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## Emergency Arbitrator: A New Player In The Field - The French Perspective

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# EMERGENCY ARBITRATOR: A NEW PLAYER IN THE FIELD - THE FRENCH PERSPECTIVE

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### *INTRODUCTION*

Obtaining interim measures<sup>1</sup> swiftly and effectively is frequently of paramount importance for parties in international arbitration. Interim measures can be crucial in ensuring the ultimate satisfaction of a judgment or final award<sup>2</sup>. Now they can sometimes to be ordered

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1. In this article, the term “interim measures” refers to all interim, precautionary, and conservatory measures, as well as measures of protection and injunctions.

2. Ali Yesilirmak, *Interim and Conservatory measures in ICC Arbitral Practice*, 11 ICC INT’L CT. ARB. BBB. 31, no. 1, (Spring 2000).

at the outset of a case, before the arbitral tribunal hearing the merits is even constituted.

Under most arbitral institution rules, it takes time to establish an arbitral tribunal. During that time, irreparable harm to a party may occur. Time is therefore of the essence, and for many years international arbitration was ill-equipped to address such situations, forcing the parties to request interim measures before the very state courts that they had chosen to avoid. International arbitration, in its continuous search for efficiency and responsiveness to user needs, has proven very dynamic and undergone substantial changes thereby ensuring the effectiveness and perennial use of arbitration as a method for settling commercial disputes. Most recently, arbitral institutions have introduced a new player in the field to respond to the temporal need of parties for interim measures before the constitution of the arbitral tribunal: the emergency arbitrator.

Albeit welcomed by the international arbitration comments, it remains to be seen how local laws will receive this new player in the field and how it will compare in terms of efficiency with state court orders for interim relief. In France, given the uncertainty surrounding the direct enforceability of an emergency arbitrator's decision and the relative efficiency of French courts, it is likely that state courts will be, in most situations, the natural forum for requesting interim measures. Emergency arbitration however is a powerful tool that responds to a market demand and its efficiency transcends local jurisdictional orders.

While state courts may remain a preferred forum for seeking pre-arbitral interim relief, their non-exclusive role in this matter creates the opportunity for the emergency arbitrator procedures. It becomes increasingly clear that emergency arbitrator procedures will become a widely used alternative and an efficient tool for obtaining urgent interim relief within the critical period of time prior to the constitution of the arbitral tribunal.

#### *I. THE NON-EXCLUSIVE ROLE OF STATE COURTS LEAVES ROOM FOR THE EMERGENCY ARBITRATOR PROCEDURE.*

With the emergence of emergency arbitration procedures, the preference for state courts results from a choice based on various considerations largely depending on an evaluation of all the surrounding facts and circumstances of a particular situation. At first

glance, access to a state court is more readily available and remains in most jurisdictions a forum concurrent to that of the emergency arbitrator.

*A. The access to emergency arbitrator procedure has limiting factors*

Access to emergency arbitrator procedures may be limited in several respects while a court's intervention is readily available and is not contingent upon or subject to the parties' agreement. While a motion for interim or conservatory relief may be filed in court as long as the criteria for jurisdiction and venue are met, the emergency arbitrator procedure requires that the parties agree to such procedure.

Emergency arbitrator procedures are now integrated in the arbitration rules of most institutions and apply automatically by mere reference thereto.<sup>3</sup> However, parties may be reluctant to assign the emergency arbitrator with important decisional powers, which may be used for abusive and purely tactical reasons, and may elect to "opt-out" of the system offered by the arbitration rules.<sup>4</sup> This is all the more true as there is little guidance regarding the remedies that can be granted by the emergency arbitrator or as to what standards it shall apply. They may feel that there is no legal certainty regarding the expected outcome of the application compared to what they would obtain in court. The costs of the emergency arbitrator proceedings may appear quite onerous in some jurisdictions, and as will be discussed below, the decision, whether it is labeled as an award or an order, may not be immediately enforceable in situations where the timing for obtaining the measure is critical to the success of the operation.

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3. See Andrea Carlevaris & José Ricardo Ferris, *Running in the ICC Emergency Arbitrator Rules: the First Ten Cases*, 25 ICC Int'l Ct. Arb. BULL. 27, no. 1, (2014) (explaining that the ICC Rules For Pre Arbitral Referee Procedure (1990) were conceived as a system autonomous from the arbitration rules and that their limited commercial success may be partially explained by their "opt-in" nature, i.e., they had to be specifically agreed upon by the parties in order to apply; see also *id.* (highlighting that they nevertheless opened the door to various other initiatives for procedures integrated in the arbitration rules as NIA (2001), ICDR (2006); SCC (2010) or ICC (2012); *id.* (quoting the ICC, which in 2013 reported that "in 24 years of existence only 14 pre-arbitral referee cases have been filed with ICC").

4. INT'L CHAMBER OF COMMERCE, ICC RULES OF ARBITRATION (2012) [hereinafter ICC RULES] at art. 29(6), [http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article\\_29](http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_29) (proposing for that purpose to add to the Standard ICC Arbitration Clause that "the Emergency Arbitrator Provisions shall not apply.").

In addition, precisely because of the contractual aspect of the procedure, emergency arbitrators, like arbitrators, cannot make orders against third parties.<sup>5</sup> Court-ordered interim measures may be directed towards third parties. In this regard, the ICC Rules (2012) adopted a rather strict position, stating that the “*Emergency Arbitrator Provisions’ shall apply only to Parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories*”.<sup>6</sup> Although this limitation was made to prevent any party from being drawn into emergency arbitrator proceedings without having clearly agreed to arbitration and to exclude the application of the emergency arbitrator provisions to treaty based arbitration,<sup>7</sup> it also defeats French law’s liberal approach concerning the extension of the arbitration agreement to non-signatories. As an example, depending on the circumstances, a contractual arbitration clause may be found to bind parties, which were involved in the negotiation of the contract.<sup>8</sup> Any argument that non-signatories are nevertheless bound by the arbitration agreement submitted to French law is more likely to fail before the emergency arbitrator and will have to wait until the arbitral tribunal is constituted. The ICC reports, however, that among the first ten applications for urgent interim or conservatory measure filed under the 2012 arbitration rules, six “*were made in multiparty cases and one was made in a multi-contract case involving four related containing different but compatible arbitration agreements*.”<sup>9</sup>

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5. *Dutch v. Cypriot*, 064/2010, Stockholm Chamber of Commerce (2010), [http://www.sccinstitute.com/media/29995/scc-practice-2010-2013-emergency-arbitrator\\_final.pdf](http://www.sccinstitute.com/media/29995/scc-practice-2010-2013-emergency-arbitrator_final.pdf) (pursuant to the 2010 SCC Arbitration Rules, the emergency arbitrator found that it had jurisdiction over the request for an injunction with respect to the Respondent only but not to the extent the requests related to others than the Respondent, as two different companies and individual and the company registrar).

6. ICC RULES, *supra* note 4, at 29(5).

7. Nathalie Voser & Christopher Boog, Special Supplement, *ICC Emergency Arbitrator Proceedings: an Overview*, 22 ICC INT’L CT ARB. BBRA. 85 (2011).

8. See *Gouvernement du Pakistan v. Societe Dallah Real Estate & Tourism Holding Co.*, Court D’Appell [CA][regional court of Appeal] Paris, Feb. 7, 2011, 09/28533; See also *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 (SC) (providing a striking example because both proceeding regarded the cancellation of the same arbitral award and both applied French law, but they reached opposite results in their analysis of the common intention of the parties to submit to arbitration.)

9. Carlevaris & Ferris, *supra* note 3, at 28.

*B. The emergency arbitrator procedure is not exclusive of that of the national courts*

Where the parties have agreed to submit to emergency arbitrator proceedings, unless there is an express provision to the contrary, such consent does not bar access to state courts. Unless the parties have agreed otherwise, emergency arbitrator procedures are not carved out as an exclusive remedy and do not operate as a waiver of the courts' authority over interim and conservatory measures.<sup>10</sup> In most cases, state courts and the emergency arbitrator have concurrent jurisdiction.<sup>11</sup> When choosing between applying to state courts or to emergency arbitrator for interim relief, state courts should remain in most instances the more natural choice of the parties as they are more likely able to deliver within a reasonable period of time and at a reasonable cost an immediately enforceable decision.

Under French law, courts have jurisdiction to hear applications for interim or conservatory measures only before the arbitral tribunal is constituted, which occurs "upon the arbitrators' acceptance of their mandate,"<sup>12</sup> or with leave of the arbitral tribunal. Filing an application with a court for interim or conservatory measures before the constitution of the arbitral tribunal is not regarded as a breach or a waiver of the arbitration agreement.<sup>13</sup> As with similar provisions of

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10. ICC RULES, *supra* note 4, at 29(7); ARB. INST. OF STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION RULES (2010) [hereinafter SCC RULES] at art. 32(5), [http://www.sccinstitute.com/media/40120/arbitrationrules\\_eng\\_webbversion.pdf](http://www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf); LONDON COURT OF INT'L ARB., LCIA ARBITRATION RULES (Oct. 1, 2014) [hereinafter LCIA RULES], at art. 9(12), [http://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx); HONG KONG INT'L ARB. CENTER, ADMINISTERED ARBITRATION RULES (2013) [hereinafter HKIAC RULES], at sched. 4(22), [http://hkiac.org/sites/default/files/ck\\_filebrowser/PDF/arbitration/2013\\_hkiac\\_rules.pdf](http://hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2013_hkiac_rules.pdf); INT'L CENTER FOR DISPUTE RESOLUTION, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES: INTERNATIONAL ARBITRATION RULES (2014) [hereinafter ICDR RULES], at art. 6(7), <https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased>.

11. English Arbitration Act 1996, c. 23, §44(5) (Eng.) (providing that the English courts will grant an order in support of arbitration "if or to the extent that the arbitral tribunal, and any arbitral and other institution or person vested by the parties with powers in that regard, has no power or is unable for the time being to act effectively.")

12. CODE DE PROCEDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1456 (Fr.) ("The constitution of an arbitral tribunal shall be complete upon the arbitrators' acceptance of their mandate. As of that date, the tribunal is seized of the dispute.")

13. *Id.* art. 1449 ("the existence of an arbitration agreement insofar as the arbitral tribunal has not yet been constituted shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures.")

arbitration rules with other institutions, this is consistent with Article 29(7) of the ICC Rules (2012), which provide:

[t]he Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, . . . Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement.<sup>14</sup>

What constitutes “appropriate circumstances” will have to be determined by the courts ruling upon an application for interim relief.

French law follows a strict court-subsidiary approach, which is reflected in the specific provisions regarding pre-arbitral, interim, or conservatory relief of Article 1449 of the French New Code of Civil Procedure. This provision deals with the issue of whether the negative effect of the “competence-competence” principle extends to pre-arbitral interim and conservatory measures. In line with established case law, it provides that before the constitution of the arbitral tribunal, the parties may apply to courts in order to seek measures for the taking of evidence in accordance with the provisions of Article 145 of the French New Code of Civil Procedure<sup>15</sup> and, where the matter is urgent, interim and conservatory measures. As a result, if challenged on the basis of an arbitration agreement, French courts will decline jurisdiction on an application seeking an interim or conservatory measure every time the urgency requirement is not met even if such a condition is not usually required by the rules of civil procedure.

In situations, where property or the environment face an immediate threat and measures have to be taken to prevent the situation from either occurring or worsening, the period of time necessary to take care of the situation is limited and hardly flexible. Time is thus critical as a recalcitrant party can take advantage of the timing issue to move assets, cease supply of essential goods, disclose information or alter the situation in such a manner that the award cannot provide a full remedy. Occasionally, state courts may impose

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14. ICC RULES, *supra* note 4, at art. 29(7); *accord* SCC RULES, *supra* note 10, at art. 32(5); ICDR RULES, *supra* note 10, at art. 6(7); LCIA RULES, *supra* note 10, at art. 9(12); HKIAC RULES, *supra* note 10, at sched. 4(22).

15. CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 145 (Fr.).



coercive penalties. As will be discussed below, there are doubts as to whether the emergency arbitrator has such a power. Where the element of surprise is vital to the success of an interim measure, rules of civil procedure in most jurisdictions provide for the possibility to file *ex parte* applications, an opportunity which, neither most of the arbitration rules providing for emergency arbitrator procedures nor, more generally, arbitration laws, offer. On rare occasions, arbitral tribunals have accepted *ex parte* applications for interim measures and issued a preliminary temporary order in that respect for the limited period of time until the application is heard. This would not be possible under the ICC emergency arbitrator provisions as, pursuant to the Emergency Arbitrator Rules, the secretariat is required to notify the responding party of the application.<sup>16</sup> The ICC reports that in one case the applicant requested that the emergency arbitrator be appointed without giving notice to the responding party. Once the president of the ICC International Court of Arbitration had decided that the application should start, the secretariat notified the application after informing the applicant that it would do so.<sup>17</sup>

Thus, in truly urgent circumstances, prevention of irreversible conduct by the opposing party could require that a party proceed before state courts rather than before the emergency arbitrator. Article 1449 of the French New Code of Civil Procedure would not prevent a party from seeking interim or conservatory relief *ex-parte*, or when the measure would impact a third party<sup>18</sup> or, as will be seen below, an interim measure which is of the kind that is exclusively reserved for French courts. Unlike the decision of the emergency arbitrator, irrespective of whether it takes the form of an award or an order, French court orders in summary proceedings are immediately enforceable upon notification notwithstanding an appeal.<sup>19</sup>

## *II. THE EMERGENCY ARBITRATOR: A NEW PLAYER IN THE FIELD*

The emergence of emergency arbitration procedures is a response to market demand. Although the status and powers of the emergency arbitrator remain uncertain in several jurisdictions, it

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16. ICC RULES, *supra* note 4, at app. V, art. 2(3).

17. Carlevaris & Ferris, *supra* note 3, at 25.

18. Eric A. Schwartz, *The New French Arbitration Decree: The Arbitral Procedure*, 2 CAHIERS DE L'ARBITRAGE, 349 (2011).

19. CODE DE PROCEDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. (Fr.).

meets many practical needs. It has been demonstrated to be the only realistic way of seeking and obtaining interim or conservatory relief in various situations.

*A. The uncertainty as to the status of and the powers assigned to the emergency arbitrator*

There is no provision in the French New Code of Civil Procedure and more generally in French arbitration law expressly referring to emergency arbitrator or the emergency arbitrator procedures. As a result, French law contains no express prohibition or limit on emergency arbitrator's powers when issuing an order for interim or conservatory measures and leaves room for the application of emergency arbitrator proceedings as set forth in the arbitration rules.<sup>20</sup> It is clear, however, that the emergency arbitrator would not have more power than that of an arbitrator and would not be in a position to order conservatory attachments or judicial securities which, pursuant to Article 1468 of the French New Code of Civil Procedure, remain within the exclusive jurisdiction of the French courts.

On its face, Article 1468 of the French New Code of Civil Procedure<sup>21</sup> strictly applies to the arbitral tribunal and not to the emergency arbitrator and it is questionable whether emergency arbitrator procedures fall within the scope of the arbitration law and whether the emergency arbitrator is or is not an arbitrator. As will be discussed below, various opinions have emerged in this regard, some expressing the view that the emergency arbitrator is an arbitrator,<sup>22</sup> others considering that emergency arbitrator procedures are a mere pre-arbitration mechanism similar to that of a dispute board or a

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20. For examples of limits on emergency arbitrator authority see ICC RULES, *supra* note 4, at art. 29, app. V, art. 2(4)-(6), 5, 6; SCC RULES, *supra* note 10, at app. II, art. 4(4), 8; HKIAC RULES, *supra* note 10, at sched. 4, ¶¶ 8, 14-18, 21, 23, 24; SINGAPORE INT'L ARB. CENTER, SIAC RULES 2016 (2016), <http://siac.org.sg/our-rules/rules/siac-rules-2016> [hereinafter SIAC RULES] at sched. 1; ICDR RULES, *supra* note 10, at art.6; LCIA RULES, *supra* note 10, at art. 9B.

21. French New Code of Civil Procedure, art. 1468 (Fr.) (“the arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set the conditions for such measures and if necessary, attach penalties to such orders. However, only courts may order conservatory attachments or judicial security. The arbitral tribunal has the power to amend or add to any provisional or conservatory measure that it has granted.”).

22. Pierre Mayer, *Référé pré-arbitral CCI*, in JOURNAL DU DROIT INTERNATIONAL (2004).

multi-tiered dispute resolution clause.<sup>23</sup> In this context, the emergency arbitrator procedure is rather an opportunity offered prior to arbitration and the emergency arbitrator may only be seen as an expert or a third-party adjudicator depending on the task assigned to it by the parties and the arbitration rules. It is, however, arguable that Article 1468 applies by analogy to the emergency arbitrator as a result of the parties' intent to vest the emergency arbitrator with the same powers as an arbitral tribunal granting an interim or conservatory relief.<sup>24</sup> In any event, irrespective of whether the emergency arbitrator is, or is not, an arbitrator, full effect should be given to the provisions of the arbitration rules as the expression of the parties' intent and it is therefore reasonable to assume that the emergency arbitrator has the same powers as an arbitrator pursuant to Article 1468 of the French New Code of Civil Procedure. Based on this assumption, except for those reliefs which are exclusively reserved for French courts, an emergency arbitrator acting in France may grant interim reliefs which are not of the kind provided for by the French rules of civil procedure and which are provided by a foreign applicable law. It should have the power to order: (i) an injunctive relief or restitution which is urgently needed to prevent either an immediate injury or an irreparable harm in order to safeguard any of the parties' rights or property; (ii) a party to make a payment; (iii) a party to take any step which ought to be taken pursuant to a contract between the parties, including the signing or delivery of any document or the procurement by a party of the signature or delivery of a document, and (iv) any measure needed to preserve or establish evidence.

In line with well-established case law, Article 1468 of the French New Code of Civil Procedure expressly grants the arbitral tribunal with the power to impose penalties for non-compliance with its order<sup>25</sup> although it is not in a position to cause those penalties to be paid. Whether such power also rests with the emergency arbitrator

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23. Charles Jarroson, *Note Cour d'Appel de Paris (1<sup>er</sup> Ch. C), Société nationale des pétroles du Congo et République du Congo c/ société Total Fina Elf E & P Congo*, 2003 REV. ARB. 1299.

24. Voser & Boog, *supra* note 7, at 86.

25. CODE DE PROCÉDURE CIVILE [C.P.C] [CIVIL PROCEDURE CODE] 1468 (Fr.) ("The arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set conditions for such measures and, if necessary, attach penalties to such order. However, only courts may order conservatory attachment and judicial security. The arbitral tribunal has the power to amend or add to any provisional or conservatory measure that it has granted.")

may be questioned and may depend on its characterization as an arbitrator and on the jurisdictional nature of the order since “imposing penalties constitute [...] the jurisdictional function inherent and necessary continuation in order to ensure a better efficiency of the jurisdictional power.”<sup>26</sup>

*B. The emergency arbitrator: a neutral and more flexible forum*

In many instances and for all the reasons that lead the parties to choose arbitration in the first instance, applying to a specific national court would appear unattractive. Seeking relief before an emergency arbitrator may be of particular interest depending on the surrounding circumstances of a particular case and on the respective expectations of the parties.

Emergency arbitrator proceedings are more likely to ensure that confidentiality is maintained than a debate in open court. However, it would be sensible for the parties to expressly provide for a confidentiality obligation in this regard as it is not certain that a confidentiality provision inserted in the arbitration agreement would extend to the emergency arbitrator procedure. This is all the 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.

In certain situations, there is no possibility of applying to a national court for interim relief. This may be because no national court would exercise jurisdiction over the parties or the subject matter of the dispute or because the measure sought needs to produce its effects over several jurisdictions. For example, a French court would not appoint an expert for the preservation of evidence in relation to an accident that occurred in the open sea when it does not have jurisdiction over the merits of the dispute.<sup>27</sup>

The neutrality and quality of some courts located in a specific forum may also be of significant concern. The issue is of the utmost importance if the respondent is a state or a state-related entity connected to the state where the court in question is located. Parties

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26. Paris Courts of Appeal, 7, 2007, *Sté Otor Participations v. SARL Carlyle*, Juris-Data n° 2004-262342, REV. ARB. 2004. 982; D. 2005. Pan. 3062, obs. Th. Clay; JDI 2005. 341, note Mourre et P. Pedone; JCP 2005. I. 134, obs. Ortscheidt.

27. Cass. civ. 1e, Apr. 7, 1998, Rev. Crit. DIP 1998. 459, note Muir Watt (on file with author).

should also consider applying for emergency arbitration when the court's independence may be questioned and when the only national court with jurisdiction for granting the relief sought has a reputation for partiality or inefficiency. Another element to consider is that of the state court's accessibility. Some courts are encumbered and backlogged with heavy caseloads and may not be reactive enough or offer the possibility for a long hearing. State courts may not have judges that are specialized in the field covering the subject matter of the dispute. In contrast, emergency arbitrator procedures offer the possibility to appoint an emergency arbitrator whose qualifications meet the needs of the parties. Further, most arbitration rules require that the emergency arbitrator be "available" for the entire duration of the procedure, providing a guarantee as to the attention that will be dedicated to the case and more generally as to the quality of the service provided.

Finally, while national courts must operate within the rigid framework of their civil procedural laws that list the kind of relief available and the standards applicable, nothing of the sort is found in the arbitration rules of most institutions. The emergency arbitrator provisions do not define the type of measures that can be ordered nor the criteria that should be applied and it is for the arbitral tribunal to determine the test it deems appropriate in the particular circumstances of the case. In so doing, absent an agreement of the parties, it will take account of any provision regarding interim relief provided for in the law of the place of arbitration or refer to Article 17A of the UNCITRAL Model law as amended in 2006 which is the basis of several national laws. As noted above, French law follows the same trend. Except for conservatory attachments and judicial securities which remain within the exclusive jurisdiction of French courts, the arbitral tribunal (and by analogy the emergency arbitrator), has a wide discretion to order "*the measures it deems appropriate*" and "*set the conditions for such measures.*"<sup>28</sup> In this context, although the standards elaborated by arbitral tribunals are not binding upon another tribunal, they serve as guidance in subsequent cases and are a source of predictability for the parties.<sup>29</sup> Against this background, emergency arbitrator procedure may be of a particular interest or can

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28. See CODE DE PROCÉDURE CIVILE [C.P.C] [CIVIL PROCEDURE CODE] 1468 (Fr.) at n.24.

29. Ali Yesilimak, *Interim and Conservatory Measures in ICC Arbitral Practice, 1999-2008*, Special Supplement, 22 ICC INT'L CT. ARB. BULL., 5, 6 (2011).

be used in the context of an ongoing contractual relationship or to lead the parties to a settlement.

*III. ALTHOUGH DOUBTS REMAIN AS TO THE ENFORCEABILITY OF EMERGENCY ARBITRATOR'S DECISIONS, EMERGENCY ARBITRATION REMAINS AN EFFICIENT TOOL*

As we have seen, the emergency arbitrator proceedings respond to market demand and most particularly to the parties' temporal need to obtain urgent interim relief before the constitution of the arbitral tribunal.

In our mind, there is no doubt that the emergency arbitrator can fill that gap alongside state courts which might remain, in some cases, the natural venue for requesting interim or conservatory relief. A number of authors however have raised concerns as to the enforceability of the decision of the emergency arbitrator, casting doubts as to the efficiency and usefulness of this new tool in the arbitration toolkit.

Although some questions arise under French law as to the nature of the decision rendered by the emergency arbitrator and hence as to its enforceability, we submit that the enforceability of the emergency arbitrator's decision might be more of a rhetorical than a practical question. Whether of a contractual or jurisdictional nature it is the better view that the decision of the emergency arbitrator is effective in France and beyond.

Further, experience seems to show that there is a high incidence of voluntary compliance with emergency Arbitrator's decisions as parties fear irritating the arbitral tribunal on the merits and incurring damages for non-compliance with an emergency arbitrator's decision. The discussion below will attempt to successively address these issues.

*A. Enforceability of the Emergency Arbitrator's Decision: The Wrong Debate*

As the availability of an emergency arbitrator has become more prevalent, concerns about the form and enforceability of emergency arbitrator's decisions have been of considerable interest and debate. What if the new player in the field is only a fad whose efficacy is almost null or yet to be proven? Numerous commentators have

warned the users of such risk<sup>30</sup> and institutions have not tried to hide the obvious. As pointed out by Gary Born, “the enforcement of tribunal-ordered provisional relief has given rise to significant uncertainties...”<sup>31</sup> especially due to the ambiguity surrounding the characterization of such measures.<sup>32</sup> Echoing such statement, members of the ICC Rules drafting committee explained that emergency measures are not enforceable under the New York Convention considering that they do not qualify as an “award” within the meaning of Article I(1) of the Convention.<sup>33</sup>

The nature of the emergency arbitrator’s decisions has not been the only source of debate in the international arbitral community. In France, concerns have arisen as to the legal status of the emergency arbitrator as an “arbitrator” or a third-party expert. The debate has also centered on the nature of its mandate, contractual or jurisdictional and on the impact (if any) of the form of the emergency arbitrator’s decision – as an award or an order – on enforceability.<sup>34</sup>

These debates, albeit fascinating, are more rhetorical than practical. The increasing use of emergency arbitrator proceedings worldwide<sup>35</sup> shows that enforceability of the emergency arbitrator’s

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30. GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2019 (2d ed. 2009). See Raymond J. Werbicki, *Arbitral Interim Measure: Fact or Fiction?*, in *AAA HANDBOOK ON INTERNATIONAL ARBITRATION & ADR* 91-92 (2010); James Hosking & Erin Valentine, *Pre-Arbitral Emergency Measures of Protection: New Tools For an Old Problem*, in *COMMERCIAL ARBITRATION 2011: NEW DEVELOPMENTS AND STRATEGIES FOR EFFICIENT, COST-EFFECTIVE DISPUTE RESOLUTION* 199 (2011); Mark Bravin et al, *The National Court Powers to Order Interim Measures or to Enforce Orders Made by Arbitral Tribunals*, in *INTERIM AND EMERGENCY RELIEF IN INTERNATIONAL ARBITRATION*, INTERNATIONAL LAW INSTITUTE 145-65 (2015); Mika Savola, *Interim Measures and Emergency Arbitrator Proceedings*, in *PRESENTATION AT THE 23<sup>RD</sup> CROATIAN ARBITRATION DAYS: ACCESS TO ARBITRAL JUSTICE* 13 (2015).

31. BORN, *supra* note 30, at 2019.

32. *Id.*

33. Voser & Boog, *supra* note 7, at 86 (“Whether an emergency arbitrator’s Order is enforceable in a state court is a question governed not by the ICC Rules but by the law at the place of enforcement. Generally speaking, Emergency Measures are not enforceable under the New York Convention because they do not qualify as an « award » within the meaning of Article I(1) of the Convention.”).

34. See Mayer, *supra* note 22; Thomas Clay, *La première application du référé pré-arbitral de la CCI*, in *RECUEIL DALLOZ* (2003); Jarrosson, *supra* note 23, at 1299; Alexis Mourre, *Référé pré-arbitral de la CCI: to be or not to be a judge...*, in *GAZETTE DU PALAIS* 5 (2003); Denis Bensaude, *L’utilité de développer une procédure arbitrale permettant d’obtenir certaines mesures provisoires ou conservatoires à côté des possibilités offertes par les juridictions ordinaires: l’exemple du Référé Pré-arbitral de la CCI*, in *INTERNATIONAL LAW FORUM DU DROIT INTERNATIONAL* 33 (2005).

35. In total, ICC (2016): 50; HKIAC: 6.

decision is not the determinative factor for its use. The emergency arbitrator seems to work as a self-contained efficient and binding tool that would benefit from the support of the French courts. We will explore the reasons behind the emergency arbitrator's success after delving into the French debate around the enforceability of emergency arbitrator's decisions.

### 1. The Enforceability of an Emergency Arbitration's Decision in France is Unlikely

The doubts that have been expressed regarding emergency arbitration<sup>36</sup> arise mainly out of the uncertainty regarding the enforceability of the decisions of the emergency arbitrator and the potential hurdle in freely enforcing them, only subject to limited defenses, under any contracting state of the New York Convention.

Such doubts are justified in France where the enforceability of an emergency arbitrator's decision is at best unsettled and could most likely be obtained only indirectly. Yet, as will be seen below, irrespective of the possibility of enforcing an emergency arbitrator's decision under French law, effective mechanisms allow parties to give the new player in the field its power and ensure compliance with the emergency arbitrator's decision.

### 2. The Contractual Nature of the Pre-Arbitral Referee's (and hence of the Emergency Arbitrator) Mandate is Disputed Under French Law

In the context of the ICC Pre-arbitral Referee Rules then in effect, the Paris Court of Appeal<sup>37</sup> in 2003 rendered a decision that, if extended to the emergency arbitrator, would characterize its powers as contractual in nature. Consistent with that reasoning, the emergency arbitrator's role would be that of a third-party adjudicator whose decision the parties have committed to abide by, not that of an arbitrator.

Following a pre-arbitral referee order for interim relief, *Société Nationale des Pétroles du Congo* and the Republic of Congo attempted to set aside the order before the Paris Court of Appeal. *Société Nationale des Pétroles du Congo* and the Republic of Congo

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36. See BORN, *supra* note 30, at 2019-20; Savola, *supra* note 30, at 13; Werbicki, *supra* note 30, at 91-92; Hosking & Valentine, *supra* note 30, at 199.

37. See Emmanuel Gaillard & Philippe Pinsolle, *The ICC Pre-Arbitral Referee: First Practical Experiences*, 20 ARB. INT'L 13, 32-37 (2004).



argued that the decision of the referee was an award, hence capable to be set aside, rendered by a referee with jurisdictional powers to decide on an issue.<sup>38</sup> TEP Congo opposed the application to set aside the order arguing that orders rendered under the pre-arbitral referee rules were not arbitral awards as they are not final.<sup>39</sup> The Paris Court of Appeal was to decide on the admissibility of the action to set aside. As under French law, only awards can be set aside, the Paris Court of Appeal had to decide upon the jurisdictional nature of the emergency decision.

The Paris Court of Appeal held that an action to set aside the order issued by the pre-arbitral referee was not admissible because the order had been rendered according to a “contractual mechanism founded on the cooperation of the parties [which] has, despite its designation, a contractual nature in the sense that it derives its authority from the agreement [of the parties.]”<sup>40</sup>

The Paris Court of Appeal explained the contractual rather than jurisdictional nature of the pre-arbitral referee order first, by acknowledging that the drafters of the pre-arbitral referee rules had carefully avoided using the words arbitration and arbitrator, and second by recognizing that the order solely derived from the agreement of the parties to confide to a third party the power to decide on urgent measures.<sup>41</sup> The Paris Court of Appeal concluded that the order could not have more binding effect than any other contractual provision and was thus deprived of *res judicata* effect.<sup>42</sup>

Following this reasoning, interim and emergency decisions would not be proper awards and any failure to comply with them would only be considered contractual breaches. As the referee’s decision had the same binding effect as a contractual provision, the Paris Court of Appeal concluded that, as a matter of French law, a

38. The setting aside of the order was based on purported violation of due process (former Article 1502 4° French New Code of Civil Procedure) and ultra petita decision (former Article 1502 3° French New Code of Civil Procedure).

39. *See id.* US law contrasts with French law on this particular issue. A US Court held that interim measures have sufficient finality for the purposes of enforcement not because those measures are in fact final in their nature, which they are clearly not, but because they are ordered for the purposes of protecting the final award. The court reasoned that arbitrators have authority to award interim relief in order to protect their final award from being meaningless. *See* Guillaume Lemenez & Paul Quigley, *The ICDR’s Emergency Arbitrator Procedure in Action*, in DISPUTE RESOLUTION J. 3 (2008-09).

40. Lemenez & Quigley, *supra* note 39, at 32-36.

41. Jarrosson, *supra* note 23, at 1298.

42. *Id.*

party could neither enforce the order nor seek for its cancellation before a state court.

The pending question is whether the reasoning of the Paris Court of Appeal still stands today and whether it similarly applies to emergency arbitrator proceedings. As will be seen, the Paris Court of Appeal's reasoning is not persuasive as to the contractual or jurisdictional nature of the mandate of the third party. What is more persuasive however is that under French law, the major obstacle to the enforceability of its decision is the definition of award.

### 3. The Court of Appeal's Decision Has Been Criticized and Doubts Arise as to its Applicability to Emergency Arbitrator Proceedings

As some commentators rightly point out,<sup>43</sup> the reasoning of the Paris Court of Appeal in relying on the contractual nature of the pre-arbitral referee was overly formalistic. First, the fact that the drafters of the pre-arbitral referee rules avoided using the label "arbitration" and "arbitrator" should not be determinative in the context of Pre-arbitral Referee Rules nor under the emergency arbitrator proceedings rules. It is a well-established principle under French law that in determining the intention of the parties as to the contractual or jurisdictional nature of the mission that they intended to provide the third party, the judge is not bound by the characterization that the parties have given to their contract.<sup>44</sup>

Hence, French courts would not necessarily draw from the fact that most institutional rules use the word "arbitrator" or "arbitration" in their rules<sup>45</sup> regarding emergency arbitrator proceedings to

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43. Baruch Baigel, *The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis*, in 31 J. INT'L ARB, no. 1, 5 (2014) Mourre, *supra* note 34, at 5.

44. Cour de Cassation, 1st Civil Section, 21 June 1956, *Revue de l'arbitrage*, 1956, 132; Cass, 2<sup>nd</sup> Civil Section, 23 Sept. 1998; Mayer, *supra* note 22 ("... la qualification commande le régime. Lorsque ce régime est entièrement supplétif, il est concevable de laisser les parties maitresses de la qualification. Lorsqu'en revanche il comporte des règles impératives, laisser les parties libres d'adopter la qualification qui leur convient reviendrait à leur permettre d'écarter des règles impératives ... or le régime de l'arbitrage comporte de telles règles." [ . . . the system is governed by characterization. When a mechanism is suppletive, it is understandable to leave the parties in charge of the characterization. However, when compulsory rules are at stake, allowing the parties to determine the characterization they see feet would be equivalent to allowing them to derogate from compulsory rules... which also exist in arbitration]).

45. ICC RULES, *supra* note 4, at art. 29; HKIAC RULES, *supra* note 10, at sched. 4; LCIA RULES, *supra* note 10, at art. 9B; SIAC RULES, *supra* note 10, at sched. 1; SCC RULES, *supra* note 10, at app. II, r. 21.13.

necessarily conclude that the mission of the emergency arbitrator is jurisdictional in nature. Similarly, the fact that the emergency arbitrator rules are usually formally integrated into the institutional arbitration rules<sup>46</sup> will not be determinative, nor the fact that they automatically apply unless the parties have expressly excluded them.

Second, the Paris Court of Appeal's holding that the pre-arbitral referee assignment was contractual in nature because the order solely derived from the agreement of the parties to vest a third party with the power to decide on urgent measures is not determinative either. Indeed, the pre-arbitral referee or the emergency arbitrator is not different from an arbitrator who also derives its power from the parties' agreement. Arbitration is contractual in nature, yet arbitrators exercise a jurisdictional function and render a decision of jurisdictional nature.<sup>47</sup> As explained by Professor Thomas Clay, the arbitrator is both a judge and a contracting party.<sup>48</sup> Arbitration is jurisdictional in nature, however the obligatory force of its award is based on the agreement of the parties to submit the resolution of their dispute to the decision of a third party.<sup>49</sup> The Paris Court of Appeal refers to article 6.6 of the Pre-arbitral Referee Rules ("The parties agree to carry out the Referee's Order without delay and waive their right to all means of appeal or recourse or opposition to a request to a court or to any other authority to implement the Order, insofar as such waiver can validly be made") to support the contractual nature of the referee's power. This text however exists with pretty much the same wording in article 29(2) for the emergency arbitrator.<sup>50</sup> The contractual nature of the pre-arbitral referee or of the emergency arbitrator do not necessarily exclude that their mission is jurisdictional.

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46. ICC RULES, *supra* note 4, at art. 29(6)(B); HKIAC RULES, *supra* note 10, at art. 23(1); ICDR RULES, *supra* note 10, at art. 6(1); LCIA RULES, *supra* note 10, at art. 9(4); SIAC RULES, *supra* note 20, at art. 30(2); SCC RULES, *supra* note 10, at app. II art. 1(1), 21.13, 4.2(a), 4.2(b).

47. Thomas Clay, *L'Arbitre*, DALLOZ 43-50 (2001).

48. *Id.* at 33

49. Mayer, *supra* note 22.

50. ICC RULES, *supra* note 4, at art. 29(2) ("The emergency arbitrator's decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator."); SCC RULES, *supra* note 10, at app. II art. 9(1)(3); SIAC RULES, *supra* note 20, at sched. 12; ICDR RULES, *supra* note 10, at art. 6(4); HKIAC RULES, *supra* note 10, at sched. 4(16).

The majority of French commentators have argued in favor of the jurisdictional mission of the pre-arbitral referee<sup>51</sup> and most of their arguments may be extended to emergency arbitrators as well. They consider that in a pre-arbitral referee situation (or that of an emergency arbitrator) we are in a situation that meets the definition of the jurisdictional nature of the mandate: a legal dispute that a third party is to decide upon based on the rule of law after analysis of the position of each party. The pre-arbitral referee (or the emergency arbitrator) is indisputably asked to make a decision that is, even temporarily, binding upon the parties. The pre-arbitral referee (or the emergency arbitrator) both apply the rule of law, have to respect due process and be independent and impartial.<sup>52</sup> They both have to decide upon their own jurisdiction and upon the issue that is put before them regarding interim measures.<sup>53</sup> This reading is consistent with the interpretation rule set forth in Article 1188 of the French Civil Code.<sup>54</sup> When parties to a contract decide to submit their dispute to arbitration proceedings, they intend to exclude the state courts' jurisdiction. They also intend to be subject to the same level of justice. In this regard, state court judges have jurisdictional power and although their decision granting interim relief is provisional, they are immediately enforceable and binding upon the parties. By analogy, it would make sense to entrust the emergency arbitrator with the same jurisdictional power and enforce before state courts the interim measures he or she orders. This reading is all the more true when considering French case law which tends to consider provisional measures as the result of a jurisdictional act<sup>55</sup> and refrains from interfering with the characterization given by the arbitrator to its decision as an award or an order. Further, the wording of the 2003 decision of the Paris Court

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51. Mayer, *supra* note 22; Mourre, *supra* note 34, at 5.

52. ICC RULES, *supra* note 4, at app. V, art. 2(4); HKIAC RULES, *supra* note 10, at sched. 4(8); ICDR RULES, *supra* note 10, at art. 6(3); LCIA RULES, *supra* note 10, at art. 9(13); SIAC RULES, *supra* note 20, at sched. 1(5); SCC RULES, *supra* note 10, at art. 14, 19(2), r. 4.2(a).

53. ICDR RULES, *supra* note 10, at Article 6(3); LCIA RULES, *supra* note 10, at Article 9(13); SIAC RULES, *supra* note 20, at sched. 1(7).

54. Code Civil [C. Civ.] [Civil Code] art. 1188 (Fr.) (“Le contrat s’interprète d’après la commune intention des parties plutôt qu’en s’arrêtant au sens littéral de ses termes. Lorsque cette intention ne peut être décelée, le contrat s’interprète selon le sens que lui donnerait une personne placée dans la même situation.” [A contract shall be interpreted according to the Parties’ common intention instead of its literal meaning. When this common intention cannot be found, the contract shall be construed in accordance with the reasonable person standard.]).

55. Jacques Pellerin, *La sentence arbitrale : incertitudes et propositions in Liber Amicorum*, Mélanges en l’honneur de Pierre Mayer, LGDJ, 2015.

of Appeal did not exclude the possibility that parties can actually agree to entrust the referee with a jurisdictional duty and the power to issue an award.<sup>56</sup>

Other authors argue to the contrary that the contractual nature of the pre-arbitral referee (and hence of the emergency arbitrator) is warranted and that the Paris Court of Appeal did well in characterizing the mission of the pre-arbitral referee as it did. If we were to transpose their arguments to the emergency arbitrator, they would argue that an emergency arbitrator is a pre-arbitration emergency adjudicator with a role similar to that of an expert or a dispute adjudication board<sup>57</sup> rather than that of an arbitrator and that the parties have committed in advance to be bound by its decision. Despite the labeling as emergency arbitrator, emergency arbitration responds to a specific need for urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal.<sup>58</sup> Such interim or conservatory measures do not prejudice on the merits of the case and do not modify the parties' position.<sup>59</sup> Only the arbitral tribunal hearing the merits of the case is untrusted with that jurisdictional power. Although it is true that the emergency arbitrator decides upon the issue put before him, that is not to say however that he has jurisdictional powers.<sup>60</sup> The fact that the emergency arbitration procedure is designed to support an upcoming arbitration on the merits of the case does not mean that it is itself an arbitral procedure because "arbitration on arbitration does not work".<sup>61</sup> The temporary nature of the emergency arbitrator's decision is another important factor in favor of its contractual essence. Despite the doctrinal debate, even if the nature of the mission of the emergency arbitrator could arguably be jurisdictional, the real test for the enforceability of its

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56. See Eliseo Castineira, *The Emergency Arbitrator in the 2012 ICC Rules of Arbitration*, CAHIERS DE L'ARBITRAGE, (Jan. 1, 2012) at no. 1, 65.

57. FIDIC CONTRACTS, art. 67 ("If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the dispute shall initially be referred in writing to the Dispute Adjudication Board (the "Board") for its decision.").

58. ICC RULES, *supra* note 4, at art. 29; SCC RULES, *supra* note 10, at app. II, art. 1; SIAC RULES, *supra* note 20, at art. 30.2; LCIA RULES, *supra* note 10, at art. 9(4); ICDR RULES, *supra* note 10, at art. 6(1); HKIAC RULES, *supra* note 10, at art. 23(1).

59. Baigel, *supra* note 43, at 9.

60. Jarrosson, *supra* note 23, at 1296.

61. Baigel, *supra* note 43, at 6.

decisions is whether its decisions qualify as an award under French law.

#### 4. Today, Under French Law, an Emergency Arbitrator's Decision on Interim Measures Cannot Be Recognized as an Award and Is Hence Not Enforceable

Irrespective of the debate as to the nature of the contractual or jurisdictional powers entrusted to the emergency arbitrator, what is determinative is whether its decisions would qualify as an award under French law. It does not. In France, like in most jurisdictions, the decisions taken by arbitral tribunals are not self-enforcing and need to be given executory force upon issuance of an enforcement order.

Pursuant to Articles 1487 al 3, (on domestic arbitration), and 1516 al 3, (on international arbitration), of the French New Code of Civil Procedure,<sup>62</sup> only decisions taken in the form of an award, as opposed to an order, may be recognized and enforced in France. French law does not specify the form of the arbitral tribunal's decision on interim or conservatory measures.

Although under Article 28(1) of the ICC Rules the arbitral tribunal is free to determine the form of the measure it takes,<sup>63</sup> Article 29(2) expressly states that "the Emergency Arbitrator's decision shall take the form of an order." The ICC stands out with this choice. Other institutions have expressly chosen to characterize decisions on equivalent pre-arbitral interim relief as awards<sup>64</sup> or, more often, they have given the emergency arbitrator maximum discretion to characterize the decision as an award or an order.<sup>65</sup>

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62. CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] 1487 and 1516 (Fr). ("Application for exequatur shall be filed by the most diligent party with the Court Registrar, together with the original award and arbitration agreement, or duly authenticated copies of such documents.")

63. ICC RULES, *supra* note 4, at art. 28 ("Any [conservatory or interim] measures shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.")

64. SIAC RULES, *supra* note 20, at art. 1(3), 30; *See also* LCIA RULES, *supra* note 10, at art. 9(8), 9(9); ICDR RULES, *supra* note 10, at art. 6(4); HKIAC RULES, *supra* note 10, at art. 3(9) & sched. 4(12); UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (2006), [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf). [hereinafter UNCITRAL Model Law], at art. 17(2).

65. Some institutions that give the emergency arbitrator this discretion include: NAI Arbitration Rules, AFA Rules of Arbitration, ICDR, SIAC and SCC EA Rules.

The ICC has explained its choice. First, under the ICC system, 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 33 of the ICC Rules (2012). Such time-consuming scrutiny would have defeated the very purpose of emergency proceedings. Second, as will be seen below, it was considered that the characterization of the emergency arbitrator's decision as an order or an award is of little practical relevance when it comes to enforceability. Indeed, most jurisdictions apply the principle of "substance over form" to any type of interim measures regardless of the form in which it was ordered.<sup>66</sup>

One should not however exaggerate the impact that the label provided in the rules may have on the enforcement of a decision on provisional measures. Under French law, state courts are free to retain the characterization that they deem appropriate.<sup>67</sup> Indeed, French courts have refrained from interfering with the decision taken by arbitral tribunals in the course of the proceedings considering that "the arbitral tribunal is an autonomous international jurisdiction" and that "state courts have no power to intervene in the conduct of an international arbitration."<sup>68</sup> In this context the characterization of the decision as an award (or an order) may not be so relevant.

The French Code of Civil Procedure does not define what an award is under French law. For the purpose of determining whether the action to set aside was admissible, it is the French courts that have defined the differentiating criteria of an award. Under French law, and for some time now,<sup>69</sup> an award is characterized as the "decision of an arbitral tribunal which finally settles in whole or in part, the underlying dispute either on the merits, on jurisdiction or on any procedural issue which terminates the arbitral proceedings."<sup>70</sup>

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66. Voser & Boog, *supra* note 7, at 86.

67. French New Code of Civil Procedure, art. 12 (Fr.); *See also* Castineira, *supra* note 56, at 65.

68. *See, e.g., Cour de Cassation*, 1<sup>st</sup> Civil Section, 12 Oct. 2011, *La Société Elf Aquitaine et la Société Total c. X*, No. 11-11058.

69. *See, e.g., Cour d'Appel de Paris*, 25 Mar. 1994, *REV. ARB.* 1994, p. 391; 10 November 1995, *REV. ARB.* 1997, P. 596; *Cour de Cassation*, 2<sup>nd</sup> Civil Section, 6 Dec. 2001 p. 932.

70. *See, e.g., Cour de cassation*, 1<sup>st</sup> Civil Section, 12 Oct. 2011, *Groupe Antoine TABET / République du Congo*, No. 09-72439; *see also* Christophe Seraglini & Jérôme Ortscheidt, *Droit de l'arbitrage interne et international* 782 (Montchrestien 2013).

This rather restrictive definition of what an award is has been criticized by some authors notably in the context of interim measures.<sup>71</sup> New definitions have since been proposed.<sup>72</sup> Yet today, the stated case law is still governing and from this definition of award under French law, an award or an order on interim and conservatory measures would not be considered as finally disposing of an issue that terminates the arbitral proceedings.<sup>73</sup> Such decision, irrespective of its characterization, could therefore not be recognized and enforced in France. This is most likely also true if one were to reason under the New York Convention.<sup>74</sup> Although under the New York Convention, there is no definition of the term “*arbitral award*” it is clear to most commentators that interim measures differ radically from final awards due essentially to the provisional nature of interim measures as opposed to the final nature of an award.<sup>75</sup>

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71. See Bernard Moreau, Eloïse Glucksmann, & Pierre Feng, ARBITRAGE INTERNATIONAL – REPERTOIRE DALLOZ DE PROCEDURE CIVILE para. 221 (June 2016) (“Nowadays Article 1468 of the Code of Civil Procedure would not make sense if the possibility to order provisional and protective measures which this Article acknowledges would not guaranty its executory force.”).

72. See Jacques Pellerin, *supra* note 55, at 681 ; see also Seraglini & Ortscheidt, *supra* note 70, at 782-83.

73. It could be argued that the order of the emergency arbitrator terminates the emergency arbitrator proceedings and disposes of the subject-matter issues of the application for interim or conservatory measures. It might be questionable, however, to consider the emergency arbitrator proceedings as severable from the arbitral proceedings in view of the requirement to file a request for arbitration within ten days from the receipt of the application by the ICC Secretariat and the arbitral tribunal’s power to modify, terminate or annul the order provided for, respectively, by Article 1(6) of the AE Rules of Appendix V and Article 29(3) of the ICC Arbitration Rules (2012).

74. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>.

75. Domenico Di Pietro, *What Constitutes an Arbitral Award Under the New York Convention?*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 155-56 (2008). Some prominent authors do not share this view and considers that an arbitral award providing for interim relief may be enforced under the New York Convention, provided that the arbitral decision granting interim relief constitutes an arbitral award at the place of arbitration. See, e.g., Albert Jan van den Berg, *The Application of the New York Convention by the Courts*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 25-35 (ICCA Congress Series No. 9, 1999). In Albert Jan van den Berg’s opinion, an award will be enforced in accordance with its terms, i.e. if the award expressly states that it is made for a limited period of time, then the enforcement will correspondingly cover that period of time only. See *id.* at 28. This would enhance the effectiveness of international arbitration. The interpretation of the term award under the New York Convention is still evolving as demonstrated by Jan Paulsson’s recent analysis of the Convention in: ALBERT JAN VAN DEN BERG, THE 1958 NEW YORK



Although it can be argued that under institutional arbitration rules, the decision of an emergency arbitrator is enforceable because it is final in respect to the specific issues it addresses unless modified, this argument will unlikely be convincing to a French Court in light of the above definition of award under French law. Indeed, the emergency arbitrator's decision is of provisional nature. All interim measures are subject to modification, termination, and annulment, pending any final decision made on the merits.<sup>76</sup> Not only does its decision deal with "interim" measures, but it also does not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order.<sup>77</sup> The obligatory force of the emergency arbitrator's decision is therefore limited in time and could only survive beyond the final award if it were adopted by the arbitral tribunal as its own.

Many commentators regret the excessive formalism of French case law in its definition of award.<sup>78</sup> Such definition does not meet the parties' expectation and most importantly the concrete needs of the situation.<sup>79</sup> If the parties chose to give the emergency arbitrator the power to order interim measures, they want those measures to be effective, which – as with State courts - requires that they be enforceable. As Alexis Mourre explained for the pre-arbitral referee, one could wonder why an interim measure ordered by a state court would be enforceable while that ordered by an emergency arbitrator would not be enforceable?<sup>80</sup>

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CONVENTION 97, 97-136 (2016). According to him, a reference to an award as being final should be understood as meaning that the award is binding upon the parties. If one were to hold this approach as the positive law, it would leave no doubt as to the final character of an interim or provisional measure ordered by an arbitral tribunal. Indeed, the vast majority of the institutions' arbitration rules expressly provides for the binding character of interim and provisional measures ordered by either the Emergency Arbitrator or an arbitral tribunal. *See id.*

76. *See* ICC RULES, *supra* note 4, at art. 29(3); SCC RULES, *supra* note 10, at art. 9(4); LCIA RULES, *supra* note 10, at art. 9(11); ICDR RULES, *supra* note 10, at art. 6(5); HKIAC RULES, *supra* note 10, at sched. 4(18)(19); UNCITRAL Model Law, *supra* note 65, at art. 17(D); *see also* Castineira, *supra* note 56, at 65; Baigel, *supra* note 43, at 11.

77. *See* ICC RULES, *supra* note 4, at art. 29(3); SCC RULES, *supra* note 10, at app. II art. 9(5); SIAC RULES, *supra* note 20, at sched. 1(10).

78. *See e.g.*, Mourre, *supra* note 34, at 5; Pellerin, *supra* note 55; Pierre Mayer, note sous Paris, 29 avr. 2003, JDI 2004, 511, spéc. 518.

79. *See* Mourre, *supra* note 34, at 5.

80. *Id.*

It cannot be assumed that French case law will not evolve as to its definition of award. French case law has shown some openings,<sup>81</sup> and doctrine has evolved towards the concept that an interim measure is not a measure that could be changed easily but would require a change in circumstances, and in the particular situation where it is ordered it has authority on what is necessarily provisional.<sup>82</sup>

Meanwhile, the situation remains unsettled as to the enforceability of the emergency arbitrator's decision. Despite this, an emergency arbitration proceeding is an effective tool. Two main reasons provide strength to the emergency arbitrator tool: first, the binding character of its decisions; and second, the fact that the party who seeks compliance with the emergency arbitrator's decision can obtain support both from local courts, including in France to a limited extent, and from the arbitral tribunal on the merits.

#### *B. Efficiency of the Emergency Arbitrator's Decision – A Binding and Persuasive Tool*

An emergency arbitrator's decision is effective with parties who undertake to comply with it.<sup>83</sup> There remains a risk however that the party against which the decision is directed fails to abide by it. Such

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81. Cour d'appel [CA] Paris, *Société Otor Participations et autres c/ Société Carlyle Holdings 1 et autre*, Oct. 7, 2004, N° rép. Gén.: 2004/13909 ("La limitation de mesures provisoires ordonnées par le tribunal arbitral à la durée de l'instant ne remet pas en cause l'autorité de chose jugée de sa décision, que les arbitres ont pu exprimer sous forme de sentence, choix de procédure auquel aucune des parties ne s'est opposé. . . . Le prononcé d'astreintes ou d'injonctions constitue un prolongement inhérent et nécessaire à la fonction de juger pour assurer une meilleure efficacité au pouvoir juridictionnel et ne caractérise ainsi aucun dépassement de la mission de l'arbitre." [The limitation of interim measures ordered by an arbitral tribunal to the duration of the proceedings does not call into question their res judicata character. Arbitrators are free to embody such decisions into an award. In this case, the parties did not contest the arbitral tribunal's procedural choice. Ordering penalties or injunctions is inherently and necessarily part of an arbitral tribunal's jurisdictional power that allows an arbitral tribunal to ensure better efficiency. An arbitral tribunal does not exceed its mission when ordering such measures]); *see also* Seraglini & Ortscheidt, *supra* note 70, at 783. The Paris Court of Appeals has admitted that interim and conservatory measures ordered by an arbitral tribunal should be considered as awards. Professor Thomas Clay, in his yearly perspective of arbitration law in France (*D. 2005, pan., p.3062, obs. Th. Clay*), considers this decision as an important one, which proves that the term award is an evolving concept that covers finally ordered interim and provisional measures, even if they do not put an end to the dispute. *See* Cour de cassation [Cass.] 1<sup>st</sup> Civil Section, 4 July 2007, REV. ARB. 2008. 442.

82. *See* Pellerin, *supra* note 55, at 683.

83. *See* ICC RULES, *supra* note 4, at art. 29(2); SCC RULES, *supra* note 10, at app. II Article 9(1) & 9(3); SIAC RULES, *supra* note 20, at sched. 1(12); ICDR RULES, *supra* note 10, at art. 6(4); HKIAC RULES, *supra* note 10, at sched. 4(16).

risk might be perceived as greater in the context of emergency arbitration where the emergency arbitrator who decided on the urgent relief will not decide on the merits of the case<sup>84</sup> and where the arbitral tribunal hearing the merits of the case could be asked to reassess the decision of the emergency arbitrator.<sup>85</sup>

There are reasons to believe that parties voluntarily comply with emergency arbitrator's decisions. What is certain, however, is that in the event of non-compliance, the successful applicant has an array of tools to choose from. It can attempt to seek support from local courts either in an enforcement action, particularly in Model law inspired countries, or in a breach of contract claim, as in France; or to raise a claim against the non-complying party before the arbitral tribunal. Preliminary feedback indicates that the emergency arbitrator is not only an effective option for urgent relief, but also an early settlement tool.

### 1. Sanctions for Non-Compliance by French Courts

In practice, parties tend to comply voluntarily with emergency arbitrators' decisions to avoid appearing uncooperative or noncompliant to the arbitral tribunal that will ultimately decide the merits of the dispute, rendering judicial enforcement of such orders unnecessary. However, where a party refuses to comply with an emergency arbitrator's order, recourse to local state courts appear necessary.

In France, if one is to assume that the emergency arbitrator's decision is contractual in nature, and hence not subject to enforcement procedure, any breach of the order should be dealt with by the arbitral tribunal in accordance with the arbitration provision of the contract in dispute. This is consistent with Article 29(4) of the ICC Rules, which provide that the arbitral tribunal shall have jurisdiction to decide on any claim relating to the emergency arbitration proceedings or arising out of noncompliance with the emergency arbitrator order.<sup>86</sup> Hence,

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84. See Voser & Boog, *supra* note 7, at 86.

85. See ICC RULES, *supra* note 4, at art. 29(4); SCC RULES, *supra* note 10, at app. II, art. 9(2); SIAC RULES, *supra* note 20, at sched. 1(10); LCIA RULES, *supra* note 10, at art. 9(11); HKIAC RULES, *supra* note 10, at sched. 4(18); ICDR RULES, *supra* note 10, at art. 6(5).

86. See ICC RULES, *supra* note 4, at art. 29(4); SCC RULES, *supra* note 10, at app. II, art. 9(2); SIAC RULES, *supra* note 20, at sched. 1(10); LCIA RULES, *supra* note 10, at art. 9(11); HKIAC RULES, *supra* note 10, at sched. 4(18); ICDR RULES, *supra* note 10, at art. 6(5).

as discussed above, French courts will decline jurisdiction on any claim for non-compliance with an emergency arbitration's decision.

Despite these general rules, and the principle that under French law, French courts should not interfere with an ongoing arbitral proceeding,<sup>87</sup> a party seeking to obtain compliance with the emergency arbitrator's decision could still request, in limited circumstances, the support of French courts by filing a summary judgment for breach of contract claim. Subject to international rules of conflict of jurisdiction, the President of the Civil Court can order specific performance of a given arbitral order or award pursuant to Article 809 al 2 of the French New Code of Civil Procedure<sup>88</sup> This provision could be invoked in relation to the judgment from the French *Cour de Cassation* rendered in relation to Article 28(6) of the ICC Rules (1998) in which the judges held that the parties' obligation to comply with a final award is in fact an obligation on the parties 'to do' a particular thing.<sup>89</sup>

Today, both Articles 22 and 29(2) of the ICC Rules (2012) provide for the parties' undertaking to comply with the order made by the arbitral tribunal or the emergency arbitrator, respectively.<sup>90</sup> Article 809 of the French New Code of Civil Procedure could therefore prove useful in the context of emergency arbitration. Such a summary judgment can be obtained in a very limited time frame<sup>91</sup> and would have the advantage of being immediately enforceable in France notwithstanding an appeal.<sup>92</sup> In addition, it could be accompanied with a provisional penalty.<sup>93</sup>

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87. See Seraglini & Ortscheidt, *supra* note 70, at 178.

88. French New Code of Civil Procedure, art. 809 al 2 (Fr.) (“[i]n cases where the existence of the obligation is not seriously challenged, [the judge] may award an interim payment to the creditor or order the mandatory performance of the obligation even where it is an obligation to do a particular thing.”).

89. See, e.g., *Cour de Cassation*, 1<sup>st</sup> Civil Section, 4 July 2007, *Société Total E et P Congo c. République du Congo*, No. 05-16586.

90. SCC RULES, *supra* note 10, at app. II, art. 9(1)(3); SIAC RULES, *supra* note 20, at sched. 1(12); ICDR RULES, *supra* note 10, at art. 6(4); HKIAC RULES, *supra* note 10, at sched. 4(16).

91. Serge Guinchard, *Droit et Pratique de la Procédure Civile: Droit Interne et Européen*, DALLOZ ACTION (2017-18), at 222, no. 125.140 *passim*.

92. *Id.* at 226, no. 125.181 *passim*.

93. The judge in summary proceeding may impose a provisional coercive penalty pursuant to Article 491 of the CCP. However, unless he/she retains the right to liquidate the penalty it will be for the enforcement judge to do so pursuant to Article L.131-3 of the Code of Enforcement Procedure. See generally GUERCHOUN, *ASTREINTE – RÉPERTOIRE DALLOZ DE PROCÉDURE CIVILE* (June 2012) (last accessed Oct. 2016).

As far as the order of the emergency arbitrator is concerned however, filing for a summary judgment would only be possible during the limited period of time between the issuance of the emergency arbitrator's decision and the constitution of the arbitral tribunal. Once the arbitral tribunal is in place, it may be argued that pursuant to Article 29(4) of the ICC Rules (2012), the arbitral tribunal has sole jurisdiction on claims arising out of or in connection with the compliance or non-compliance of the order. In this regard, a claim before the arbitral tribunal to have the order reconsidered pursuant to Article 29(3) of the ICC Rules may bar any application before state courts. At that time, however, it would be possible for the arbitral tribunal to confirm the order in the form of an award if it deems it appropriate. Recourse to state courts is not the only remedy available to the party who is seeking compliance with the emergency arbitrator's decision. Arbitral tribunals are perfectly armed to address such situations.

## 2. Arbitral Tribunal's Treatment of Non-Compliance and Intrinsic Efficiency of the Emergency Arbitrator Tool

Under French law, there are no statutory or case law limits on the ability of an arbitral tribunal to take into account non-compliance with an emergency arbitrator's order or award when considering the merits of the case or deciding on costs. In light of the clear power of arbitral tribunals to grant interim measures under French law, an arbitral tribunal conducting an arbitration proceeding in France is likely to consider any party's failure to comply with the arbitral tribunal's decision on interim measure to be a breach of the arbitration agreement. As such, when awarding damages or allocating costs, arbitrators on the merits will often consider compliance with interim decisions. Damages can only be awarded however to the non-defaulting party when a direct causal link is established between the party's non-compliance with the order and the damage that has allegedly been suffered.

It is likely that those same principles apply when arbitrators on the merits have to consider whether an emergency arbitrator's decision has been complied with or not. This is all the more true in light of the various institutions' arbitration rules which expressly

provide for the emergency arbitrator's decision to be binding upon the parties, and for the parties to undertake to comply with it.<sup>94</sup>

This view is consistent with Article 29(4) of the ICC Rules which states that “[t]he arbitral tribunal shall decide upon any party’s requests or claims related to the emergency arbitrator proceedings including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or noncompliance with the order.”<sup>95</sup> This provision gives to the arbitral tribunal the power to: (i) reallocate the costs of the emergency arbitrator proceedings in light of a party’s failure to carry out the order; or (ii) to deal with the issue of compensation for costs and damages if the party who has been granted the emergency measures does not ultimately prevail on the merits.

Arbitral tribunals on the merits could also be inclined to order additional relief, including drawing adverse inferences in situations in which the interim measure ordered aims at preserving documents or other evidence that are potentially relevant and material to the outcome of the case.<sup>96</sup> Such measures should be exceptional however because there is a high incidence of voluntary compliance with interim measures granted by arbitral tribunals.<sup>97</sup> Evidence to date suggests that this is likely to be the case for emergency arbitrator proceedings as well, and that such decisions may lead the parties to settlement.<sup>98</sup> Such intrinsic efficacy of the emergency arbitrator tool leverages on the fact that the parties are contractually bound by the decision of the emergency arbitrator<sup>99</sup> and on the fact that the parties

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94. SCC RULES, *supra* note 10, at app. II, art. 9(1)(3); SIAC RULES, *supra* note 20, at sched. 1(12); ICDR, *supra* note 10, at art. 6(4); and HKIAC RULES, *supra* note 10, at sched. 4(16).

95. SCC RULES, *supra* note 10, at app. II, art. 10(5); SIAC RULES, *supra* note 20, at sched. 1(13); LCIA RULES, *supra* note 10, at art. 9(10); ICDR RULES, *supra* note 10, at art. 6(8); HKIAC RULES, *supra* note 10, at sched. 4(15).

96. Pursuant to Article 9(5) of the IBA Rules on the Taking of Evidence in International Arbitration, if a party fails without satisfactory explanation to produce any document requested in a request to produce to which it has not objected in due time or fails to produce any document ordered to be produced by the arbitral tribunal, the arbitral tribunal may infer such evidence would be adverse to the interests of that party.

97. Carlevaris & Ferris, *supra* note 3, at 25.

98. Jason Fry, *The Emergency Arbitrator Flawed Fashion or Sensible Solution*, DISP. RES. INT’L 179 (2013).

99. ICC RULES, *supra* note 4, at art. 29(2).

do not want to annoy the arbitral tribunal which could order damages for noncompliance with an emergency arbitrator's order.<sup>100</sup>

As an arbitral tribunal will be reluctant to overturn an order unless the objecting party can show that circumstances have changed to such an extent since the rendering of the order that a modification of the order is warranted,<sup>101</sup> a party will also take very seriously the emergency arbitrator's prima facie analysis of the case. Such analysis can act as a reality check on the strength of the parties' case and lead to early settlement.

### CONCLUSION

The increasing number of emergency arbitration proceedings worldwide indicates the growing appetite of users for this new type of relief. The emergency arbitrator offers a balanced solution that seems to meet the needs and expectations of all parties. Although, there remain a great number of open-ended issues that will determine how emergency arbitration measure up against the other procedural options available, the parties who obtain interim measures through an emergency arbitrator are not left without a remedy in case of non-compliance. France is a good illustration of the self-contained efficacy of emergency arbitration. In spite of its lack of direct enforceability under French law, the decision of an emergency arbitrator will most likely be complied with voluntarily. In addition, in case of non-compliance, the party who is seeking compliance with the emergency arbitrator's decision can still benefit from the support of courts in many jurisdictions, possibly even in the French courts (and the arbitral tribunal on the merits). The emergency arbitrator is a welcome tool now added to the international commercial arbitration landscape. This new player in the field will not be new for long.

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100. Jean-François Poudret & Sébastien Besson, *Droit comparé de l'arbitrage international*, 569 (2002) (on file with author).

101. Voser & Boog, *supra* note 7, at 87.