The emergency arbitrator in the 2013 CEPANI Arbitration Rules

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Summary

Article 26 of the 2013 CEPANI Arbitration Rules contains a swift and flexible procedure in which an emergency arbitrator can order interim and conservatory measures which cannot await the constitution of the arbitral tribunal. Although the concept is easily understood in theory, practice has shown many procedural pitfalls with the result that the procedure is seldom applied. A closer look at emergency arbitration shows that the procedure is often misunderstood: it can prove beneficial alongside state organised interim relief, but only in certain specific circumstances.

1. Introduction

1. The new CEPANI Arbitration Rules have been in force since 1 January 2013. One of the most notable novelties has been the “emergency arbitrator”, an arbitrator empowered to order interim and conservatory measures prior to the constitution of the arbitral tribunal (Art. 26 of the CEPANI Arbitration Rules).

2. Article 26 provides for a swift and flexible procedure in which an emergency arbitrator is to be appointed within 2 working days. The emergency arbitrator has

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1 I am grateful for the continuous support of Bénédicte Deboeck (counsel Loyens & Loeff Brussels) and Pieter De Smedt (associate Loyens & Loeff Brussels) with the redaction of the present Article.
full authority to grant any type of interim relief in the form of a reasoned order or award within 15 days following his receipt of the file.

3. This Article identifies the origins and purpose of emergency arbitration and discusses each procedural step as stipulated in Article 26 of the CEPANI Arbitration Rules in detail. Where relevant, a comparison is made with arbitration rules of other arbitral institutions, such as ICC, LCIA, SCC, and SIAC.

2. Origins of the emergency arbitrator

2.1. Ratio legis

4. Given its many advantages, international arbitration has earned its place as a widely used method of dispute resolution. Nevertheless, one of its most notable disadvantages when compared to state court dispute resolution is the difficulty for parties to obtain urgent interim relief or remedies, be it prior to or after the constitution of the arbitral tribunal.

5. During arbitral proceedings, the arbitral tribunal has the power to issue interim or conservatory measures in order to preserve evidence, to protect assets, etc. However, practical problems arise because the interim relief ordered by an arbitral tribunal has its limits, e.g. regarding scope (only the parties to the arbitration may be affected), enforceability, and ex parte requests.

In view of these limitations, it comes as no surprise that parties who seek interim relief might feel inclined to turn to state courts.

This is particularly true when the need for interim relief is urgent and the arbitral tribunal has not yet been established. Considering that the constitution of an arbitral tribunal may take several weeks or even months, this “temporal problem” can place parties who are bound by an arbitration agreement in an inconvenient limbo.

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2 ICC (International Chamber of Commerce, Paris), LCIA (London Court of International Arbitration), SCC (Stockholm Chamber of Commerce), SIAC (Singapore International Arbitration Centre).


By including an arbitral clause in their agreements, parties expressly choose to have their disputes settled by arbitration and indicate reluctance to turn to state courts, including interim relief. This is supported by a survey conducted by the SCC in 2008, which confirms that a strong majority of arbitration users would prefer to have interim measures available as from the initiation of the arbitration proceedings.

Furthermore, attempts at obtaining interim relief before state courts are not always satisfactory either and arbitration has much to offer by comparison. For example, the interim relief sought may not be available in the relevant state courts, the procedure may be too time consuming or costly (e.g. payment of considerable bonds), confidentiality may not be guaranteed, or the state court may be “insufficiently independent or experienced to accommodate such a request”, especially in investor-state disputes.

Moreover, in multi-jurisdiction cases, it may take several applications in multiple states in which case initiating one single (emergency) arbitration could be a preferred course of action resulting in one (enforceable) decision.

7. Considering these different elements, arbitral institutions have gradually developed procedures in which a referee or arbitrator can be appointed for the single purpose of ordering interim relief as long as the arbitral tribunal has not yet been constituted.

2.2. The ICC’s pre-arbitral referee

8. The ICC was the first arbitral institution that attempted to tackle this challenge. In 1990, the ICC adopted a “pre-arbitral referee” procedure in a separate

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9 However, under the new Brussels I bis Regulation an exequatur procedure is no longer required to enforce provisional and conservatory measures in multiple EU member states (Articles 39 and 42 (2) Regulation n° 1215/2012 of 12 December 2012).

set of procedural rules alongside their existing ICC Rules of Arbitration. According to this set of rules, a pre-arbitral referee could be appointed upon request of a party to an arbitration agreement to “order any conservatory measures or any measures of restoration that are urgently necessary to prevent either immediate damage or irreparable loss and so to safeguard any of the rights or property of one of the parties”\(^{11}\), or “to order any measures necessary to preserve or establish evidence”\(^{12}\).

9. After several years, it became apparent that the ICC’s pre-arbitral referee procedure was not a successful instrument. Many causes were identified, such as the limited range of the referee’s powers and the availability of annulment proceedings against the referee’s decisions.

However, the main reason for the failure of the pre-arbitral referee procedure as it was then conceived, was that parties had to include an express opt-in regarding the specific pre-arbitral referee rules in their arbitration clauses or agreements\(^{13}\). The ICC rules thus required the inclusion of a special provision in the contract in addition to the arbitration agreement, which almost never occurred in practice\(^{14}\).

10. The ICC’s referee procedure was therefore only used in few instances, and afterwards described as “an excellent idea which thus far has not worked”\(^{15}\). A reform was therefore inevitably required.

### 2.3. The rise of emergency arbitration

11. The term “emergency arbitrator” was first coined by the International Centre for Dispute Resolution (ICDR) in 2006\(^{16}\). Since then, many institutions have adopted emergency arbitration into their rules: ICC, SIAC, HKIAC, ACICA,

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11 Art. 2.1 (a) of the Pre-Arbitral Referee Procedure Rules.
12 Art. 2.1 (d) of the Pre-Arbitral Referee Procedure Rules.
The Belgian arbitral institution CEPANI could not stay behind and incorporated their version of this mechanism in its 2013 Arbitration Rules. The details thereof will be discussed hereafter.

2.4. Distinction – the expedited formation of the arbitral tribunal

12. As a preliminary side-note before delving into the CEPANI Arbitration Rules, it is useful to discern between emergency arbitration and arbitration rules intended to expedite the formation of the arbitral tribunal.

13. Several arbitral institutions have regulated the situation where (one of) the parties wish(es) to establish an arbitral tribunal within a shorter than usual time frame: e.g. the NAI, SCC, SIAC, LCIA and HKIAC. However, the arbitration rules of ICDR, ICC and also CEPANI (with the exception of disputes of limited financial importance) do not contain such an expedited procedure.

Arbitration rules regarding the expedited formation of the arbitral tribunal are typically construed as a special procedure whereby, at the request of one or all of the parties, the time limits to establish an arbitral tribunal are significantly shortened in cases of “exceptional urgency”.

14. The reasons for parties to rely on this procedure may overlap to some extent with those that could drive parties towards emergency arbitration. Overall though, the urgency surrounding the expedited formation of the arbitral tribunal mostly revolves around the need to have a final award on the merits rendered swiftly, rather than obtaining interim relief. This makes the two compatible rather than mutually exclusive.

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3. Interim and conservatory measures which cannot await the constitution of the arbitral tribunal

15. Emergency arbitration under Article 26 of the CEPANI Arbitration Rules is only available for a party who requests “interim and conservatory measures which cannot await the constitution of the arbitral tribunal” (Art. 26 (1)). Article 26 (4) of the CEPANI Arbitration Rules additionally refers to “measures urgently requested”.

16. The 2012 ICC Arbitration Rules refer to the same concept in Article 1 (3) (e) of Appendix V: “urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal”. Legal scholars commenting the 2012 ICC Arbitration Rules have determined that this type of relief is only available “in truly urgent situations”. The procedure is indeed generally referred to as “emergency” arbitration (although the 2012 ICC Arbitration Rules never mention the words emergency arbitration or emergency arbitrator).

17. Urgency alone, however, is not sufficient. Article 26 seems to demand exceptional urgency, so that taking interim measures cannot await the constitution of the arbitral tribunal. CRAIG and JAEGER describe it more pragmatically: to them the test should be “whether the measure sought could still be ordered by the arbitral tribunal once constituted or whether the measure, if ordered by the arbitral tribunal once constituted, would come too late to prevent the harm”. In that sense, the concept is more or less equal to the assessment made in accordance with the general conditions for interim relief in summary proceedings under Belgian (judicial) law.

18. An example can be found in a situation where one party threatens to disclose confidential information of another party to competitors or to the press. It is clear that a request for a confidentiality injunction is a measure which cannot await the constitution of the arbitral tribunal. Nevertheless, most scenarios will...


be less straightforward and in that regard it is somewhat unfortunate that no further guidance or clarification is given in the CEPANI or ICC Arbitration Rules. On the other hand, a broadly worded condition has the advantage of flexibility in its application.

19. Inspired by the 2012 ICC Arbitration Rules, neither the CEPANI Secretariat nor its President is the one assessing whether or not the urgency requirement is fulfilled. It is left to the emergency arbitrator himself to assess whether or not the requested interim relief “cannot await the constitution of the arbitral tribunal”, like a state judge would do.

4. Overview of Article 26 of the CEPANI Arbitration Rules

20. Having learned from the failure of the ICC’s pre-arbitral referee procedure due to the requirement of an express opt-in provision, the drafters of the CEPANI Arbitration Rules have made the emergency procedure in Article 26 directly available to the parties who have chosen the CEPANI Arbitration Rules. Moreover, the CEPANI Arbitration Rules (following the example of the ICC) do give the parties the possibility to opt-out of Article 26.

21. The emergency arbitration procedure is described in no less than 11 paragraphs, each of which is discussed below.

4.1. The conditions regarding the request for interim and conservatory measures (Art. 26, §§ 1-3)

22. A party can start the emergency arbitration procedure by filing a request for interim and conservatory measures with the Secretariat of CEPANI.

23. In the absence of any further specification in Article 26 on this point, the request can be filed at any time on the sole condition that the arbitral tribunal

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24 The 22nd Willem C Vis International Commercial Arbitration Moot court problem demonstrates that it is not always clear whether the parties have excluded emergency arbitration from their arbitration clause, and whether they could have done so tacitly.
has not yet been constituted. This makes emergency arbitration a pre-arbitral procedure by nature\textsuperscript{25}.

It is therefore not required to file the request for arbitration (on the merits) pursuant to Article 3 of the CEPANI Arbitration Rules \textit{prior} to the request for emergency arbitration, nor does Article 26 require that both requests should be filed \textit{simultaneously} (as the SIAC Arbitration Rules require\textsuperscript{26}). It is also possible to file an emergency arbitration request \textit{after} the request for arbitration has been filed\textsuperscript{27}. Moreover, there is no obligation to submit a request for arbitration within a certain time-frame after the Secretariat’s receipt of the emergency arbitration request, or to submit such request at all. By contrast, Article 1(6) of Appendix V of the 2012 ICC Arbitration Rules obliges a party to file an Arbitration Request within 10 days of the Secretariat’s receipt of the emergency arbitration request\textsuperscript{28}.

The supposed underlying reasoning behind Article 1(6) of Appendix V of the 2012 ICC Arbitration Rules is that this brings balance to the emergency arbitration procedure: on the one hand, the 2012 ICC Arbitration Rules provide an instrument for a party in need of interim relief. On the other hand, the requirement to file a request for arbitration within 10 days as detailed above, prevent that same party from using (a procedure in order to obtain) interim measures as a way to put undue pressure on another party without ever commencing an arbitration.

\textbf{24.} In practice, the claimant will probably start the arbitration procedure on the merits shortly after the request for interim measures, if only to maintain credibility.

Moreover, if the party requesting the appointment of an emergency arbitrator fails to start the arbitration proceedings on the merits, the other party (respondent) is likely to do so (unless that party disputes the jurisdiction of any arbitral tribunal). Lastly, the emergency arbitrator himself can decide that a request for arbitration should be filed within a certain time limit, failing which the granted emergency measures expire.

\textbf{25.} According to Article 26 (1) the request for emergency arbitration shall be made in the agreed language of the arbitration, or in the absence thereof, in the language of the arbitration agreement.

\textsuperscript{26} Schedule 1, § 1 of the 2013 SIAC Arbitration Rules.
\textsuperscript{27} D. Demeulemeester and H. Verbist, \textit{Arbitrage in de praktijk}, Brussels, Bruylant, 2013, 199, no. 602.
Theoretically, the emergency arbitrator could decide to conduct the emergency arbitration procedure and to render his decision in another language than used in the emergency request. If the later appointed arbitrators of the constituted arbitral tribunal decide to use yet another language, this could create some practical difficulties. However, the parties can always remedy this in the “Terms of Reference” in the arbitral proceedings on the merits, and specify whether it is necessary to translate documents written in another language.

26. Article 26 (3) contains a list of information which should be included in the request for emergency arbitration (which is basically the same information required in Article 1 (3) of Appendix V of the 2012 ICC Arbitration Rules). A succinct recital of the nature and circumstances of the dispute is required, together with the reasons for which the claimant requests one or more interim and conservatory measures. The arbitration agreement must be annexed to the request.

27. Similar to Article 3 (1) of the CEPANI Arbitration Rules, an adequate number of copies of the request should be filed with the Secretariat (one for the to-be-appointed emergency arbitrator, one for (each of) the other party(ies), and one for the Secretariat).

4.2. The swift appointment by the Appointments Committee or the President of CEPANI (Art. 26, § 4)

28. If the request for emergency arbitration satisfies all conditions of Article 26, §§ 1-3 of the CEPANI Arbitration Rules, the Appointments Committee or the President of CEPANI will appoint an emergency arbitrator. As indicated above, the CEPANI bodies will not decide on whether the special urgency requirement is met or not.

29. Article 26 of the CEPANI Arbitration Rules states that “in principle” (indicating that exceptions may exist) the emergency arbitrator will be appointed within two working days.

The 2012 ICC Arbitration Rules have a similar rule whereby the emergency arbitrator will be appointed “within as short a time as possible, normally within two working days”.

30 Appendix V, Art. 2(1) of the 2012 ICC Arbitration Rules.
days from the Secretariat’s receipt of the Application”. According to the 2014 LCIA Arbitration Rules an emergency arbitrator is appointed within three days\textsuperscript{31}. The 2013 SIAC Arbitration Rules\textsuperscript{32} and the 2010 SCC Arbitration Rules\textsuperscript{33} even require the appointment within one business day or twenty-four hours of receipt of the emergency application respectively.

\textbf{30.} When the emergency arbitrator has been appointed, he will receive the file from the Secretariat and subsequently inform the parties of his appointment. The Secretariat also provides the other part(ies) with a copy of the request. The procedure then becomes adversarial, so that the parties and the arbitrator must henceforth communicate while copying all parties as well as the Secretariat.

\textbf{4.3. Declaration of independence, acceptance and – paramount – availability (Art. 26, §§ 5-6)}

\textbf{31.} A prospective emergency arbitrator has to sign a declaration of independence, acceptance and availability. The latter’s importance may not be underestimated since the schedule of the emergency arbitrator must allow him to fully dedicate himself to the proceedings for a period of minimum two weeks (\textit{i.e.} based the time necessary to review the exhibits and submissions, organise a hearing, and draft a decision).

\textbf{32.} Article 26, § 6 prohibits an emergency arbitrator from acting as arbitrator in the subsequent arbitration proceedings or any other arbitration “\textit{which is related to the dispute at the origin of the Request}”\textsuperscript{34}.

\textbf{4.4. Shortened procedure for the challenge of the emergency arbitrator does not exclude the risk of dilatory actions (Art. 26, §§ 6-7)}

\textbf{33.} As any other arbitrator, an emergency arbitrator can be challenged as well. The procedure prescribed in § 7 basically reiterates the challenge procedure of Article 16 of the CEPANI Arbitration Rules, albeit with shortened time limits: the

\textsuperscript{31} Art. 9B (9.6) of the 2014 LCIA Arbitration Rules.

\textsuperscript{32} Schedule 1, § 2 of the 2013 SIAC Arbitration Rules.

\textsuperscript{33} Appendix II, Art. 4 (1) of the 2010 SCC Arbitration Rules.

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The challenge must be sent within three\textsuperscript{35} days either of receipt of the notification of the appointment of the arbitrator deciding on provisional measures by the party making the challenge, or of the date on which the said party was informed of the facts and circumstances that it relies on in support of its challenge if said facts and circumstances occur after the receipt of the above mentioned notification.

\textbf{34.} Article 26, § 7 allows the challenged emergency arbitrator and the other party(ies) to respond to the challenge. The Secretariat will impose a time limit for making such observations.

The Challenge Committee of CEPANI will then render a decision within three working days. As is also the case for challenges during the proceedings on the merits (Article 16, § 4 of the CEPANI Arbitration Rules), the Committee’s decision cannot be appealed and the reasons for its decision are not communicated.

The challenge procedure of Article 26, § 7 is similar to the procedure of Article 3 (1), Appendix V of the 2012 ICC Arbitration Rules, but the ICC rules contain no specific deadline for the ICC Court to make a decision\textsuperscript{36}.

\textbf{35.} Although the time limits of the challenge procedure have been shortened considerably, it goes without saying that in practice one or several challenge(s) of the emergency arbitrator will significantly slow down the proceedings, and will thus inevitably undermine the relevance of the interim relief urgently sought.

From the emergency arbitrator’s point of view, if his independence or impartiality is called into question after his appointment, it might be advisable for him to step down and allow CEPANI to appoint another emergency arbitrator. However, this will depend entirely on the given circumstances.

Similarly, if it is apparent that Respondent’s challenge has been made for dilatory purposes only, a pragmatic claimant might reassess its decision of pursuing interim relief through emergency arbitration proceedings and opt for state organised interim relief instead.

\textbf{36.} The possibility of a challenge, whether based on legitimate concerns or not, and the consequences thereof on the swiftness of the proceedings and the enforceability of the resulting decision, qualifies as one of the main downsides of the emergency arbitrator procedure. Although inevitable in arbitration in gen-

\textsuperscript{35} The 2010 SCC Arbitration Rules and the 2013 SIAC Arbitration Rules require a challenge being made within 24 hours or one business day respectively.

eral, this is all the more true when urgent arbitral relief is requested when compared to state courts where challenges rarely occur.

4.5. **The conduct of emergency arbitration proceedings (Art. 26, §§ 8-9)**

4.5.1. **Determining the procedural calendar**

37. Once the emergency arbitrator is appointed, he will contact the parties and set a procedural calendar within three working days of receipt of the file. There is no obligation to draw up the traditional terms of reference.

4.5.2. **Flexibility in the choice of the seat of the emergency arbitration proceedings is required**

38. The next important step is defining the seat of the emergency arbitration. The seat of the arbitration (i.e., the *locus arbitri*) will in general determine the law that applies to the arbitration proceedings (i.e., the *lex arbitri*), and the place where the award can be challenged. For the avoidance of doubt, the place or seat of arbitration is unrelated to the place where the hearings are actually held or where the award is drafted.

In general, the seat of the arbitration is determined by the parties in their arbitration agreement. If this is not the case, the place of arbitration is usually determined by the arbitral institution, or, in case of ad hoc arbitration, by the arbitral tribunal itself.

39. Most arbitration rules have specific rules on the place of arbitration in the context of emergency arbitration:

   Article 4 (1) of Appendix V of the 2012 ICC Arbitration Rules states:

   "If the parties have agreed upon the place of the arbitration, such place shall be the place of the emergency arbitrator proceedings. In the absence of such agreement, the President shall fix the place of the emergency arbitrator proceedings, without prejudice to the determination of the place of the arbitration pursuant to Article 18(1) of the Rules."

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37 A schedule is required within two business days in Schedule 1, § 5 of the 2013 SIAC Arbitration Rules and in Art. 5(1) of Appendix V of the 2012 ICC Arbitration Rules.


39 Examples: Article 21 of the 2013 CEPANI Arbitration Rules; Article 18 of the 2012 ICC Arbitration Rules. According to Article 16 of the 2014 LCIA Arbitration Rules, the seat is London, unless otherwise determined by the arbitral tribunal.

Article 5 of Appendix II of the 2010 SCC Arbitration Rules states:

“The seat of the emergency arbitration proceedings shall be that which has been agreed upon by the parties as the seat of the arbitration. If the seat of the arbitration has not been agreed by the parties, the Board shall determine the seat of the emergency proceedings.”

Article 9B, 9.13 of the 2014 LCIA Arbitration Rules refers to Article 16, i.e. the general rule on determining the seat of arbitration.

40. Article 26 of the CEPANI Arbitration Rules is, however, entirely silent on the seat of emergency arbitration. This could create uncertainty if the parties have failed to determine the place of arbitration in their arbitration agreement.

One could argue that in such case Article 21 (“place of arbitration”) as “a general rule” also applies to emergency arbitration procedures. This would imply that the Appointments Committee or the President of CEPANI determines the place of arbitration. Another possible interpretation is that it is left to the emergency arbitrator to decide this issue, similar to the 2006 UNCITRAL Model Law and the various national arbitration laws41.

41. When the parties have not chosen the seat of arbitration, then the seat of the emergency arbitration proceedings should not necessarily be identical to the seat of the arbitration proceedings on the merits42.

One can image situations in which interim relief is best sought where the measure is likely to be enforced (cf. the interim relief provisions of the Brussels I Regulation43). For instance, if a party seeking interim relief aims to have a ship kept in the docks in Spain until full payment of leasing debts, it might be practical that Spain is determined as the place of emergency arbitration. However, the seat of the arbitration proceedings on the merits could, depending on the circumstances, more fittingly be located in Brussels.

42. This is why the 2012 ICC Arbitration Rules clarify that the decision on the place of emergency arbitration is “without prejudice to the determination of the place of the arbitration pursuant to Article 18(1) of the Rules [i.e. the general rule on the seat of arbitration]”. In other words, the decision on the seat of the emergency arbitration proceedings is not binding for the subsequent arbitration proceedings on the merits.

41 Cf. footnote 40.
42 The same remark has been made under the 2012 ICC Arbitration Rules: M.W. Buhler, “L’arbitre d’urgence” in X., Le nouveau règlement d’arbitrage de la CCI, Brussels, Bruylant, 2014, 25
Therefore, should Article 21 of the CEPANI Arbitration Rules also apply in emergency arbitration, and when the parties have not previously agreed on the seat of arbitration, it is preferable to read into said Article that the Appointments Committee or the President of CEPANI deciding on the seat in the arbitration proceedings on the merits, is not bound by any previous decision on the seat of the emergency arbitration proceedings.

4.5.3. The emergency arbitrator needs a firm grip on the proceedings

43. For emergency arbitration to lead to efficient results, the emergency arbitrator should have a strong command on the proceedings in terms of setting timetables and procedural rules. Unwilling parties could otherwise all too easily affect the procedure with dilatory actions. This necessarily implies a far more limited party autonomy compared to arbitration proceedings on the merits.  

44. This will also inevitably require the emergency arbitrator to balance the parties’ respective (procedural) rights. In this regard, Article 26, § 9 of the CEPANI Arbitration Rules states that the emergency arbitrator organises the proceedings “in the manner which he deems to be the most appropriate”, while still having to conduct the proceedings “in an impartial manner” and ensuring that “each party has sufficient opportunity to present its case”. Prior consultation with the parties will therefore remain essential.

With those confines, the emergency arbitrator is allowed to impose strict deadlines for the parties’ written submissions and for the filing of evidence.

4.6. The emergency arbitrator’s decision (Art. 26, § 10)

46.1. The deadline of fifteen days to render a decision

45. Similar to the appointment of the emergency arbitrator, Article 26, § 10 of the CEPANI Arbitration Rules states that “in principle” the emergency arbitrator must render his written and reasoned decision at the latest within fifteen days of his receipt of the file. However, the emergency arbitrator should take into account the most appropriate time limit depending on the circumstances.
4.6.2. **Pitfalls surrounding the enforceability of the emergency arbitrator’s decision**

46. Much has been written on the enforceability of the emergency arbitrator’s decision(s): should the emergency decision be qualified as an order or an award? Are the decisions of the emergency arbitrator enforceable under the New York Convention and, for that matter, under the Belgian Judicial Code? This discussion has often been regarded as a weak spot in emergency arbitration and is one of the major reasons why the procedure is used so little.

Enforceability of the emergency arbitrator’s decision(s) could therefore be the subject of an entire separate Article. A detailed analysis on enforcement, however, falls outside the scope of this text, which therefore limits itself to providing an overview of the different issues at play when enforcement is sought in Belgium only.

47. Traditionally, only “final and binding awards” can be enforced under the New York Convention, and therefore mere “procedural orders” do not qualify for enforcement. As a result, it could be argued that an emergency arbitrator should qualify his decision as an “award”.

However, the importance of the form and nomenclature of an arbitral tribunal’s decision should not be overstated. In practice, courts will (or should) decide on the enforceability of an arbitral decision focusing on its content and characteristics.

48. When considering arbitral decisions ordering interim measures, it is often argued that these decisions do not resolve a dispute in a final manner, and are as a result not enforceable under the New York Convention.

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45 The 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.


However the lex arbitri could expressly allow enforcement of arbitral decisions that order interim measures, e.g.:

- Article 17H of the 2006 UNCITRAL Model Law recognises interim measures issued by an arbitral tribunal as binding and enforceable before courts; and
- Articles 1696 and 1713 of the Belgian Judicial Code allow enforcement of interim decisions (i.e. decisions “alvorens recht te doen/ avant dire droit”), and regardless of the form of the decision.

49. Enforcing arbitral decisions containing interim measures rendered by an (already constituted) arbitral tribunal is therefore not problematic in Belgium. However, in the context of emergency arbitration, enforcement of an emergency arbitrator’s decision is more complicated.

4.6.2.1. The form of the emergency arbitrator’s decision

50. Most arbitration rules are flexible on the nomenclature of the emergency arbitrator’s decision and allow the emergency arbitrator the choice between a reasoned order and an award. Similarly, Article 26 of the CEPANI Arbitration Rules gives the emergency arbitrator some flexibility and allows a decision to be made either “in the form of a reasoned Order or, if the arbitrator deciding on provisional measures deems it appropriate, in the form of an Award.”

51. The ICC is a notable exception allowing only a reasoned order. This is, however, merely due to the fact that the ICC Court is obliged to scrutinise awards, and this obligation does not exist for orders. Given the time constraints that apply in emergency arbitration proceedings, a policy decision has been made against applying this two-tiered approach.

4.6.2.2. Is the emergency arbitrator an arbitrator and his decision enforceable under the New York Convention and the Belgian Judicial Code?

52. As previously stated, interim measures ordered by an arbitral tribunal can be enforced in Belgium pursuant to Articles 1696 and 1713 of the Belgian Judicial Code.

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48 E.g. the New York Convention encourages more favourable domestic regimes cf. Article 8 (1) of the New York Convention.


The CEPANI Arbitration Rules define the emergency arbitrator as an “arbiter who shall provisionally decide on the measures urgently requested” (Article 26, § 4).

It would be an oversimplification to argue that merely because the Belgian Judicial Code allows enforcement of arbitral interim decisions, that enforcing an interim decision rendered by an emergency arbitrator is equally possible.

53. With respect to interim relief, the Articles 1691 to 1698 of the Judicial Code indeed state that the “arbitral tribunal” can order preliminary or conservatory measures which can be enforced.

However, the Belgian Judicial Code does not define an “arbitral tribunal”, nor an “emergency arbitrator”. Similar to Article 2 of the 2006 UNCITRAL Model Law, Article 1677 of the Belgian Judicial Code merely states that the term “arbitral tribunal” encompasses both a single arbitrator as well as several arbitrators.

54. Upon its conception, the “arbitral tribunal” referred to in the Belgian Judicial Code was not meant to include an emergency arbitrator as described in the CEPANI Arbitration Rules. Appointing an arbitrator in view of obtaining interim measures prior to the constitution of the arbitral tribunal is a procedure which has not been included in the Belgian Judicial Code52.

55. On the other hand, the Belgian Judicial Code attaches great importance to party autonomy and therefore allows parties to agree on the rules of the arbitral procedure, including on the appointment of their (emergency) arbitrator(s)53.

One can say that by adopting the CEPANI Arbitration Rules, the parties have contractually agreed to rely on an emergency arbitrator if necessary, so that his decisions ought to be enforceable under the Belgian Judicial Code.

Similarly, the drafters of the CEPANI Arbitration Rules also anticipated the enforcement of the emergency decision under the Belgian Judicial Code. Article 26’s requirement of a reasoned order or award for the emergency decision aligns with Article 1696 of the Belgian Judicial Code: regardless of the form, the decision should always mention the reasons why interim relief is (not) granted54.

52 D. De Meulemeester and H. Verbist, Arbitrage in de praktijk, Brussels, Bruylant, 2013, 198, no. 599.


56. It is noteworthy that some countries have adjusted their arbitration acts in order to align them with emergency arbitration practice. Since and as long as this is not the case for the arbitration law in the Belgian Judicial Code, questions can be raised whether the emergency arbitrator is a real arbitrator within said law and whether his decisions can be enforced pursuant to the Belgian Judicial Code. Indeed, if the seat of the arbitration is located in Belgium, it could be argued that the emergency arbitrator and thus the order/award by which he has ordered interim relief, lacks standing under the Belgian Judicial Code (i.e. the law governing the arbitration).

57. The New York Convention does not provide a clear cut answer either. Article 1 (1) of the New York Convention states the following: “This Convention shall apply to the recognition and enforcement of arbitral awards [...]”. It thus puts emphasis on whether the decision is a final and binding arbitral award rather than on whether the decision has been rendered by an “arbitrator”. This brings us full circle with our comments under numbers 47 above.

58. In any case, the Belgian courts will eventually decide on the enforcement or challenge of the emergency arbitrator’s decision, and thus whether the appointment of the emergency arbitrator and/or his decision is recognised and/or enforced under the New York Convention and under the Belgian Judicial Code.

4.6.2.3. Does enforcement really matter that much in practice?

59. Notwithstanding the above, the issue of enforceability might not be of such paramount importance as certain authors have made it out to be, when looked at pragmatically.

60. It is true that enforcement of pre-arbitral interim measures certainly has disadvantages compared to court ordered interim relief, which is enforceable by a bailiff’s service upon being rendered. If a party does not voluntarily comply with the emergency arbitrator’s decision, the claimant is dependent on state courts for the enforcement thereof. Especially in case of urgent measures, the potential
time-lapse could rightly be considered as a serious jeopardy to the effectiveness of the pre-arbitral emergency decision. Put differently: if a party needs to rely on state courts anyway, why even bother appointing an emergency arbitrator?

61. On the other hand, an arbitral tribunal deciding on the merits will probably not sympathise with a party that did not voluntarily act in accordance with the emergency arbitrator’s decision. Although it can strategically make sense not to cooperate during the (emergency arbitration) procedure, the party that decides to follow that route is taking a considerable risk.

62. Therefore, often the issue of enforceability will not present itself. However, the voluntary compliance that this presupposes, should not be taken for granted when major interests are at stake.

4.7. The arbitral tribunal is not bound by the emergency arbitrator’s decision

63. When the emergency arbitrator has rendered his decision, the procedure envisaged in Article 26 of the CEPANI Arbitration Rules comes to an end. However, as long as the arbitral tribunal has not yet been constituted, the emergency arbitrator can, upon request of one of the parties, still modify or retract his decision, depending on the (changed) circumstances.

64. As stated above, the decision is only preliminary. The arbitral tribunal deciding on the merits is therefore not bound by what the emergency arbitrator has decided, and can modify, retract or confirm the ordered interim measures in a subsequent arbitral decision.

4.8. The immediate payment of the costs (Art. 26, § 11 and Schedule I (7))

65. A party who seeks interim relief from an emergency arbitrator must pay EUR 15,000 at the time of filing the request for emergency measures. This


61 D. De Meulemeester and H. Verbiest, Arbitrage in de praktijk, Brussels, Bruylant, 2013, 206, no. 625.
amount covers both the arbitrator’s fees and the administrative expenses of CEPANI (EUR 3,000).

66. The costs are governed by Article 7 of Schedule I of the CEPANI Arbitration Rules. Curiously, the Dutch and French version of Article 7 of Schedule I of the CEPANI Arbitration Rules explicitly refer to Article 26 when determining the costs for the party requesting the interim and conservatory measures, whereas the English version of the CEPANI Arbitration Rules does not contain this reference.

67. In his decision, the emergency arbitrator will indicate which party has to pay the costs or how the costs should be divided between the parties. This too can be overruled by the arbitral tribunal in a subsequent award.

5. Conclusion

68. It is said that arbitral institutions were naïve when drafting their emergency arbitration rules, and that their assumption of voluntarily compliance with the emergency arbitrator’s decision creates legal uncertainty. Many consider emergency arbitration as a theoretical concept which will never be used in practice and which will never avoid parties claiming interim relief before state courts.

69. Practice has indeed shown that emergency arbitration is only used on very few occasions. Many claim that arbitration is not the appropriate venue to claim interim measures and that (even during arbitral proceedings) interim relief should be sought where it can be easily enforced, being before state courts. If interim relief becomes necessary at a time when no arbitral tribunal is yet in place, it is argued even more vigorously that one should go to state courts instead of appointing an emergency arbitrator with all its accompanying procedural pitfalls.

70. In the author’s opinion, these comments are true in a great number of cases. However, it should be acknowledged that emergency arbitration was not conceived as a replacement for state organised interim relief, nor should parties in favour of arbitration at all times appoint an emergency arbitrator to obtain interim relief when no arbitral tribunal is yet in place.

62 D. De Meulemeester and H. Verbiest, Arbitrage in de praktijk, Brussels, Bruylant, 2013, 206, no. 624.
The ICC acknowledges this in its 2012 ICC Commission Report on Controlling Time and Costs in Arbitration:\textsuperscript{64} “In deciding whether to file an Application for Emergency Measures, a party should consider a number of issues: first, whether it is genuinely useful and necessary to spend time and money on seeking to obtain interim or conservatory measures; second whether an application for Emergency Measures under the Rules is preferable to seeking interim measures in a state court.” The state court reflex for obtaining interim measures should therefore not be abandoned.

71. However, emergency arbitration should be recognised and appreciated for what it is and for what it is made for, namely an additional and useful instrument when obtaining interim relief before a state court is, simply stated, not a viable option for one (or both) of the parties. Admittedly, these instances rarely occur, but they exist. Amongst other scenarios, emergency arbitration should be used if a party is heavily concerned with confidentiality (e.g. when operating in a small market with few players), when state courts are unreliable because the opponent has strong ties with that country or is even partly state-owned, or when considerable bonds should be paid by foreign parties before they can claim interim measures before court. As referred to earlier, also in multi-jurisdictional cases, one single emergency arbitration procedure offers a clear advantage above a multitude of state court proceedings.

72. With this important consideration in mind, emergency arbitration can be regarded as a more than welcome and necessary addition to the CEPANI Arbitration Rules.

\textsuperscript{64} 2012 ICC Commission Report on Controlling Time and Costs in Arbitration, 16 (no. 88).