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ENFORCEABILITY OF THE EMERGENCY ARBITRATOR DECISIONS

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ENFORCEABILITY OF THE EMERGENCY ARBITRATOR DECISIONS

Abstract

This document aims to examine the enforceability of decisions made by emergency arbitrators in international arbitration. It will analyze the challenges and potential solutions within the current legal framework, including the nature of emergency arbitrator decisions and the mandatory and public order regulations in each jurisdiction. The study will assess the different approaches taken by various jurisdictions and arbitral bodies, as well as the role of national courts in enforcing or annulling emergency arbitrator rulings. Additionally, the analysis will consider the impact of these developments on the efficiency and effectiveness of the arbitration process. By thoroughly exploring these issues, this document seeks to improve understanding of the enforceability of emergency arbitrator decisions and provide valuable insights for practitioners, arbitrators, and policymakers in the field of arbitration law.

الملخص (Abstract in Arabic)

تهدف هذه الدراسة إلى تحليل مدى إمكانية إنفاذ القرارات التي يتخذها محكمو الطوارئ في إطار التحكيم الدولي، وعرض التحديات والحلول المحتملة ضمن الأطر القانونية الحالية. ان معالجة هذه النقاط يتطلب العودة إلى تحديد طبيعة قرارات محكم الطوارئ وتمييزها عن قرارت التحكيم التقليدية وذلك وفق أنظمة قانونية مختلفة، فضلا عن البحث في دور المحاكم الوطنية في إنفاذ أو إلغاء أحكام محكم الطوارئ. بالإضافة إلى ذلك، سوف يلقى الضوء على المستجدات في اطار عمل محكم الطوارئ خاصة ان العديد من اللوائح مراكز التحكيم كرست هذه الآلية، و البحث في تأثيرها على التحكيم و اجراءاته بشكل عام. من خلال استكشاف هذه القضايا بدقة، تسعى هذه الدراسة إلى تحسين فهم إمكانية إنفاذ قرارات محكم الطوارئ وتوفير رؤى قيمة للممارسين والمحكمين وواضعي السياسات في مجال قانون التحكيم.

Keywords

Emergency arbitrator, Enforceability, International and domestic arbitration, Interim relief, Judge of urgent matters, National courts, Arbitration law.

الكلمات الدالة (Keywords in Arabic)

محكم الطوارئ, تنفيذ قرار المحكم, التحكيم الداخلي و الدولي, التدابير الاحترازية, قاضي المور المستعجلة, المحاكم الوطنية

1. INTRODUCTION

In the past decade, emergency arbitration has emerged as one of the greatest success stories in international arbitration[(1)] .

It is a growing institute in international arbitration to address urgent matters prior to the constitution of an upcoming arbitral tribunal. Commentators applaud it as "an avenue for fast and uncomplicated interim protection" under an arbitral mechanism that "appropriately balances opposing parties" rights and interests(2).

The evolving landscape of international arbitration, and the lack of the necessary tools in the traditional arbitration rules to provide timely relief prior to the constitution of an arbitral tribunal, threatens to frustrate the original purpose of arbitration and render it futile. Emergency arbitration represents a logical step forward in the world of alternative dispute resolution. It offers a range of benefits, including flexibility, privacy, neutrality, and a commitment to party-driven procedures. In doing so, it provides a way to avoid undue interference from state courts, which can be problematic within a well-established statutory framework governing arbitration.)

Thus, the proliferation of emergency arbitration shows that there has been a practical need to obtain interim measures(3) for ensuring the preservation of evidence or factual status quo, the freezing of assets, or preventing the unjustified calling of a bond, within the confines of arbitral process. This summarizes the significance and necessity of emergency arbitration, while emphasizing its advantages alongside its flaws.

Despite being a very practical solution that significantly contributes to developing arbitration as a "stand-alone" dispute resolution system that can nimbly deliver results(4); there are questions regarding the status and nature of emergency arbitration and its relationship to the actual arbitration. Noting that until now the "nature" and the "enforceability" of the decisions of emergency arbitrators are clearly unsettled.

This leads to the main concern of the present dissertation that revolves around an ultimate question in establishing the pedigree of emergency arbitration. The question is whether the international arbitration community, and importantly, state courts, are willing to accept

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(1) Patricia Shaughnessy, *"The Emergency Arbitrator, in The Powers and Duties of an Arbitrator",* in Patricia Shaughnessy & Sherlin Tung (eds), chapter 32, Essays in Memory of Liber Amico rum - Pierre A. Karrer (available at Kluwer Law International 2017), accessed 15 February 2024.

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

(3) The term "interim measure" has different names depending on jurisdiction, it lacks a universally accepted definition; ICC Arbitration Rules (2017) art. 28, referred to as "interim or conservatory measures", Swiss Private International Law Act(1987) c 12, art.183, referred to as "provisional or protective measures", Swedish Arbitration Act, (SAA) SFS 1999:116, referred to as "interim measures", Saudi Center for Commercial Arbitration (SCCA) Arbitration Rules, effective from (1st of May 2023) Appendix III, Article 1, no 5.c, referred to as "emergency, provisional or precautionary relief, or similar measures", Cairo Regional Center for International Commercial Arbitration (CRCICA) Arbitration rules, in force as from (15 Jan. 2024) Annex 2, Article 1, no 1, referred to as "urgent interim measures";
See also William Wang, *"International Arbitration: The need for Uniform Interim Measures of Relief",* Brooklyn Journal of International Law (Vol.28, Issue 3, 2003) p.1059;
Also, Ali Yesilirmak, *"Provisional Measures in International Commercial Arbitration"*, International Arbitration Law library, (KLI 2005) p.34.

(4) Patricia Shaughnessy, *"Emergency Arbitration – Justice on the Run"*, paper delivered at a conference themed: *"When Justice Delayed Would be Justice Denied"*, (presented at Institute of Transnational Arbitration 28th annual conference in Dallas- June, 2016) published by LAW PUB STOCKHOLM, empowered by Stockholm Law Faculty's Trust Fund for Publications, (on July 2017) at https://lawpub.se/en/artikel/5885 accessed 27 March 2024.

"Emergency Arbitration" as a procedure resulting in a "final and binding decision" that can be enforced as an Arbitral Award or not.

"Enforcing emergency arbitrator decisions" is a real challenge due to various factors, and the specific difficulties may vary depending on the jurisdiction and the arbitration rules in place. The complexity arises from the decentralized nature of international arbitration, where different legal systems and procedural frameworks require careful consideration.

Despite being a practical solution stipulated in soft laws(5), emergency arbitration as a procedural process is not out of flaws and an emergency arbitrator's activity is not out of risks of unenforceability due to the ambiguity surrounding his authority and powers. In fact, risks abound under the following perspectives depending on the jurisdiction of the seat of the arbitration (lex-fori), the place of performance and the place where the arbitral award is meant to be enforced.

This dissertation discusses the challenges to enforce emergency arbitrator decisions and suggest ways to enhance enforceability after presenting a Literature review.

2. LITERATURE REVIEW:

The institute of Emergency Arbitrator was first inserted in set of rules in 1990, by the International Chamber of Commerce(6).

The said ICC Rules for a Pre-Arbitral Referee Procedure comprised the criteria to indicate an emergency arbitrator, including the need for such provision to be expressly provided for in the contract.

In 1999, the American Arbitration Association (AAA) adopted the opt-in Optional Rules for Emergency Measures of Protection that allows parties to choose the facility of emergency arbitration to obtain effective interim measures that maintains the objectives required of arbitration mechanism(7).

Although such innovation has been warmly welcomed, it has remained seldom explored until 2006 amendment to the AAA's International Center for Dispute Resolutions (note that AAA Rules were more popular in USA than the ICC Rules) that included opt-out provisions(8), later followed by 2012 ICC reformed rules that update the dispositions related to the emergency arbitrator's activity and that were more popular to use in the globe.

When Emergency Arbitrator mechanism reached broader proportions, in between, other international arbitration institutions adopted specific provisions in their rules as soft laws specified for Emergency Arbitration Procedures, such as International Center of Dispute Resolution (ICDR) as the "first major arbitral institution to incorporate opt-out emergency arbitrator provisions in its arbitration rules"(9) considering urgency needs that justify opt-out provision in Arbitration mechanism. Followed by Arbitration Institute of Stockholm Chamber of Commerce (SCC), Singapore International Arbitration Center Rules 2010 (SIAC), Australian Center for International Commercial Arbitration Rules 2011(ACICA), Swiss Chambers' Arbitration Institutes' (SCAI) Swiss Rules for International Arbitration 2012, Hong Kong Arbitration Center (HKIAC), Arbitration Rules of Finland Chamber of Commerce 2013(FIA), London Court of International Arbitration (LCIA) and others.

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(5) The Guidelines and Protocols of arbitration institutions.

(6) Review https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/rules-pre-arbitral-referee-procedure/ accessed 3 February 2024.

(7) Rafael Dean Brown, *"Challenging the Enforcement of Emergency Arbitrator Decisions"* Kilaw Journal, (Vol.8, Issue3, Ser.No.31, Muharram-Safar 1442, September 2020) p.44.

(8) ibid.

(9) Ank Santens & Jaroslav Kudrna, *"The State of Play of Enforcement of Emergency Arbitrator Decisions"* Journal of International Arbitration (Vol.34, Issue1,2017).

Lately arbitral centers in the region followed such as Dubai International Arbitration Center (DIAC) 2022 Rules, Saudi Center of Commercial Arbitration (SCCA) 2023 Rules and Cairo Regional Center for International Commercial Arbitration (CRCICA) 2024 Rules.

Knowing that such soft laws(10) do not have the power to be automatically enforced by public (governmental) authority. Thus, they have far-reaching effects if chosen to bind to by parties for their ability to maintain predictability and certainty(11).

So, if not agreed on as binding rules they do not compete with hard laws as state legislations in their automatic power to be urged to enforcement by public (governmental) authority.

The legal framework in Lebanon lacks a foundation for enforceability, in contrast to certain other legal systems.

3. CHALLENGES OF ENFORCEABILITY:

Challenges of enforceability of the Emergency Arbitrator Decisions pivots on one dominant aspect: "Nature of Emergency Arbitration Decisions", which involves obtaining interim measures(12). That includes three primary challenges, nature of the decision itself: "whether it is considered as an award or an order?", its finality: "whether it is a final decision or a temporary one?", and the nature of the authority and power granted to the Emergency Arbitrator: "whether she or he is considered as a sole arbitrator-an arbitral tribunal or not?".

The "Nature of Emergency Arbitration Decisions", as a dominant factor, reveals several challenges due to the decentralized nature of International Arbitration itself, where different legal systems and procedural frameworks require careful consideration.

This occurs whenever Emergency Arbitrator decisions are not considered or classified as "awards" because of their interim nature and their guaranteed non-final content. Its enforceability raises public policy concerns and may lead to undesirable conflict between substantive and procedural laws, that "Arbitration" as an alternative dispute resolution in international commercial issues is meant to avoid.

This appears in cases where there is a lack or absence of clear, solid solutions presented by soft laws referred to from parties involved in the dispute. It may also appear even when parties refer to such soft laws due to procedural issues that are exclusively granted to public authorities in the state where interim measure decisions are to be enforced. It also appears when parties do not refer to any soft law, thus binding their arbitration agreement on available legislations as hard laws, which generally state their own jurisdiction over interim measures that is considered of procedural public policy nature. This highlights the importance and need of coordination and cooperation between soft laws and hard laws to overcome procedural obstacles.

Over and above, this leads to mistrust in "Arbitration" as the most suitable dispute resolution mechanism.

Theoretical and practical aspects of these challenges will be presented as follows:

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(10) Felix Luth - Philip K. Wagner, *"Soft Law in international Arbitration-Some Thoughts on Legitimacy"* StudZR, Student Journal For law Heidelberg- "blue Booklets" (3/2012) p.409-422, https://studzr.de/archiv.php accessed 5 February 2024.

(11) Note that soft laws are legitimized through the process of their application and turn into hard laws before the parties who choose to bind to its rules in their agreements, please see Felix Luth - Philip K. Wagner, no. (10), for more elaboration.

(12) Rafael Dean Brown, no. (7), p.47-67;
See also Ank Santens & Jaroslav Kudrna, no. (9).

3.1 Lack of Statutory Framework:

Emergency arbitration has been developed to allow parties to seek interim measures within the arbitral forum, but before the actual arbitral tribunal has been constituted.

It is well known that the enforcement of emergency arbitration decisions is as crucial as the tool itself in achieving effective results that serve the goals of arbitration mechanisms. Therefore, its enforcement requires approval from state courts due to the nature of interim measures issued, which needs specific power and authority to be obtained and enforced accordingly.

The majority of state judiciaries lack specific legislation addressing the enforceability of emergency arbitrator decisions. This provokes difficulties in implementing such decisions that leads to uncertainty, where judiciary is always bound to return to general provisions of local procedural and substantive laws. Thus, hard laws, specifically procedural public policy rules shall be well considered.

This dissertation will present a review of the existing statutory framework of the Lebanese Rules of International Commercial Arbitration (procedural and substantive) as hard laws, followed by rules of different soft laws referred to as guidelines in International Arbitration. Thus, both will be regarded as legal foundations for the study that may lead to a common initial solution to enforcement.

3.1.a. The Lebanese legal system: Hard law:

Lebanon has a legal framework governing International Arbitration. It is considered among the first countries in its region to adopt International Arbitration mechanisms through its legislations, as well as recognize and enforce its awards through judicial decisions.

Given the global growth and acceptance of Emergency Arbitration, it would be beneficial to explore on hand provisions related to its "decisions enforceability" if available (if possible or deemed appropriate) within Lebanese legislation in the present study.

This inquires an overview of current International Arbitration Rules in general, focusing on the Rules of recognition and enforcement of Foreign Arbitration Awards or International Arbitration Awards in line with the New York Convention Rules that are dominantly applicable in the recognition and implementation of International Commercial Arbitration Awards(13). Followed by a study of the nature of interim measures and the exclusiveness in issuing them to the judicial authority.

The aim is to determine the enforceability of emergency arbitration decisions, particularly those involving interim measures.

3.1.a.(i) Current International Arbitration Rules:

The Lebanese legislator allocated International Arbitration with specific rules included in the second section of part one of book two of the Code of Civil Procedure under the title "The International Arbitration"[(14)] .

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(13) Note: the researcher devoted section (3) to study the provisions of New York Convention and its impact on Emergency Arbitration decisions enforcement. (comprehensiveness of its provisions)

(14) Note that these rules consist of 13 Articles, starting by Article#809 ending by Article#821 of Lebanese Code of Civil Procedure.

It is reported by reviewing those rules, that Emergency Arbitration as a growing institution in international arbitration, is not yet determined by a legal framework(15). But it is not prohibited due to parties' freedom of choice of law.

In fact, these Articles include all procedural rules that shall be followed during arbitration process. Starting with general provisions(16) that: define International Arbitration and determine the status of who may resort to its rules, establish a specific mechanism for appointing the arbitrator or arbitrators. This mechanism permits either direct appointment or referral to an arbitration system that determines a specific method of appointment. Followed by procedural conditions to be met for recognition and enforcement.

Freedom of choice of law grants acceptance of "Emergency Arbitration Institution":

General provisions allow parties in arbitration agreement to specify the principles related to their arbitration dispute. They also allow them to subject their dispute to a specific law of procedure of their own choice(17). Moreover, these provisions specify that the arbitrator will resolve the dispute according to the substantive legal rules selected by the opponents, or otherwise, according to the rules that he (the arbitrator) deems (considers or counts) appropriate, taking into consideration in all cases commercial norms(18).

This approves that Lebanese legislator grants wide acceptance to arbitral parties in International Arbitration, and the freedom to choose the rules that will govern their arbitration process.

So, despite the fact that emergency arbitration is not determined by Lebanese legislator, it is clear through the content of the above-mentioned Articles that resorting to other arbitration systems is not prohibited. Hence, in principle, resorting to seek interim measures via Emergency Arbitrators within such systems shall not be void, nor null, nor even out of any guarantee to enforcement.

Nature of the decision as an impediment to enforcement:

The Lebanese legislator follows up to determine Rules regulating procedural conditions required for the recognition of Foreign Arbitration Awards or International Arbitration Awards and their execution(19). According to the provisions outlined in this Article, "Arbitration Awards" shall be recognized and given executive form after the party which invokes

(15) Noting that it is determined by several legislations such as Hong Kong, Singapore, The Netherlands, and New Zealand as explicit legislations supporting the recognition and enforcement of emergency arbitrators' decisions-please review the ICC Commission Report no.40 available at: http://iccwbo.org/publication/emergency-arbitrator-proceedingd-icc-arbitration-and-adr-commission-report/ accessed 5 February 2024.

(16) Article#809 until Article#813.

(17) Article#811 of (LCCP).

(18) Article#813 of (LCCP).

(19) Article#814 of (LCCP); noting that it is consistent with the New York Convention Rules.

them proves their existence, provided they do not violate international public policy concerns. Some additional formal conditions to be present are included in the second paragraph of the same Article.

The explicit reference to Article#815(20) pertaining to certain rules considered to National Arbitration Articles #793 until #797, specifically through Article #794 clarifies that: the referred "Awards" are granted finality due to their nature upon issuance, which is totally distinct from the nature of the interim measures' decisions issued by the Emergency Arbitrator.

So, Lebanese legislation is not meant by enforcement of interim measures obtained through "DECISIONS" due to their specific nature. Thus, only "Arbitral Awards" are subject to recognition and enforcement(21).

Is naming Emergency Arbitration "Decisions" as "Awards" enough to grant them recognition and enforcement?

It may happen that the referenced laws pursuant to freedom of choice of law by opponent's name decisions issued by emergency arbitrator as "Awards" in purpose of granting them enforcement. These laws clarify that emergency arbitration falls within the definition of "arbitral tribunal" for enforcement purposes. So, it is necessary to study the effectiveness of this approach in granting enforcement.

In return to the referenced Articles(22), it is reported that all of what the legislator aimed to set rules for are "Arbitral Awards" and not any other type of decisions. Knowing that "Arbitral Awards" are issued by an arbitral tribunal that is supposed to be pending or in process at the time an Emergency Arbitrator takes interim measures "decisions".

It may appear that the only legal way out to grant recognition and enforcement of decisions made by emergency arbitrators according to Lebanese legislation, is if the legal rules invoked by the opponents to rule their dispute, states interim measures held by emergency arbitrator as, clearly classified and named: "Arbitral Awards"(23) .

BUT this is not a satisfying solution. Thus, such decisions even if named "Arbitral Awards" within the law referred to by opponents, are of

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(20) Article#815 of (LCCP).

(21) Note that some legislators determined explicit legislation supporting the recognition and enforcement of emergency arbitrator decisions clarified that emergency arbitration falls under the definition of "arbitral tribunal" for purpose of enforcement, such as Singapore's International Arbitration Act (SIAA);
While commentators foreseen that "despite including relevant provisions to facilitate the enforcement of emergency arbitration orders, not all jurisdictions are so enforcement-friendly", Michael Dunmore, The Use of Emergency Arbitration Provisions, Hong Kong International Arbitration Center (HKIAC) (2015) Vol.17, Issue3, p132-available also at (KLI 2024) accessed 12 February 2024.

(22) Articles#793until#797 of (LCCP).

(23) See some legislations (hard laws) such as Singapore, Hong Kong, The Netherlands, and New Zealand that named decisions issued by emergency arbitrator as "Arbitral Awards", mentioned at Rafael Dean Brown, no. (7), p.48;
Also available in ICC commission report on "Emergency Arbitration Proceedings" at:
http://iccwbo.org/publication/emergency-arbitrator-proceedingd-icc-arbitration-and-adr-commission-report/ accessed 5 February 2024;
Also, as for (soft laws) review the rules of SCCA or CRCIAC or DIAC counted new within the region.

special nature that stands as an impediment to enforcement as proved within the above, and in all cases are present to null-ness due to different factors stated within the second paragraph of Article#796.

The paragraph mentioned in this Article stipulates that it is forbidden to vacate recognition or enforcement of "Arbitral Awards" unless due to one of the nullification causes mentioned in Article#800, which include:

Nullification causes that prevent enforceability:

Nullification causes are:

1- Issuance of the Award without arbitration agreement or in accordance with a void arbitration agreement that exceeded its time limit.
In this case if the parties of arbitration did not state willingly and clearly in their agreement their acceptance of appointing an emergency arbitrator or arbitrators granting him or them to take interim measures, decisions will be present to null-ness even if named as "Arbitral Awards" by the law referred to. And in all cases, nullification will occur if the time frame is exceeded. This proves that only opt-in provisions of emergency arbitration may be accepted.[24]
2- Issuance of the Award by appointed arbitrators out of laws.
3- This plays a role in the need of explicit Arbitrators legal identity and authority to be within the Arbitration Rules being followed. It will be proven later that even if the identity of the emergency arbitrator is recognized by the referenced law, their authority and power to enforce interim measures may be hindered by procedural public policy.
4- Issuance of the Award beyond the limits of assigned arbitrators' tasks.
5- This cause applies in the case of an Arbitral Award granted by an Arbitral Tribunal that determines the subject of dispute and NOT applicable to Emergency Arbitrator due to his only one specific task related to "interim measures".
6- Issuance of the Award without taking into consideration opponents right of defense.
7- Here over comes again an important need to ensure granting both opponents right of defense while issuing interim measures decisions through Emergency Arbitration. So even if the Rules referred to by parties name such decisions as "Awards", it should be clear that it does not take opt-out provisions in its arbitration rules for emergency arbitrator. Thus, only opt-in old provisions that allow parties to choose

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(24) Note that UAE Judiciary followed the same approach regarding interim measures obtained by emergency arbitration, the Dubai Court of Cassation has ruled:
"If the parties did not agree explicitly-whether in the main contract or in an arbitration deed that follows it- that the arbitrators can undertake interim, precautionary or urgent measures – it means – then that their agreement to refer their dispute to arbitration in relation to the main contract does not give the arbitrators the authority or jurisdiction to decide on such procedures or issue. As may be seen, the Dubai Court is silent on enforcement of such measures under UAE"; mentioned at John Gaffney & Mohamed Al Marzouqi, "The Use of Emergency Arbitrator Procedures in the UAE: Some Practical Considerations", available at: http://www.tamimi.com/law-update-articles/the-use-of-emergency-arbitrator-procedures-in-the-uae-some-practical-considerations/
accessed 18 March 2024.

in advance the use of emergency arbitration may grant them recognition and enforcement, and IF all other conditions are available.

8- Unfortunately, this works against the development of Emergency Arbitration that relies on the need of urgency and shortening time factors that requires opt-out provisions.

9- If the Award does not include all its mandatory data related to the opponents' demands. The reasons and the means supporting them, the names of the arbitrators, the reason for the decision, its text, its date, and the arbitrators' signatures on it.

10- If the Award violated a rule related to public policy.

11- This is the most crucial among all the factors mentioned above, for the frustration of public policy leads to the non-enforcement of emergency arbitration decisions, even if named as "Awards" due to null-ness of the decision.

12- Frustration of procedural public policy is guaranteed in the process of obtaining interim measures through emergency arbitration with regards to both their nature and the nature of power and authority needed to grant such measures by an emergency arbitrator, according to the exclusiveness of State Judicial Jurisdiction in issuing and implementing interim measures that will be studied as follows.

3.1.a.(ii.)- Exclusiveness of State Judicial Jurisdiction defeats Emergency Arbitrators actions:

What is meant by interim measures?

Interim measures, regardless of their different names across jurisdictions[25], represent orders issued in purpose of preserving rights and granting them temporary protection by the state's judiciary, which holds the authority and jurisdiction to issue such orders and the power to enforce them.

The Lebanese legislator, along with legislators in other states, have not provided a specific definition for interim measures, opting instead to leave it to the discretion of judicial jurisdiction.

Commentators praised the legislator's approach, attributing its reason to considering urgency as a standard and legal control that changes according to circumstances and conditions.

Exclusiveness of state Judicial Jurisdiction:

Legislator grants the "Judge of urgent matters" specific and exclusive authority to take urgent or interim measures without addressing the basis of the right. This authority includes: the authority to take measures leading to removing clear violations of legitimate rights and conditions, granting temporary advances to creditors at the expense of their rights, and imposing a fine and liquidating it temporarily(26).

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[25] Kindly review (3).

[26] Article #579 of (LCCP).

Additionally, the legislator defines the nature of the Judicial Jurisdiction in interim measures and urgent matters, Judge as a "mandatory qualitative jurisdiction(27)". Moreover, he exceptionally grants the Trial Judge while examining a case, jurisdiction to implement temporary and precautionary measures to preserve rights and prevent harm, upon the request of one of the litigants, including placing seals, inventorying assets, imposing judicial receivership, selling perishable assets, and describing the situation(28). However, judicial jurisprudence unanimously reports that the jurisdiction of the Judge of urgent matters is a qualitative, mandatory, exceptional jurisdiction related to procedural public order(29).

Moreover, it reports that the Judge of urgent matter holds the general mandate to take urgent measures. Thus, any removal of that jurisdiction from him can only be by virtue of a special law. It also clarifies that even if the law permits referral to another authority such as in soft laws by freedom of choice of law, his jurisdiction is not revoked except by legal text and in specific cases. Thus, all decisions obtaining interim measures issued by any authority other than State courts will face un-enforceability due to procedural public policy concerns(30) . So, he, as the Judge of urgent matters is the sole holder of general original jurisdiction(31) to issue and enforce interim measures orders.

This leads to a specific question regarding "interim measures" issued within the arbitral process that follows the formation of an arbitration panel, in purpose of finding an answer to another question related to arbitration mechanism but precedes that formation.

The question says,

Is it acceptable for opposing parties to agree on mandating the Arbitral Tribunal the power to issue interim measures despite the

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(27) Article#86 of (LCCP).

(28) Article#589 of (LCCP).

(29) Court of Appeal-Beirut-Lebanon (8-12-1994- Decision no. 962) Sader between legislation and jurisprudence, Interim measures and urgent matters Judiciary, (Sader Legal publications, 2013) p11 no. 2-3.

(30) Note that 2006 amendments to Article 17 of the UNCITRAL Model Law on International Commercial Arbitration grants the arbitral tribunal the power to order interim measures and provides court enforcement of such orders; Kindly review: https://uncitral.un.org last visited at: March 21- 2024; Such amendment is a necessity to include in States legislation as an enhancement equipping arbitral tribunals with the ability to render interim measures and to facilitate court recognition and acceptance of such measures.

(31) Court of Appeal-Beirut (11-07-1991- Decision no. 198) Sader between legislation and jurisprudence, Interim measures and urgent matters Judiciary, (Sader Legal publications, 2013) p.12, number 6;
Also, it is clearly stated within Article#22 of the UAE Code of Civil Procedure that "UAE local courts have extensive power to grant interim measures even if they do not have jurisdiction due to an arbitration clause between parties", please refer to: John Gaffney &Mohamed Al Marzouqi, no. (24);
On the contrary it is noted that "some mandatory laws prohibit an arbitral tribunal from issuing interim measures, which would also likely apply to emergency arbitration awards" such as the law in China, for more elaboration see Michael Dunmore, The Use of Emergency Arbitration Provisions, Hong Kong International Arbitration Center (HKIAC) (2015, Vol.17, Issue3) p132-available also at (KLI), accessed 12 February 2024.

exclusivity of State Judicial Jurisdiction? And if so, are these interim measures enforceable?

Answering this question will provide a clear answer to the following one that represents the subject of the study;

Is it beneficial to mandate an Emergency Arbitrator to obtain timely relief before the constitution of an arbitral tribunal?

Judicial Jurisprudence answers the first question as follows:

Some mentioned that there are two legitimate ways for obtaining interim measures while arbitration is in process, by referring to the judge of urgent matters who has the general mandate to take urgent matters or by choosing the Arbitral Tribunal as another authority (due to the parties' freedom of choice of law) to do so(32).

While others as majority with commentators(33) assert that while this may be legitimate and legal due to the freedom of choice of law, its effectiveness is hindered by the process of enforcement. Thus, Arbitral awards need a judicial review to grant recognition and enforcement. Interim measures may encounter procedural public orders that leads to non-enforcement and makes them useless due to the qualitative, mandatory, and exceptional jurisdiction of the Judge of urgent matters, as well as the uncertain and non-final nature of interim measures that may change during the Arbitration process.

As for the second question related to emergency arbitrator, it is clear from the above answer of the first question that mandating an emergency arbitrator to obtain timely relief before the constitution of an arbitral tribunal will surely face unenforceability due to the lack of authority and power of assigned emergency arbitrator facing the exclusive nature of judicial jurisdiction in interim measures and the extensive power of State Courts to grant and enforce such orders.

Thus, the main concern about enforceability is the "lack of coercive power to enforce interim measures(34)" within both arbitral tribunals and emergency arbitrators.

Commentators also prove through practical application that mandating an emergency arbitrator to obtain timely relief before the constitution of an arbitral tribunal is impractical due to different mentioned factors that lead to non-enforcement. Specifically, when the application of hard laws proves their excellency on soft laws referred to by parties in their application. So, if they grant rights guaranteed needed protection in a shortage of time such as "UAE Civil Procedures Code that requires UAE Court to issue interim relief within 24 hours from the date of making a request for an interim order….therefore, seeking an interim measure from the UAE Courts in relation to UAE-related arbitration is likely to be much faster than

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(32) Judge of urgent matters- Beirut-Lebanon (07-09-1984- Decision no. 155) Justice Magazine, Issued by Beirut Bar Association (1985 part 2) p. 252.

(33) Court of Appeal-North Lebanon (29-12-1997- Decision no. 599) Justice Magazine, Issued by Beirut Bar Association, (1998 part 1) p. 110.

(34) Peter Ashford, *"Handbook on International Commercial Arbitration"* (Juris publishing, 2nd edition,2014) p.63.

seeking relief from Emergency Arbitrator" (35), the importance of emergency arbitration will fade.

Based on the analysis of Hard Laws presented above, it is evident that the identified Articles of the Lebanese Code of Civil Procedure offer no specific solution to the enforcement of emergency arbitrators' decisions.

This proves that seeking recognition and enforcement through this sophisticated process does not serve as a countermeasure to the lack of clear and direct legislation accepting Emergency Arbitration as an institute within the arbitration mechanism and granting automatic recognition and enforceability to its decisions.

Therefore, it is necessary to include explicit Articles within the Code of Civil Procedure that mitigate its procedural public policy concerns, enabling International Arbitration parties to seek interim measures within the arbitral forum(36), and ensuring exequatur to Emergency Arbitrators' decisions. In other words, recognizing the authority, identity, and power of Emergency Arbitrators simultaneously.

And in the meantime, it is necessary to undertake real reform of the Lebanese Code of Civil Procedure by mandating specific time limits for the Judge of urgent matters to issue interim relief, similar to UAE Law.

Unless concrete legislative reforms are taken into consideration, including petitioning to an amendment of the New York Convention Rules(37),mandating an emergency arbitrator to obtain timely relief before the constitution of an arbitral tribunal will remain futile. It's important to recognize that such efficient actions to ensure helpful and proper enforcement of Emergency Arbitration decisions rely on coordination and cooperation between soft and hard laws to overcome procedural obstacles.

3.1.b. Soft laws:

During the period when most of the national laws were silent, Soft Laws took action by introducing and organizing emergency arbitration as an efficient solution to fulfill Arbitration mechanisms.

One proffered reason for the relative success of soft laws compared to hard laws regarding International Arbitration rules is the "built-in mechanism" for emergency arbitration rules within soft laws, which is entirely absent in hard laws. Such built-in mechanism provides parties with flexibility, privacy, neutrality, and party-driven procedure, avoiding unwanted exposure to different legal systems and different jurisdictions, aiming to prevent conflicts of laws and of judicial jurisdiction due to the international nature of their

(35) John Gaffney &Mohamed Al Marzouqi, no. (24).

(36) By including it by explicit Articles like Article 17 of the UNCITRAL model law of International Arbitration mentioned above.

(37) Kindly refer to -3- of the study.

dispute. Different soft laws(38) have introduced emergency arbitration as an efficient need and established it as an institution through statutory framework. Commentators praised this approach, describing it "as an avenue for fast and uncomplicated interim protection"(39) , where interim measures are maintained through rapid applicable emergency arbitrators' decision. But it has been practically proven that soft laws are not without flaws regarding the enforcement of decisions obtained.

Such flaws frustrate emergency arbitration goals and are classified as challenges to the enforceability of its decisions. Some of these flaws represent built-in soft laws enforceability challenges that may hinder the enforcement of emergency arbitration decisions, while others ban their effectiveness, with the most dominant ones leading to non-enforcement.

3.2 Built in Enforceability Challenges:

Enforcing the resulting emergency arbitral decisions raises different concerns included in soft laws, which may hinder the enforceability of emergency arbitration decisions. These concerns may vary in their effect from one soft law to another of different arbitral institutions.

Among the most common concerns in all soft laws are the following:

Consent of Parties and Inadequate cooperation:

Consent parties as a clear reflection of freedom of choice of law provided by arbitration mechanism, plays an important role in emergency arbitration, as it impacts the effectiveness of procedures related to decision enforcement.

The prevalent use of opt-out provisions in emergency arbitrator rules, set by soft laws, guarantees that parties consent to comply with emergency arbitration decisions unless they explicitly state in their arbitration agreement that the emergency rules would not apply(40). In such cases, they opt to keep jurisdiction for obtaining interim measures decisions related to their dispute through state courts. Thus, by clearly expressing their non-consent, they lose all advantages of emergency arbitration mechanisms.

However, various soft laws make it obligatory for parties instead of optional. In such instances, consent from the parties is guaranteed once they choose to rely on that law. However, the effectiveness of emergency arbitrator decisions depends on the parties' agreement to comply with them in this case. Although they are bound by their choice of soft law that provides emergency arbitration rules to be applied, difficulties arise if one party refuses to follow the decision obtained. Relying on voluntary compliance from the parties is not enough to ensure enforcement.

Commentators have noted that in general, "the parties often follow the decisions of emergency arbitrators without court enforcement in order to avoid additional costs and to show their good faith cooperation with the arbitral process"(41).

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(38) Please refer to -1- of the study.
(39) Review no. (2).
(40) Rafael Dean Brown, no. (7), p. 46.
(41) Patrecia Shaughnessy, no. (4), p.324.

Others stated that compliance is not always obeyed and "noncompliance remains troublesome, especially because there is a higher potential of irreparable harm in cases requiring urgent relief."(42)

And the losing party may refuse to cooperate with the enforcement process, which can further complicate and delay the execution of the emergency arbitrator decision.

Commentators have also noted that "even in instances where the arbitral institution rules allow for sanctions for non-compliance, there is an important distinction between sanctions and enforceability per se. Sanctions may lead to a claim for damages, specific performance, or a later tribunal drawing adverse inferences from the non-compliance. Nevertheless, the granting of sanctions does not achieve the same result and does not equal to enforcement."(43)

Moreover, if voluntary cooperation occurred from parties of arbitration, third parties are not concerned.

However, the refusal of a counterparty or a third-party to comply with such orders and their inadequate cooperation, is problematic and poses a significant challenge to enforcement, hindering its effectiveness. Some commentators concluded that parties may be better served by resorting to national courts from the beginning to obtain such measures through a guaranteed hard law that provides more effective interim measures, as in the UAE, and avoid unnecessary costs and delays. Noting that "unlike institutional rules, emergency relief may be obtained in the Abu Dhabi courts on an ex parte basis, and it is submitted that the threshold for obtaining such relief may be lower than will apply in the case of institutional emergency arbitrator relief".(44)

Jurisdictional issues:

There are two common jurisdictional key issues related to emergency arbitration that are yet to make their own way before the courts anticipated to development(45).

First, regarding the court of the seat of the emergency arbitration and its role in addressing challenges to the emergency arbitrator. Typically, emergency arbitration rules mainly include procedures for challenging the emergency arbitrator before the respective arbitral institute, with tight time frames reflecting the fast-track nature of emergency arbitration. But this is not the only way to challenge an emergency arbitrator. It has been proven that after exhausting all available avenues within respective arbitral institute, soft laws often allow parties to petition the courts of the seat of arbitration to remove an arbitrator. And this is not guaranteed to bind within a fast track that may hinder emergency arbitration decisions enforceability.

Second, regarding the court of the seat of emergency arbitration and the power it may have to annul emergency arbitration decisions. Typically, emergency arbitration rules allow the arbitral tribunal, once constituted, to modify or terminate the emergency arbitration decision. However, it may be unclear whether the court of the seat has the power to annul

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(42) Gordon Smith, *"The Emergence of Emergency Arbitrations"* updated version available at http://www.gordonsmithlegal.com.au/resources/Emergency%20Arbitrations%20(120820116).pdf accessed 21 March 2024.

(43) Rafael Dean Brown, no. (7), p.49-50.

(44) John Gaffney & Mohamed Al Marzouqi, no. (24).

(45) Cameron Sim, *"Chapter 7: Emergency Arbitration Meets the Courts"* in Patrik Scholdstrom and Christer Danielsson(eds), Stockholm Arbitration Yearbook Series, (Volume 5 2023), pp. 95- 113&114; available also at: (KLI) 2023 accessed 25 March 2024.

emergency arbitration decisions due to the absence of specific annulment rules and procedures. In such cases, parties may wait for tribunal formation before seeking annulment of the decision before the courts of the seat of arbitration. Noting that if the relevant soft law considers that emergency decisions constitute an "arbitral award" under the law of the seat of emergency arbitration, and if annulment procedures of arbitral awards are available in such law, it may be concluded that such court is empowered to annul an emergency arbitration decision designated as an "award".

This consideration can be viewed from two perspectives. The first appears to be positive, ensuring the independence of emergency arbitrators to seek interim measures without unwanted authority reviewing their actions, granting confidentiality to the parties in protecting their rights. The second appears to be negative, permitting the arbitral tribunal to modify and terminate emergency arbitration decisions. This is seen as a flaw of the emergency arbitration institution due to the probability of considering the process of emergency arbitration as nothing but a waste of time and expenses. Knowing that this bans the enforcement of interim measures decisions obtained by emergency arbitration, rendering them as nonsense.

Challenges in asset identification:

Identifying and locating assets against which the decision can be enforced may be a common and challenging issue in enforcement, especially in international cases where parties have assets in multiple jurisdictions and there is a need for enforcement of interim measures within those jurisdictions.

For example, a party could dissipate assets or place them in a jurisdiction where enforcement is difficult to hinder the Arbitral Tribunal's ability to provide effective relief[(46)].

This underscores the important role of parties in selecting well-reputed arbitral institution rules that allow them to seek interim measures within the arbitral forum through relied-upon "emergency arbitration" to be applied on their dispute. Knowing that even if this happens, they will have no guarantee on the prosecution of the interim measures set through emergency arbitration due to the different legal systems and procedural frameworks that assets may be allocated to enforce such interim decisions set by emergency arbitrators.

Thus, complex jurisdictional issues shall oppose enforcement in international arbitration cases. Such jurisdictional issues may lead to the non-enforcement of emergency arbitration decisions or any other necessary interim measures, where the assets are located. Such challenges in execution may even lead to a useless execution of the final arbitration award.

3.3 Challenges that may ban the effectiveness of emergency arbitration decisions:

Different factors may ban the effectiveness of emergency arbitration decisions. Some raise trepidations regarding the effectiveness of emergency arbitration and the enforceability of its decisions due to limited precedents by state courts to granting enforceability. While others, raise trepidations regarding confidentiality, timing and urgency, which are crucial in arbitration mechanisms.

Limited Precedent:

(46) Gray B. Born, *"International Commercial Arbitration"* (2nd edition) p.2451, available also at (KLI) 2014.

Emergency arbitrator decisions often lack the legal authority and precedent associated with court judgments. This can pose challenges when convincing national courts to enforce these decisions.

Commentators have concluded that "the reporting of emergency arbitration decisions is particularly useful in a number of respects. Such reporting provides practitioners with an understanding of how frequently emergency arbitration has been utilized, as well as how often claimants have been successful in obtaining emergency relief".(47)

Though such a reporting does not lead to ensure necessary interim measure relief needs of enforcement.

The 2015 Queen Mary/White & Case International Arbitration Survey showed that 79% of respondents considered the enforceability of Emergency Arbitrator Decisions as the most important factor influencing their choice between state courts and emergency arbitration, when seeking urgent relief before the constitution of the arbitral tribunal(48).

Therefore, judicial precedents are a necessity to understand the very high threshold required for an arbitrator to have jurisdiction over an emergency arbitration.

There are few available reported cases;

The first and oldest was in France before the Paris Court of Appeal to set aside an order rendered by an ICC pre-arbitral referee. The court determined that such an order had a contractual nature and should not be considered an award, nor should the referee be considered an arbitrator, hence not calling the process arbitration. In conclusion, the court deemed the annulment petition inadmissible(49).

The United States was the second to assure enforceability of emergency arbitrators' decision in both opt-in and opt-out emergency arbitrator provisions(50), while the third was the Democratic Republic of Congo (DRC)(51) , followed by Ukraine(52).

Based on the judicial precedents presented above, the record of enforcement of emergency arbitrator decisions has been largely positive over time. Knowing that whether the decision is enforced or set aside depends in significant part on the country of enforcement.

Unsurprisingly, due to the recent adoption of the emergency arbitration institution by (DIAC), judicial precedents are limited, and majority shows thar its preferable and more effective to refer to the competent state judiciary, which can provide the required protection in less time.(53)

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(47) Michael Dunmore, no. (21), p134.

(48) Queen Mary/White&Case, 2015 International Arbitration Survey; Improvements and Innovations in International Arbitration- available at:
www.arbitration.qmul.ac.uk/research/2015/index.html accessed 12 February 2024.

(49) Société Nationale des petroles du Congo v. Société Total Fina Elf E&P Congo, Cour d'appel de Paris [CA] [Court of Appeal], 29 April 2003, studied at: Ank Santens & Jaroslav Kudrna, The State of Play of Enforcement of Emergency Arbitrator Decisions, Journal of International Arbitration, Vol.34, Issue1, see also Rafael Dean Brown, no.( ), p.p,53 to 55.

(50) Blue Cross Blue Shield of Michigan v Medimpact Healthcare Systems [2010] E.D. Mich., 2010 WL 2595340.
Draeger Safety Diagnostics v. New Horizon Interlock [2011] E.D. Mich., 2011 WL 653651.
Both addressing a motion to vacate or set aside an emergency arbitrator's decision.
Also, Chinmax Medical Systems Inc. v. Alere San Diego Inc. [2011] S.D. Ca., 2011 WL 2135350.
Yahoo v. Microsoft [2013] S.D.N.Y. 2013, 983 F. Supp. 2d 310, available at:
https://casetext.com/case/yahoo-inc-v-microsoft-corp accessed 25 March 2024.
Both addressing the confirmation of an emergency arbitrator's decision.

(51) Ank Santens and Jaroslav Kudrna, no. (9), p.4-6.

(52) Patricia Shaughnessy, no. (4), p.323; also, Ank Santens and Jaroslav Kudrna, no. (9), pp.6-7&8.

(53) John Gaffney & Mohamed Al Marzouqi, no. (24).

As for SCCA, and CRCICA no judicial precedents have been reported yet due to the recent issuance of their new provisions, including Emergency Arbitration institution.(54) Thus, some time is needed for addressing different concerned national courts to take a motion to vacate or confirm Emergency Arbitrators decisions.

Timing and urgency:

Today, arbitral interim measures have become an integral part of the procedural and tactical landscape of arbitration across the globe. However, a gap exists due to the time required to constitute the arbitral tribunal, a gap that typically takes months. During this gap, there is a risk that the purpose of arbitration may be frustrated, especially when the situation for the allegedly aggrieved party deteriorates in some cases, or when measures are not sought against third parties.

So, the delay in constituting the tribunal could have severe consequences in instances requiring emergency relief. This highlights the need to grant emergency arbitrators the power and authority to issue interim measures before an arbitral panel is consituted, where no formal foreign procedural services is required,(55) and national courts may not provide an attractive alternative for several factors.

Emergency arbitrators are in charge of setting up and implementing necessary procedures even in very complex cases due to their expert knowledge. They are obligated to ensure that parties' rights to be heard and treated equally are upheld throughout the process, aiming to achieve the requirements of arbitration mechanism. And the most important is that they must take decisions in a very short period of time. So, predictability of time when interim relief will be granted is guaranteed. But practice proved that power and authority are not enough to guarantee emergency relief by issuing interim measures to save rights. Thus, time is the most important of all. Anticipated challenges that emergency arbitrator decisions may face regarding timing and urgency may be reported in the time needed to obtain interim measure as in the time needed to enforce such measures.

As for the time granted to emergency arbitrator to obtain interim measures, it has been reported that it varies among different soft laws of arbitration institutional rules. For example, the majority(56) required obtaining interim measures within a specific period. While others(57) left it to the discretionary power of an emergency arbitrator taking into consideration different circumstances. And this challenges the emergency arbitration process and may hinder its effectiveness.

On the other hand, it has also been reported that the time it takes to enforce emergency arbitrator decisions through national courts may defeat the necessary urgency as a purpose of obtaining timely relief.

So, although emergency arbitrator decisions are meant to provide quick relief, timing may be considered a limiting factor in their effective enforcement that does not serve urgency. Where hard laws sometimes prove their excellency on soft laws pertaining to the specific timing granted to the local courts to obtain interim measures decisions having the power and authority for enforcement. That is in addition to obtaining them within local courts on an ex

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(54) SCCA Rules, date of issuance: 1 May2023; CRCICA Rules, date of issuance: 15 January-2024.

(55) Hermann J. Knott and Martin Winkler, *"Chapter II: The Arbitrator and the Arbitration Procedure, Emergency Arbitration Securing advantages at an early stage*" - in Christian Klausegger, Peter Klein, et al.(eds), Austrian Yearbook on International Arbitration, (V0l.2022 -Manz'sche Verlags-und Universitatsb uchhandlung-2022) p.161-172, available also at (KLI) 2024 accessed 12 February 2024.

(56) SCCA, ICC, SCC, SIAC Rules and others.

(57) CRCICA Rules.

parte basis such as UAE Civil Procedure Code that has proven to be excellent in addressing the urgency needs of interim measures on soft laws in this regard(58).

Confidentiality concerns:

Confidentiality is a further advantage of emergency arbitration, and should be well considered across different aspects such as parties, arbitrators, witnesses, experts, interim measures, and the final award. Parties are allowed to request interim measures from both arbitral tribunals and state courts. But experience has demonstrated that parties usually do not prefer to seek interim measures from state courts that have jurisdiction due to concerns about confidentiality. State courts are perceived as an "unfriendly" forum(59) using national language and national civil laws procedures that require using local counsel. As they have limited opportunities to ensure the privacy of proceedings, and the effectiveness of its orders is limited to the territory of the court. Whereas, arbitrators are already familiar with the facts of the dispute, possess specialized legal or technical knowledge, understand the language of the dispute, provide a neutral alternative to potentially unfriendly courts, and are considered better equipped to ensure and guarantee privacy and confidentiality of the dispute and its procedures.

Although parties choose emergency arbitration proceedings to obtain interim measures in disputes that often involve sensitive information due to their interest in its confidentiality guarantee, experience demonstrated that they are reluctant to seek state court enforcement due to concerns about compromising the confidentiality of the arbitration process. Thus, relying on the principle of compliance of the parties with interim measures obtained through emergency arbitration is a result of confidentiality as a challenge to enforcement that may ban its effectiveness.

3.4 Limited remedies and public policy concerns:

It has been clearly proven in the present dissertation that jurisdictions may not provide adequate remedies for the enforcement of emergency arbitrator decisions due to "mandatory qualitative jurisdiction" of state judge of urgent matters. This limitation may eliminate the effectiveness of such decisions.

Also, public policy concerns can arise as challenges to enforceability. National courts may refuse to enforce emergency arbitrator decisions if they conflict with public policy or different fundamental legal principles of the jurisdiction. This can be a subjective ground for refusal.

Procedural public policy represents the main concern of un-enforceability of emergency arbitrators' interim measures decisions due to the qualitative, mandatory, and exceptional jurisdiction of the judge of urgent matters that overcomes emergency arbitrators' authority and power. Despite the adoption of specific rules for emergency arbitration within soft laws, it still lacks the power of enforcement that is in definite need of procedural hard laws to achieve its goals and maintain the success of arbitration mechanisms.

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(58) "Moreover, unlike institutional rules, emergency relief may be obtained in the Abou Dhabi courts on an ex parte basis, and it is submitted that the threshold for obtaining such relief may be lower than will apply in the case of institutional emergency arbitrator relief.… Therefore, seeking interim measures from the UAE courts in relation to UAE-related arbitration is likely to be much faster than seeking relief from an emergency arbitrator", review John Gaffney & Mohamed Al Marzouqi, no. (24).

(59) Patricia Shaughnessy, no. (4), p.321.

4. NEW YORK CONVENTION, AS A COMMON INITIAL SOLUTION TO ENFORCEMENT:

From the first moment Emergency Arbitration was introduced, the role of Emergency Arbitrators in issuing interim measures was exposed. Yet, the enforceability of its decisions under New York Convention has been controversial[60].

Although the ICC commission report on "Emergency Arbitration Proceedings" stated that, "concerns about enforceability of EA decisions have given rise to numerous debates".(61)

It is relevant to highlight that New York Convention uses the term "Award" and not "measure" or "decision" to grant enforceability(62).

Thus, all three main conditions shall be present together for the implementation of Article V of the New York Convention to render an Award enforceable, including:

- Issuance of the Award by an arbitrator with jurisdiction for such an act,
- The nature of the Award shall be binding upon the parties,
- It shall be final in terms of procedure.

This excludes "interim measures decisions" as thoroughly demonstrated throughout the dissertation.

So, petitioning with other countries for a needed amendment of the New York Convention Rules to explicitly include Acts that clearly guarantee the automatic acceptance of Emergency Arbitrators' decisions as interim measures is essential to save and protect the rights of individuals under private international law.

5. ENHANCING THE ENFORCEABILITY OF THE EMERGENCY ARBITRATOR DECISIONS

Although procedural obstacles are the dominant aspects of the challenges affecting the enforceability of emergency arbitrator decisions, commentators have demonstrated in practice that "arbitration has gained procedural muscle, adding features that enable it to favorably compete with litigation. These features include arbitral power to order interim measures, consolidation, joinder, production of documents, appointment of "magistrates", expedited procedures, and more recently, summary proceedings and ethical regulation of parties' representatives."(63)

Commentators have also added the 2006 amendments to Article 17 of the UNCITRAL Model Law on International Commercial Arbitration, which grant the arbitral tribunal the power to order interim measures and ensure court enforcement of such orders(64) as a necessity to include in states legislation (hard laws) to strengthen arbitral tribunals with the authority to render interim measures and to facilitate court recognition and acceptance of such measures. Thus, they contribute to highlighting the importance of these amendments by breaking the

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(60) Ank Santens & Jaroslav Kudrna, no. (9), p.1; Michael Dunmore, no. (21), p132; see also, Hermann J. Knott and Martin Winkler, no. (56), p.175.

(61) To review the report it is available at: http://iccwbo.org/publication/emergency-arbitrator-proceedingd-icc-arbitration-and-adr-commission-report/ accessed 5 February 2024.

(62) Article 5 in New York Convention: "Recognition and enforcement may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:… e- The **award** has not yet **become binding** on the parties, or has set aside or suspended by a **competent authority** of the country in which, or under the law of which, that award was made."

(63) Patricia Shaughnessy, no. (4), p.320.

(64) Kindly review Article 17 (A) and (H) at: https://uncitral.un.org accessed 21 March 2024.

deadlock over the exclusive jurisdiction of the state judiciary to take temporary measures as a first step to acceptance.

Some legislations, as hard laws, allowed arbitrators wide discretion to order interim measures unless parties have agreed otherwise respecting freedom of choice of law(65). But such orders have remained unenforceable due to public policy concerns and the protection of the rights of third parties. Regardless of their temporary unenforceability, this legislative approach contributed to the acceptance and recognition of the authority of arbitration in issuing interim measures equally to State Courts authority as a first step in hand. Thus, amending hard laws by equipping arbitral tribunals with the ability to render interim measures and to facilitate court recognition and acceptance of such measures as mentioned in UNCITRAL model law is useful. Such amendments can be considered an initial step towards enhancing the enforceability of the emergency arbitrator decisions.

On the contrary, all soft laws, as institutional rules of arbitration, allow arbitrators (whether arbitral tribunal or emergency arbitrators) wide discretion to order interim measures as previously mentioned. However, some of those rules grant parties of arbitration the freedom of choice not to allow emergency arbitrator issue interim measures unless parties have agreed. Whereas, others consider the choice of institutional soft law binding on parties, including granting the emergency arbitrator the power and authority to issue interim measures related to their dispute. But in both cases, soft laws alone are not effective in granting the power to enforce interim measures decisions. Thus, cooperation and coordination between hard laws and soft laws are not only necessary but also imperative to enhance enforcement.

Moreover, some soft laws(66) grant the arbitral panel the authority and power to review and even eliminate emergency arbitrators' decisions regarding interim measures. This practice can be perceived as inefficient, potentially resulting in wasted time and increased expenses. So, ensuring a minimum level of respect and effectiveness of emergency arbitrators' decisions is also a necessity to enhancement.

Enforcing an emergency arbitrator's decision depends on several factors, including the location of the arbitration, the governing rules and procedures, and the jurisdiction where enforcement is sought. Therefore, to tackle the difficulties that may arise in arbitration, it is advisable to include precise provisions in the arbitration agreements. Additionally, including specific language in the arbitration agreement about the enforceability of such decisions can strengthen their legal basis. Parties involved can also choose arbitration rules that deal with enforcement issues and carefully assess the potential challenges in enforcing emergency arbitrator decisions within selected jurisdictions. It is also beneficial to seek legal advice and consult with international arbitration experts.

To improve the enforceability of such a decision, certain steps can be taken, such as selecting a reputable arbitration institution like the ICC, LCIA, or AAA, SCC, SIAC, HKIAC, which have established procedures for recognizing and enforcing emergency arbitrator decisions and proved its effectiveness through practice.

It is important to adhere to the applicable arbitration rules and procedures, as well as the local laws and regulations of the relevant jurisdiction, to ensure the enforceability of the

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(65) Review for example: Article#24, para.4, Swedish Arbitration Act, (SAA), 1999: "Unless the parties have agreed otherwise, the arbitrators may, at the request of a party, decide that, during the proceedings, the opposing party must undertake a certain interim measure to secure the claim which is to be adjudicated by the arbitrators….".
Please note that this is not available in the Lebanese Legislation where issuance of interim measures decisions is inclusively granted to Local courts due to its nature as proved before.

(66) Review SCCA rules and CRCICA rules for example.

emergency arbitrator's decision. Parties can also seek judicial confirmation of the decision in some jurisdictions, which can help to enhance its enforceability. By maintaining comprehensive documentation of the arbitration proceedings, engaging local legal experts, and seeking interim relief from national courts, if necessary and more effective, parties can increase the likelihood of the emergency arbitrator's decision being recognized and enforced.

An amendment to the New York Convention for recognition and enforcement of arbitral awards should explicitly cover emergency arbitrator decisions.

It is worth noting that while integrating emergency arbitration into arbitration mechanism is a progressive step, its effectiveness is not guaranteed. This is due to essential need going through enforcement procedures that widely vary between different jurisdictions, necessitating that parties seek legal advice to navigate the specific legal landscape relevant to their dispute, and enhance the enforceability of interim measures obtained by emergency arbitrators. Thus, all the desired goals of emergency arbitration are obstructed.

6. METHODOLOGY AND STUDY DESIGN

A survey of global arbitrators and practitioners was conducted to examine their approach to different challenges facing the enforceability of Emergency Arbitration decisions, and generally on what specific issue do they rely on to avoid such uncertainty of enforcement due to different aspects mentioned in the study. The answers represent an only available outlet to semi guarantee the enforcement of Emergency Arbitration decisions including interim measures that is “obeying by compliance”. Knowing that this will not lead to final release of the problem, for in most interim measure’s decisions third parties’ rights will be affected. Thus, voluntary compliance does not apply in this case while it is impossible to take their pre-approval on enforcing such emergency decisions.

On the other hand, discussions with local judges authorized to grant foreign judicial rulings and arbitration awards execution revealed that granting enforcement to Emergency Arbitration decisions is a complicated procedural issue that has no legal grounds to be solved until now. Thus, there is currently no means for enforcement within existing legislations, as long as the nature of the arbitrator issuing interim measures is of emergency nature and lacks the features of the arbitral tribunal, and the nature of the interim measure itself is classified as a decision rather than an award.

Therefore, an additional global mindset effort shall be done from global arbitrators, practitioners, researchers, legislators in cooperation with their local judges, to work on lessening the harshness of procedural laws that hinders the achievements of International Commercial Arbitration mechanism in full, by providing new practical tools specified to enforce Emergency Arbitration interim measures through enhancing local legislations by adopting the UNCITRAL Arbitration procedure model law. Over and above endeavor (hustle) on the amendment of New York convention to include mandatory implementation of Emergency Arbitration decisions a necessity.

7. RESULTS

- It is indisputable that no other new arbitral mechanism has found such widespread acceptance in recent revisions of institutional arbitration rules.
- The enforcement of emergency arbitration decisions is of the same importance as the tool itself, to provide effective results that serve the goals of the Arbitration mechanism.
- Primary potential challenges to enforceability of emergency arbitrator decisions are worthwhile undertaking.

- Using arbitration mechanism measurement doesn't fit enforcing emergency arbitration decisions in full, due to its need of coercive power present through state courts.
- Challenges to enforceability underscore the importance of procedural public policy concerns.
- While UNCTRAL Model Law as amended in 2006 can be helpful if recognized by state legislations, it does not offer a final solution.
- Procedural obstacles are dominant to non-enforcement.
- Consent of parties to comply with emergency arbitration decisions may lead to inadequate cooperation.
- The rights of third parties reveal a real challenge to enforcement of emergency arbitration decisions if affected.
- Specialized Multilateral Convention to enforceability of Emergency Arbitration decisions is the only solution.
- Both Ad-Hoc and Institutional Arbitration need New York Convention rules as the only legal means to address the absence of binding enforcement rules of emergency arbitration.
- An amendment to the New York Convention to include grant emergency arbitration decisions is essential.
- Commentators, specialized arbitrators, judges, lawyers, academics specialized in Arbitration, and legislators are urged to make more efforts in offering suitable and applicable solutions to guarantee effective enforcement.
- Explicit legislations granting recognition and enforcement of emergency arbitrator decisions, regardless of their nature, as Hong Kong and Singapore have done, is essential.

8. CONCLUSION:

Enforceability of Emergency Arbitrator Decisions are, "as old as the institution of emergency arbitration itself"(67) .

In recent years, almost every arbitral institution which has revised its rules has incorporated provisions on emergency arbitration. Its arrival has been received with praise by arbitration mechanism community.

The foregoing potential difficulty of un-enforcement presented in the dissertation is not unique to one state only. Thus, the enforcement of the emergency arbitrators order or decision is problematic in all states, as well. Practice proved that its decisions enforceability is challenged by one dominant aspect: "Nature of Emergency Arbitration Decisions" including three primary challenges regarding the nature of the decision, its finality, and the nature of power and authority granted to emergency arbitrators. In addition to more practical challenges that present the lack of coercive power of arbitrator to enforce interim measures decisions in states as a real challenge.

By analyzing the impact of the enforceability of emergency arbitrator decisions on the decision and whether to seek emergency relief from an emergency arbitrator or state court, it is proved to be different from one state to another due to the variance of procedural and substantive legislations and public policy concerns. Thus, hard laws practically contribute to announce it extremely, either useless or useful.

It was important to address the challenges related to the enforceability of emergency arbitrator decisions in international arbitration. Although emergency arbitration provides timely relief, the lack of a uniform legal framework and varying enforcement mechanisms across jurisdictions presents significant hurdles that even lead to ban the effectiveness of its enforceability frustrating emergency arbitration goals.

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(67) Ank Santens & Jaroslav Kudrna, no. (9).

So, to enhance enforceability, parties should focus on strengthening arbitration agreements, selecting reputable arbitration institutions, and adhering to established rules. It is also important to navigate local laws carefully, seek judicial confirmation when possible, and engage experienced local counsel to handle jurisdiction-specific complexities.

Consequently, all involved parties in the application of soft law in international arbitration are to warrant appropriate solutions to disputes in this field, thereby ensuring its legitimacy to emergency arbitrators' authority and power, that is definitely unexpected from the side of third parties involved in a way or another in such interim measures. Such involvement may be guaranteed by state courts only in two ways, including explicit legislations granting recognition and enforcement of emergency arbitrator decisions regardless of their nature, and amending New York Convention to include granting emergency arbitration decisions as essential.

LIST OF ABBREVIATIONS

1- International Chamber of Commerce (ICC).
2- London Court of International Arbitration (LCIA).
3- American Arbitration Association (AAA).
4- Arbitration Institute of Stockholm Chamber of Commerce (SCC).
5- Singapore International Arbitration Center Rules (SIAC).
6- Hong Kong Arbitration Center (HKIAC).
7- International Center of Dispute Resolution (ICDR).
8- Australian Center for International Commercial Arbitration (ACICA).
9- Swiss Chambers' Arbitration Institutes' (SCAI).
10- Dubaï International Arbitration Center (DIAC).
11- Saudi Center for Commercial Arbitration (SCCA).
12- Cairo Regional Center for International Commercial Arbitration (CRCICA).
13- Swedish Arbitration Act (SAA).
14- Lebanese Code of Civil Procedure (LCCP).
15- New York Convention (NYC).
16- Kluwer Law International (KLI).

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