevent any party from

10 Appendix IV of the HKIAC Rules.
11 Appendix I of the SIAC Rules.
12 Article 9A and 9B of the LCIA Rules.
13 Article 43 of the SCAI Rules.
14 Blackyby, N. (2018), Constantine Partasides QC and Alan Redfern, Martin Hunter, *International Arbitration,* Youth Publishing, pp. 321.
15 Thuan, H. Q. & Linh, T. H. T. (2021), 'The Possibility of Recognizing Emergency Arbitration in National Laws of Countries with Developing Commercial Arbitration: Experience from VietNam', *Contemporary Asia Arbitration Journal*, Vol. 14.2, pp. 188-191.
16 As mentioned, this is the most significant distinction between the regulations on emergency arbitrators and the regulations on Pre-arbitration Referee procedure of the ICC in 1990 (the consent of parties is required in order to implement this provision).
17 The Preamble of the SCC Rules; Article 9.14 of the LCIA Rules; Article 43(1) of the SCAI Rules; Article of 1.2 of the SIAC Rules.

submitting a request for emergency interim measures at the competent judiciary (mainly the state court) at any time before the request submission, and in certain cases, after filing such request in accordance with the arbitration rules.[18]

*Third*, regarding the point of the time for the disputing parties to submit a request for the emergency arbitrator, Article 29(1) of the ICC Rules allows such parties to seek emergency interim measures even before instituting arbitration proceedings, which is similarly regulated in the LCIA Rules[19] and the SCAI Rules.[20] In contrast, many procedure rules of other arbitration institutions, such as the SIAC Rules[21] and ICDR rules,[22] provide that parties may only institute emergency arbitration proceedings after or concurrently with the submission of a request for the arbitration tribunal.

*Fourth*, the procedure for applying the emergency arbitrator is straightforward. The requesting party will send the request to the arbitration Institution, then the arbitration institution (after preliminarily review of its jurisdiction) will swiftly appoint an emergency arbitrator.[23] The emergency arbitrator, after being appointed, only has the right to decide whether to apply emergency interim measures in a case of emergency (ICC Rules, HKIAC Rules) or necessity (ICDR Rules, SIAC Rules).[24]

*Fifth*, in the form of making a decision to apply emergency interim measures: most of the rules of procedure of arbitration institutions allow emergency arbitrators to choose the form to issue emergency interim measures order whether as a decision or an award. Only the ICC Rules allow emergency arbitrators to apply emergency interim measures in the form of decisions.[25]

18 Article 26.5 of the SCAI Rules; Article 9.12 of the LCIA Rules; Article 30.3 of the SIAC Rules; Article 32.5 of the SCC Rules.

19 Article 9.4 of the LCIA Rules and Article 4 of the LCIA Notes on Emergency Procedures. Received from: https://www.lcia.org/adr-services/lcia-notes-on-emergency-procedures.aspx#2.%20THE%20EMERGENCY%20PROCEDURES%20AVAILABLE [accessed 25 July 2020].

20 Article 43.1 of the SCAI Rules.

21 Article 1, Appendix I of the SIAC Rules.

22 Article 6.1 and 6.2 of the ICDR Rules.

23 Artice 2.1 of Appendix V of the ICC Rules provides that: "The President shall appoint an emergency arbitrator within as short a time as possible, normally within two days from the Scretariat's receipt of the application". See also: Article 43.2 of the SCAI Rules ("as soon as possible after receipt of the Application, the Registration fee, and the deposit for emergency relief proceedings, the court shall appoint and transmit the file to a sole emergency arbitrator"), Article 9.6 of the LCIA Rules ("an Emergency Arbitrator shall be appointed by the LCIA Court within three days of the Registrar's receipt of the application or as soon as possible"), Article 3 of Schedule 1 of the SIAC Rules ("The President shall, if he determines that SIAC should accept the application for emergency interim relief, seek to appoint an Emergency Arbitrator within one day of receipt by the Registrar of such application and payment of the administration fee and deposits")

24 However, most of the Arbitration Procedural Rules do not have specific guidance on these standards (The Article 3.5 of the ACIAC Rules are an exception). See also: Hanessian, G. and Dosman, E. A. (2016), 'Songs of innocene and experience: Ten years of Emergency Abitrator', *The American review of International Arbitration,* Vol. 27, pp. 227-230.

25 Article 29.2 of the ICC Rules. This article is explained by the ICC for these following reasons: (i) First, according to the ICC Rules, if the emergency arbitrator were to render an award, such award would have to be scrutinized by the International Court of Arbitration pursuant to Article

*Sixth*, on the validity of the decision to apply emergency interim measure: The majority tendency in dispute settlement, which is acknowledged by most of the arbitration rules, is that the implementation of emergency arbitration does not bind the arbitration tribunal established thereafter. As a result, the arbitral tribunal has the full right to amend, replace, or cancel these emergency interim measures when considering such amendment, replacement, or cancellation is necessary.[26] On the other hand, for the disputing parties, stemming from the private nature of the arbitrator, the decision ordered by the emergency arbitrator only binds the parties on a voluntary basis, and whether these measures shall be enforced by state power or not is regulated in national laws rather than in arbitration procedural rules, which are still silent on this issue,[27] and shall be discussed in later parts.

**2. Benefits and Limitations of Emergency Arbitration Rules**

The implementation of the regulations on emergency arbitration is expected to have significant effects on arbitration proceedings because of these following advantages:[28]

*Firstly*, the implementation of emergency arbitrator provisions overcomes the shortcomings with respect to the time for constituting the tribunal (as mentioned above), thus allowing the arbitrator to have influences on the parties at the time when their dispute arise, thereby strengthening the arbitrator's position.

*Second*, regulations on emergency arbitration show respect for the principle of party autonomy as well as avoid the monopoly of the court. Indeed, once the parties have reached the arbitration agreement, it means that the parties do not wish the court to resolve or intervene in their arising dispute. Meanwhile, without the emergency arbitration mechanism, the parties would have had no choice but to submit their requests for emergency interim relief to the court before the establishment of the arbitral tribunal, which is apparently against the wishes and aspirations of the parties.

*Third,* regulations on emergency arbitration broaden the choices of seeking emergency interim measures for disputing parties. In certain cases, it is not feasible to request the court to issue emergency interim measures.

33 of the ICC Rules (2012). Such scrutiny would have defeated the "urgent" nature of emergency proceedings. (ii) Second, the recognition in the form of a judgment or a decision does not affect the possibility of enforcing emergency interim measures, since the decision ordered by emergency arbitrator is almost exclusively executed on a voluntary basis of the parties. See also: Paraguacuto-Maheo, D. and Lecuyer-Thieffry, C. (2017), 'Emergency Arbitrator: A New Player In The Field - The French Perspective', *Fordham International Law Journal,* Vol. 40, No. 3, pp. 770.

26 Article 29.3 of the ICC Rules; Article 43.8 of the SCAI Rules; Article 9.11 of the LCIA Rules; Article 10 in Appendix I of the SIAC Rules.

27 Blackyby, N. (2018), *supra* note 14, pp. 323.

28 Thuan, H. Q. & Linh, T. H. T. (2021), *supra* note 15, pp. 195-200.

This may result from the lack of jurisdiction of the national court over the parties or the subject-matter of the dispute or because the measure sought needs procedure its effects over several jurisdictions.[29] Having provisions on emergency arbitrators in these cases will allow the parties to achieve their purposes. On the contrary, as mentioned, the provision of emergency arbitration does not prevent the parties from seeking the Court assistance, especially measures that involve third parties, therefore providing the parties with many different alternative dispute resolution mechanisms to find an interim injunction that meets their demands.

*Lastly*, regulations on emergency arbitration help to avoid limitations on the implementation of the court's emergency interim measures. There is a concern that the national court may not be impartial, objective, or unbiased (especially with respect to disputes whereby the defendant is a state or a country which the court requested to grant emergency interim measures is located in or has a relationship with).[30] The parties should also have to consider other facts such as the independence of the court, or the only national court authorized to issue emergency interim measures has a reputation for partiality or inefficiency.[31] This does not happen very often, but it will hinder or even eliminate the arbitration's effect (especially when one party takes advantage of this limitation with a bad purpose).[32]

Emergency interim measures applied by the court could be costly and time-consuming. For example, derived from the national sovereignty principle, in order to file a request for emergency interim measure to the court, the parties often have to translate foreign-language documents into a suitable language with the country where the court is located, as well as using local legal services, which is likely to increase the arbitration costs. Meanwhile, arbitration is an international dispute resolution mechanism; hence it is not limited by the language to be used. In addition, the courts often face the problem of case-overload, which can lead to the delay in reviewing the request for emergency interim measures. On the contrary, the application of emergency interim measures by emergency arbitrators will usually be very swift and promptly responsive to urgent requests of the parties.

Regarding the difficulties in determining which court has jurisdiction, especially for cross-border disputes, it can make the parties feel bewildered at determining which court to request for interim measures, and in some

29 For example, a French Court shall not appoint an expert to conserve envidences in relation to an accident occured in international water when it does not have jurisdiction over the merits of the dispute. See also: Paraguacuto-Maheo, D. and Lecuyer-Thieffry, C. (2017), *supra* note 25, pp. 759.

30 Michaelson, P. L. (2015), 'Emergency Arbitration: Fast, Effective and Economical'. Received from: http://ssrn.com/abstract=2762715 [accessed 22 July 2020].

31 Paraguacuto-Maheo, D. and Lecuyer-Thieffry, C. (2017), *supra* note 25, pp. 760.

32 Schaefer, J. K. (1998), *supra* note 01.

cases, the parties might face the risk of inconsistencies in the court's decisions. Conversely, if the parties already have an agreement to choose the arbitration as their method of dispute settlement, they can determine where to submit the request for interim measures.[33]

Regarding the confidential feature, in principle, court proceedings are open and accessible to the public, which is considered undesirable characteristics for the parties.[34] Meanwhile, arbitration procedure is a private process, which is a superior feature of commercial arbitration compared to the court proceeding.[35]

The provisions on emergency interim measures of court proceedings are rigidly regulated and there is a limited list of judges who may not all be experts in the field being considered for the application of emergency interim measures. On the contrary, the emergency arbitrators, who they are often specialized in the subject-matter of the dispute, could be flexibly appointed depending on case by case.[36]

Despite the positive effects brought by the regulations on emergency arbitrator, it is impossible not to mention the significant limitations of this set of regulations, which affect the efficiency and attractiveness of emergency arbitrator, namely:

*First, the regulations on emergency arbitrator procedures still meet many obstacles preventing its wide application*

This limitation stems from the fact that the procedure for the court to intervene in the application of emergency interim measures is available, regardless of or in accordance with the agreement of the parties. Accordingly, as long as the jurisdiction condition is satisfied, the parties can file a request for application of the emergency interim measures to the court and the proceedings will be governed by national laws. On the contrary, with respect to the emergency arbitrator, in principle, the parties must agree on or consent to the applicable procedure.

On the other hand, currently, the emergency arbitrators procedure is integrated into the procedural rules of many arbitration centers (as mentioned above) and will automatically be applied. However, the parties have the right to choose not to apply the emergency arbitrators procedure due to the fear of power abuse or merely because of their dispute settlement strategy.[37] The

33 Savola, M. (2016), *supra* note 02, pp. 74.
34 Michaelson, P. L. (2015), *supra* note 30.
35 "However, it is neccessary for the parties to expressly provide for a confidentiality obligation in this regard since it is not certain that a confidentiality provision inserted in the arbitration agreement would extend to the emergency arbitrator procedure. This is all more true under French Law where the principle of confidentiality provided for by Article 1464 of the French New Code of Civil Procedure only applies to domestic arbitration". Paraguacuto-Maheo, D. and Lecuyer-Thieffry, C. (2017), *supra* note 25, pp. 759.
36 Paraguacuto-Maheo, D. and Lecuyer-Thieffry, C. (2017), *supra* note 25, pp. 760.
37 Article 29(6) of the ICC Rules.

reason is that there is little guidance on the emergency interim measures that the emergency arbitrators can apply and which conditions to apply such measures. As a result, the parties will feel the uncertainty from the legal perspective about their desired results, compared to the outcome they can achieve in court.[38]

*Second, the emergency arbitrator is not able to influence the entity who is not a party to arbitration agreement*

Similar to the arbitral tribunal, the authority of the emergency arbitrators also arises from the arbitration agreement; hence its power is limited to only over the disputing parties without being able to influence a third party, of which the national court is capable.[39] This is clearly stated in the rules of arbitration centers. For example, Article 29(5) of the ICC Rules of Arbitration provides that the regulations on emergency arbitrators only apply to the parties directly signing the arbitration agreements in accordance with the rules. Article 9(8) of the LCIA Rules only allow the emergency arbitrators to exercise the same authority as the arbitral tribunal in accordance with the arbitration agreement. This disadvantage reduces the "attractiveness" of this regulation to the parties in dispute, compared with requesting the court to apply the emergency interim measures before the establishment of an arbitral tribunal.

*Third, it is difficult to apply emergency arbitrators only on the basis of the request of one party without notifying the applied party (ex parte application)*

The Model Law (Article 17B), as well as the national laws and the procedural rules of the arbitration centers, currently have provisions on the application of the preliminary order from the arbitral tribunal, according to which there is no need to notify the other party in cases of emergencies and the notification will reduce or even lose its effectiveness. However, this regulation does not apply to emergency arbitrators in some circumstances, which is very clearly demonstrated in the arbitration rules of the ICC,[40] SCC,[41] LCIA.[42] Meanwhile, the court procedure to apply emergency interim

38 Paraguacuto-Maheo, D. and Lecuyer-Thieffry, C. (2017), *supra* note 25, pp. 752.

39 Smith, G. (2014), 'The emergence of emergency arbitrations'. Received from: http://www.gordonsmithlegal.com.au/resources/Emergency%20Arbitrations%20(12082016).pdf [accessed 22 July 2020].

40 Pursuant to Article 2.3 of Appendix V, The ICC Rules provides that the Secretariat is required to notify the responding party of the emergency arbitrator appointment. In the event that the requesting party requested for appointment of an emergency arbitrator without giving notice to the responding party and after the President had decided that the proceedings should be set in motion pursuant to Article 1.5 of the Emergency Arbitrator Rules, the Scretariat shall notifed the application to the responding party after first informing the applicant that it would do so. Carlevaris, A. & Feris, J. R. (2014), *supra* note 05, pp. 11-12.

41 Article 3 of Appendix II of the SCC Rules provides that "*As soon as an application for the appointment of an Emergency Arbitrator has been received, the Secretariat shall send the application to the other party*" (see also: Karl Falk, *ibid*, pp. 12-13).

42 Article 9(5) of the LCIA Rules. However, the Emergency Arbitrator is not required to hold any hearing with the parties and may decide the claim for emergency interim measures on available documentation pursuant to Article 9(7) of the LCIA Rules and Article 43 of the LCIA Notes on Emergency Procedures.

measures under the law of most countries does not require a notice to the applied party. The element of surprise plays a considerably important role in the application of interim measures, especially in the current situation of industry 4.0 technologies. If this element is not guaranteed, the emergency interim measure may lose its effectiveness (for example, the party subject to emergency interim measures would not have time to disperse the assets). Therefore, the mentioned disadvantage may make the parties hesitate in choosing an emergency arbitrator over the court.

*Fourth, the uncertainty on the emergency arbitrator's authority over the applied types of measures*

Although the rules of the majority of arbitration centers recognize the authority of emergency arbitrators similar to that of the arbitral tribunals, it still depends on the provisions of the law of the country where the emergency interim measure is sought. The law in most countries is "silent" regarding the authority of emergency arbitrators, leading to a question of which interim measures the emergency arbitrators are allowed to apply? Whether it is the same as the jurisdiction of the arbitral tribunal or not?[43]

In this regard, in France,[44] one viewpoint is that the emergency arbitrator is an arbitrator; hence he has the full authority to apply the interim measures as the arbitral tribunal. However, another viewpoint is that the emergency arbitrator procedure is a pre-arbitration procedure and is considered as a "connecting boat board" before the arbitration resolves the dispute.[45] In this view, the emergency arbitrator procedure is regarded as an opportunity given before the arbitrator resolves a dispute, and the emergency arbitrator now acts as an expert or a third dispute resolution mechanism. However, the majority viewpoint believes that the emergency arbitrator will have a similar authority to apply emergency interim measures with the arbitral tribunal because it is consistent with the will of the parties when choosing arbitration as the method of dispute resolution and agreeing to the emergency arbitrator procedure (when choosing arbitration rules recognizing this regulation).[46] Nevertheless, provisions of national law are not expressed and of great certainty about this issue, which easily causes concern for the parties when choosing to apply the regulations on emergency arbitrators.

*Fifth, the limitations on the effectiveness of decisions on the application of interim measures issued by emergency arbitrators*

43 According to Article 2(1) of the Singapore Arbitration Law, emergency arbitrator is defined collectively in the concept of "arbitral tribunal". Therefore, the emergency arbitrator will have the same powers as the arbitral tribunal.

44 France is the place of origin of the emergency arbitration regime. Hence, studies on Emergencies arbitrator regime cluster in France

45 Mayer, P. (2004), 'Référé pré-arbitral CCI', *Journal du droit International* (trích trong Paraguacuto-Maheo, D. and Lecuyer-Thieffry, C. (2017), *supra* note 25, pp. 757-758).

46 Voser, N. and Boog, C. (2011), 'ICC Emergency Arbitrator Proceedings: an Overview', *ICC Bulletin Supplements*, pp. 85.

Specifically, whether the emergency arbitrator's decision to apply interim measures can be enforced by state power is open to doubt.[47] Most current research perspectives suggest that the answer of this question will depend on the law of the country where interim measures are enforced.

Laws on arbitration of most countries are silent about the effectiveness of the emergency arbitrator's decision to apply emergency interim measures. Only the Laws on arbitration of Hong Kong and Singapore clearly recognize this matter. Specifically, the Amended Law on Arbitration of Hong Kong in 2013 has added the regulations on emergency arbitrators in Article 22A and Article 22B. Accordingly, the emergency arbitrator is defined as an arbitrator designated under the law on arbitration (including the arbitration rules of the arbitration centers) by agreement or acceptance of the parties for settlement of the request to apply interim measures before the establishment of an arbitral tribunal. At the same time, the decision granted by the emergency arbitrator is also guaranteed to be enforced by the state power after being approved by the court.[48] Although Amended Singapore Law on Arbitration in 2012 has no separate regulation on the emergency arbitrator, Article 2(1) explains the concept of an arbitral tribunal, including emergency arbitrators and decisions of the emergency arbitrators is also of equal value as that of the arbitral tribunal.[49]

When the national laws are silent on this issue, many experts tend to follow the idea that the decision of the emergency arbitrator, although it is binding to the parties in the arbitration agreement, has no compulsory effect with support of the state power, instead, it is still based on the willingness of the involved parties. This regulation can easily be found in French judicial practice.[50] However, practice in the U.S. or India, in some cases, has

47 Article 17H(1) of the UNCITRAL Model Law on International Commercial Arbitration provides that: "An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provision of article 17I". Most of many recent national arbitration laws have almost the same regulations as the UNCITRAL Model Law regarding the effects of enforcement of the emergency interim measure order granted by the arbitral tribunal. However, the question of whether the decision issued by the emergency arbitrator is the same of that of issued by the arbitral tribunal or not depends on the definition of "arbitral tribunal" in the national arbitration law.

48 See also Ziayeva, D. (Editor) (2015), *Interim and Emergency Relief in International Arbitration,* Jurisnet Publisher, pp. 282-283.

49 Kronenburg, E. J. and Peng, T. K. (2015), 'Singapore in Arbitration in 60 jurisdictions worldwide', *Arbitration in 60 jurisdictions worldwide,* Law Business Research, pp. 396.

50 In 2003, the French Court refused to issue an enforcement decision to the ICC's decision to apply the interim measures (before the arbitral tribunal was established) on the grounds that this decision was only binding for the parties to comply with the arbitration agreement that the parties participate in and the involuntary enforcement will be treated as breaching the contract. Therefore, the parties do not have right to request the Court to enforce or cancel this decision. See also: Gaillard, E. and Pinsolle, P. (2004), 'The ICC Pre-Arbitral Referee: First Practical Experiences', *Arbitration International*, Vol. 20 , No. 1, pp. 13-37. Although there are many opposing views against the Court's decision in this case, the current French law does not recognize the decision of the emergency arbitrator as valid and therefore has no compulsory effect for enforcement (see also Paraguacuto-Maheo, D. and Lecuyer-Thieffry, C. (2017), *supra* note 25, pp. 769-772).

recognized the validity of the decision issued by the emergency arbitrator.[51]

Some researchers also believe that it is not necessary to concern about the implementation of the arbitrator's decision to apply interim measures because, in most cases, parties may voluntarily enforce the measures. If the parties do not voluntarily enforce the measures, the parties may face punishments by the arbitral tribunal in the dispute resolution (including fines, arbitration fees, or even bias of the arbitral tribunal during its judgment). However, the opposing viewpoints believe that the above reason is not always true, and in many cases, the implementation of the interim measures before the dispute procedure is of great necessity to avoid one party deliberately evading its obligations and hence decrease the efficiency and effectiveness of the arbitral award. At such time, the support of the state power is the only resource that the parties can rely on to protect their legitimate rights and interests before the dispute is resolved by the arbitral tribunal.[52]

*Sixth, the imposition of emergency arbitrator procedures may adversely affect the rights of the parties to choose the appropriate location to request the application of interim measures*

Specifically, the regulations of the emergency arbitrators will cause the court to lose its power in some cases and go against the original intention of this regulation. For example, in the U.K., in the case of Seele Middle East FZE with Drake & Scull International SA CO in accordance with the ICC arbitration rules, a petition for application of interim measures was submitted to the British Court before the arbitral tribunal was established. The English Court has accepted this request but has admitted that it had jurisdiction because the ICC changes in the addition of regulations on emergency arbitrators do not apply in this case. In other words, if this ICC regulation has been applied, the English Court would not have had the authority to apply the interim measures in compliance with the provisions of Article 44(5) of the Law on Arbitration.[53]

In another case between Gerald Metals SA and Timis, the parties have chosen the LCIA Arbitration Rules, and the English Court has denied the request for application of interim measures on the grounds that priority to apply such measures should be given to the emergency arbitrators as provided

51 In India, although the Indian Arbitration Act only allows for enforceability of final awards, the Bombay High Court enforced the arbitrator's order by providing similar relief to that provided by the emergency arbitraion award. Or in the USA, although there are still sparse precedents, some courts have acknowledged the validity of the decision issued by the emergency arbitrator, typically in the case between Yahoo and Microsoft in 2013 (see also: Hanessian, G. and Dosman, E. A. (2016), *supra* note 24, pp. 230-235).

52 Savola, M. (2016), *supra* note 02, pp. 95.

53 Field, S. (2015), 'Narrowing the powers of the national courts to grant interim measures – A measure too far?', *Kluwer Arbitration Blog*. Received from: http://arbitrationblog.kluwerarbitration.com/2015/08/27/narrowing-the-powers-of-the-national-courts-to-grant-interim-measures-a-measure-too-far/?doing_wp_cron=1595857673.9145169258117675781250 [accessed 27 July 2020].

in Article 44(5) of the Law on Arbitration.[54]

In both cases above, although the arbitration rules of both ICC and LIAC stipulate that the recognition of the emergency arbitrator does not prevent the parties from seeking the assistance of the court in applying interim measures, it must also be considered from the perspective of the national law, and U.K. law does not allow the court to intervene if the emergency arbitrator can apply such measures. This will most likely also happen for countries where laws on arbitration tend to favor the jurisdiction of the arbitral tribunal as analyzed above.

Therefore, when choosing the governing procedural rules that recognize the regulations on emergency arbitrators, the parties need to consider relevant national laws on arbitration with respect to the court's assistance in the application of interim measures. In some cases, the parties may choose to agree not to comply with the regulations on emergency arbitrators. However, this is contrary to the purpose set out by this regulation, which is meant to support the parties in seeking the interim measures.[55]

From the above analysis, it can be seen that the younger regulations on emergency arbitrators are still controversial regarding its effectiveness. This seems to be the reason why the laws on arbitration of countries are "reluctant" in recognizing this regulation.[56] However, the recent statistics also show that the provisions on emergency arbitrators are increasingly being chosen by the parties to apply in dispute settlement.[57] Therefore, the regulations on the emergency arbitrators themselves have gradually proved its own value, and popular recognition of this regulation in domestic law is probably a reasonable option.

## 4. The applicability of the provisions of emergency arbitration to Vietnam

### *4.1. Regulations of Vietnamese Law*

Vietnamese arbitration laws have no provision to govern the emergency arbitration mechanism. The Law on Commercial Arbitration of Vietnam also

54 Parker, C. and Aaron, M. (2016), 'English High Court has no power to grant urgent relief under Arbitration Act where urgent relief could be granted by expedited tribunal or emergency arbitrator under LCIA Rules'. Received from: https://hsfnotes.com/arbitration/2016/10/07/english-high-court-has-no-power-to-grant-urgent-relief-under-arbitration-act-where-urgent-relief-could-be-granted-by-expedited-tribunal-or-emergency-arbitrator-under-lcia-rules/ [accessed 22 July 2020].

55 Noran Mohammed Al Mekhlafi (2017), 'Interim Measures in International Commercial Arbitration: A Discourse in Continued Uncertainty', *International Conference on Advances in Business, Management and Law,* Vol. 2017, pp. 107.

56 Currently, only the Arbitration Law of Singapore and Arbitration Law of Hongkong have specific provisions on Emergency Arbitrator.

57 According to a statistic conducted in 2016 (10 years since the regulations on emergency arbitrators was introduced), there were at least 175 requests for emergency interim measures worldwide, in which, ICDR had 59 applications, SIAC had 50 applications, ICC had 39 applications, SCC had 14 applications, SCAI and HKIAC had 6 applications. (see also: Hanessian, G. and Dosman, E. A. (2016), *supra* note 24, pp. 225-227).

does not recognize regulations on emergency arbitrators. The 2010 Law on Commercial Arbitration stipulates in the clause 1 of Article 48: "Parties in dispute shall have the right to request the arbitration tribunal or a court to order an emergency interim measure in accordance with the provisions of this Law and other relevant laws, unless such parties have some other agreement".

Authority of the arbitration council is recognized in clause 1 of Article 49 of the 2010 Law on Commercial Arbitration: "The arbitration tribunal may, at the request of one of the parties, order one or more forms of emergency interim measure applicable to the parties in dispute".

For the Court, the clause 1 of Article 53 of the 2010 Law on Commercial Arbitration stipulates: "If after a party has lodged its statement of claim, such party's legal rights and interests have been infringed or there is a direct danger of such infrigement, such party shall have the right to file an application with the competent court to order one or more forms of emergency interim measure".

Before the arbitral tribunal is established, the disputing parties could only request the court to grant emergency interim measures after filing a request for the arbitration.

The question is, should Vietnam arbitration law recognize the provisions on emergency arbitrators? This matter should be assessed on the impact of this regulation (especially the existing limitations) on the development of commercial arbitration.

### *4.2. The necessity of recognizing the emergency arbitration in Vietnam arbitration laws*

The analysis in the above sections has shown the regulations on emergency arbitrators, although there are still certain limitations, it cannot be denied that this is a "a breath of fresh air". Therefore, with the aim of developing the arbitration laws, the author suggests that Vietnamese legislators should recognize the emergency arbitrator mechanism because of these following reasons:

*First*, the purpose of arbitral law-making in the world is to reduce the court intervention in arbitration proceedings. The court intervention should be supportive of arbitration procedures rather than exerting negative effects on them.[58] Therefore, that Vietnam laws officially recognise emergency arbitrator procedure would prevent court's deep interference in arbitration practice, by which enhancing the arbitration's "power" and "atractiveness" of arbitration to disputing parties.

*Second*, one of the reasons why enterprises do not choose Vietnamese arbitration to settle their disputes is the concern about the court intervention

58 Reymond (1993), 'The Chanel Tunnel case and the law of international arbitration' (quote from Blackyby, N. (2018), *supra* note 14, pp. 591-592).

in the arbitration proceedings, which affects the autonomy rights of the parties - a "specialty" that distinguishes the arbitration characteristics.[59] Therefore, the recognition of the emergency arbitration institution will help to ensure their own autonomy, thus promoting the arbitration as their preferred dispute resolution method.

*Third*, as mentioned, there are very few countries in the world that have recognized the regulations on emergency arbitration. But the statistics above illustrate that such provisions are increasingly favored by the claimants. Therefore, if Vietnam officially acknowledges this legal institution in the arbitration law, it will be a highlight and attract foreign businesses to choose arbitration centers in Vietnam for their dispute settlement.

*Fourth*, although there are still some limitations, the quantity and quality of the Vietnamese arbitrators are growing rapidly with the participation of lawyers who used to be judges, prosecutors, legal researchers working at well-known law-training institutions, etc. Therefore, the arbitrators who are appointed as emergency arbitrators are fully qualified and experienced to be able to grant the most appropriate emergency interim measures, thus effectively supporting the dispute settlement process as well as the enforcement of arbitral awards.

*Fifth*, the recognition of the regulations on the emergency arbitrator in Vietnam arbitration law will provide a solid foundation for arbitration centers in Vietnam to amend their procedural rules, thus making such procedural rules more compatible as well as more similar to many primary arbitration procedural rules in the world.

The above section shows that the recognition of the provisional emergency arbitrator regulation in the current Vietnamese law is feasible and can, to some extent, promote the development of commercial arbitration. The next issue is whether the emergency arbitration should be considered as a separate legal institution or an existing form of arbitration tribunal?

In this regard, the process of acquiring experiences from other countries around the world is very limited and difficult since there are still many different approaches to the regulations on emergency arbitration amid various national laws. But the case of Hong Kong and Singapore are two exceptions. Specifically, the Singapore Arbitration Law defines emergency arbitration as "the arbitration council", in other words, the emergency arbitrators will have the same authority as arbitration council. In contrast, the Hong Kong Arbitration Law gives a distinct definition of the emergency arbitrator and specifies the authority of this subject.[60]

59 Anh, P. T. (2009), 'Why Vietnamese business are not interested in resolving commercial contract disputes by arbitration', *Democracy and Law Journal*, No. 09, pp. 25-31.

60 Article 2.1 of the SIAC Rules and Article 22A, 22B of Law on Arbitration of Hong Kong.

However, it is more practical for the current Vietnamese arbitration law to allow emergency arbitrators to have the same authorities that the arbitration council has. This is because regulations on the relationship between the arbitration tribunal and the court in the 2010 Law on Commercial Arbitration with respect to implementation of emergency interim measures will overcome the limitations of the emergency arbitration clause in general. Specifically:

*First,* the 2010 Law on Commercial Arbitration stipulates the power to grant emergency interim measures in arbitration proceedings for both the court and the arbitration council, and this authority exists in parallell with no priority for any dispute resolution mechanism. In other words, the disputing parties, depending on their tactics or goals, are entitled to independently seek emergency interim measures from the national court or the arbitration center,[61] which is likely to enable the recognition of the regulations on the emergency arbitration in Vietnamese law to avoid shortcomings in limiting the autonomy rights of the parties as well as the intervention of the court.

*Second*, Clause 5-Article 50 of the 2010 Law on Commercial Arbitration stipulates: "Enforcement of a decision by an arbitration tribunal ordering emergency interim measure shall be implemented in accordance with the Law on Enforcement of Civil judgments". On the other hand, the point e, clause 1 of Article 2 of the 2008 Law on Enforcement of Civil Judgments amended and supplemented in 2014 also stipulates that commercial arbitration awards and arbitration decisions, which also embrace the interim relief decision issued by the arbitration tribunal, are subject to civil judgment enforcement procedures.[62] Thus, it can be seen that, unlike the law of most countries in the world in which emergency interim measure must be granted by the court in order to be enforced by state power, Vietnamese arbitration law recognizes the enforcement effect of these decisions. In other words, the decision on the application of emergency interim measures issued by the arbitration council or granted by the court shall have the same effects of enforcement. Therefore, the disputing parties can be assured of the enforcement procedures of the decision on emergency interim measures granted by the arbitration council or the emergency arbitrator.

61 However, it should be noted that Clause 3 Article 49 and Clause 5 Article 53 of the Law on Commercial Arbitration 2010 are regulated in order to avoid a conflict of jurisdiction between the Court and the arbitration council. Specifically, if the request for the emergency interim measures is submitted to both the Court and the arbitration council, on principle, the party receiving the request first will have authority to grant emergency interim measures (for example, if during the dispute resolution process one of the parties had already applied to a court to order one or more of the forms of interim relief and then applies to the arbitrion tribunal to order interim relief, the arbitration must refuse such application. On the other hand, if during the dispute resolution process one of the parties had already applied to the arbitration tribunal to order one or more of the forms of interim relief and then applies to the court for interim relief, the court must refuse such application, unless the application for the interim relief was beyond the jurisdiction of the arbitration tribunal).

62 Nghia, P. D. (2010), 'Provisional urgent measures in arbitration proceedings', *Legislative Research Journal,* No. 23 (184), pp. 79.

*Third,* according to Article 50 of the 2010 Law on Commercial Arbitration, the arbitrators do not have the obligation of notifying the other party when considering the request for emergency interim measures of the requesting party. In other words, the arbitral tribunal fully has the right to apply the emergency interim measures with the only request of one party without pondering the opinion of the other party (applying ex parte). This provision of the 2010 Law on Commercial Arbitration affects the procedural rules of many arbitration centers in Vietnam since such arbitration institutions also do not force the arbitral tribunal to notify the requested party of the consideration for emergency interim measures application. Therefore, the application of emergency interim measures by the arbitration council will not only ensure the element of surprise, a characteristic which is similar to that of the court but also avoid the situation in which the parties take advantage of information to disperse assets or evade their obligations.

*Fourth,* the powers of the arbitral tribunal in the application of emergency interim measures are specified in Article 49 and Article 50 of the 2010 Law on Commercial Arbitration, including the measures to be applied, the procedure for application, etc. Therefore, if the emergency arbitrator is recognized as a form of the arbitration council, there will be sufficient grounds for the emergency arbitrator to exercise his or her competence in considering the request for emergency interim measure application of the disputing parties.

*Fifth,* with regard to the lack of authorities of the emergency arbitrator over third parties who do not involve in the arbitration agreement, it can be seen that this is an inherent weakness of the arbitration in general, which comes from the nature of the arbitration characteristics. This disadvantage is also one of the main reasons why it is necessary to maintain the court's intervention and support in arbitration proceedings. The provisions of the emergency arbitrators can exist in parallel and do not exclude the court's power of granting emergency interim measure. Therefore, the absence of emergency arbitrator's power regarding emergency interim measures enforcement against third parties does not affect the interests of the disputing parties because such parties can seek court assistance in these cases.

## Conclusion

Emergency interim measure plays an extremely important role in resolving disputes by commercial arbitration in particular and by judicial proceedings in general, especially with the constant development of electronic transaction means. Although provisions on emergency arbitration have been introduced recently, they have partly proved their contribution to the general development of commercial arbitration through their benefits of applying emergency interim measure before the establishment of the arbitral tribunal. It is still uncertain

that the regulations on emergency arbitration will continue to develop and be successful in the future, especially with respect to Vietnam, a country far behind in the development of arbitration. If Vietnamese legislators decide to take the first-mover advantage in adopting these provisions into its domestic laws prior to other countries, which could be considered as a risky move, it is likely to bring great results to the development of the arbitration law in Vietnam. ●

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