

The New Development of International Arbitration Law: Emergency Arbitrator System*

Shiping Lu

School of Marxism
Xi'an University
Xi'an, China 710065

Hongyan He

School of Medical Technology
Xi'an Medical University
Xi'an, China 710021

Abstract—The emergency arbitrator system is a procedural system in which the parties apply for emergency temporary relief to the arbitration institution to protect their legitimate rights and interests before the formation of arbitral tribunal, whose core is the decision on emergency temporary relief measures. This system can make up for the inadequacy of in traditional arbitration that arbitration institutions cannot provide relief for emergency situations before the arbitral tribunal is formed. Therefore, its creation has considerable legitimacy and has become the latest development phenomenon of international arbitration legislation.

Keywords—*emergency arbitrator; distribution of jurisdiction; emergency arbitral tribunal; emergency temporary relief decision*

I. INTRODUCTION

The emergency arbitrator system is a procedural system in which the parties apply for emergency temporary relief to the arbitration institution to protect their legitimate rights and interests before the formation of arbitral tribunal, whose core is the decision and implementation of emergency temporary relief measures. This system can fully respect the parties' willingness to arbitrate and reduce the unnecessary intervention of court, so as to make the entire arbitration process more efficient and fair, and it can also guarantee the authority of arbitration and the predictability of arbitration results. Therefore, the major arbitration institutions in the world have introduced the emergency arbitrator system to their arbitration rules, which is also widely welcomed in today's international arbitration practice. However, there is no provision in China's arbitration legislation yet, which creates obstacles to arbitration practice. Therefore, it is extremely necessary to study this system in China.

II. THE FORMATION OF EMERGENCY ARBITRATOR SYSTEM

The Emergency Arbitrator System derives from the "Pre-arbitral Referee System" of the International Court of Arbitration of the International Chamber of Commerce (ICC), and was then formally established in the International Arbitration Rules of the American Arbitration Association-

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International Centre for Dispute Resolution (AAA-ICDR).

A. Pre-arbitral Referee System of ICC

In order to resolve the urgent issues that need to be dealt with before the formation of arbitral tribunal, the ICC established the 1990 Pre-arbitral Referee Rules. This is the "Pre-arbitral Referee System", embryonic form of the emergency arbitrator system.

The purpose of the rule is to enable parties who agree to accept pre-arbitral refereeing to promptly turn to the referee, who has the power to make orders to resolve urgent issues under dispute, including the power to order to preserve or record evidence. Therefore, the order can temporarily resolve the dispute and lay the foundation for the final resolution of the dispute through agreement or other means. It can be seen that the procedure does not deprive the jurisdiction of any entity (arbitral tribunal or national court) making the final decision on any substantive issue of the dispute.

The Pre-arbitral Referee Rule is a procedural rule for adjusting the pre-arbitral referee procedures. It stipulates that an immediately designated person ("referee") has the right to make certain orders before the arbitral tribunal or domestic court ("jurisdictional agency") that has jurisdiction over the case accepts the case.

The pre-arbitral referee system stipulates that a referee selected by the parties before the formation of arbitral tribunal may take any temporary measures for emergency. However, at that time, it was only stipulated that the referee can take temporary measures, but there was no provision for the implementation of temporary measures. Therefore, the implementation of temporary measures relied entirely on the voluntary performance of the parties to the arbitration.

B. Emergency Arbitrator System of ICDR

AAA established the ICDR in 1996 to manage international arbitration items initiated under the rules of this agency.

The ICDR is an innovator of many international arbitration rules. The ICDR Arbitration Rule is also known as the leader of international arbitration rules innovation for its many pioneering important rules and regulations such as emergency temporary relief. In 2006, when the ICDR amended the 1991 ICDR Arbitration Rule, it officially

stipulated emergency temporary relief in Article 6 (emergency protection measures). Therefore, ICDR officially established the emergency arbitrator system in the world's international arbitration rules.

Subsequently, many arbitration institutions also developed the emergency arbitrator system. Article 29 "Emergency Arbitrators" of ICC's 2012 ICC Arbitration Rule and Annex V Emergency Arbitrator Rules (Article 8) together constitute the ICC's Emergency Arbitrator System. China International Economic and Trade Arbitration Commission (CIETAC) also stipulate the system in Article 23 of the 2015 CIETAC Arbitration Rule and its Annex III CIETAC Emergency Arbitrator Procedure. Articles 19-24 of the Arbitration Rules of China (Shanghai) Pilot Free Trade Zone (referred to as the Free Trade Zone Arbitration Rules) also stipulate the emergency arbitrator system. Beijing Arbitration Commission (BAC) also stipulates the emergency arbitrator system in Article 63 of the BAC Arbitration Rule.

In addition, the world's major arbitration institutions such as Singapore International Arbitration Centre (SIAC) have already introduced the system in their respective arbitration rules.

C. The Legitimacy of the Formation and Existence of the Emergency Arbitrator System

In 2009, the official report of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) showed that 82% of SCC arbitration participants believed that arbitration institutions should provide temporary relief measures in the early stage of arbitration or even before that. It can be seen that both arbitration practitioners and authoritative arbitration experts believe that the emergency arbitrator system is in rigid demand in arbitration practice. In fact, such rigid demand fully proves that the emergence of the system is fully adapted to its background. As for the background of its emergence, arbitration institution makes a special application for emergency arbitration according to the parties before the formation of arbitral tribunal; in order to ensure the smooth progress of arbitration procedures and protect the legitimate arbitration rights of both parties, it is necessary to create a new system for taking temporary measures for special cases in a relatively short period of time. At this time, the designated special emergency arbitrator will be able to complete the mission. The emergency arbitrator system emerged. Therefore, the core of the emergency arbitrator system is its procedural significance, and its value is manifested through procedural significance. Therefore, the legitimacy of the formation and existence of the emergency arbitrator system is precisely its procedural value and significance.

Up to this day, although the specific meaning of the emergency arbitrator system in each country, the rights and obligations of emergency arbitrators, and even the practice are different, there are many common characteristics that reflect its legitimacy:

Firstly, it can guarantee the efficiency of the arbitration process. This is the purpose of the system's establishment, to

prevent the loss to the parties caused by unnecessary judicial intervention and mechanism delay. It is essentially a procedural system in which arbitration institution issues emergency temporary relief measures. The relief time of the system is before the formation of arbitral tribunal. This can exactly ensure the efficiency of the arbitration process. In fact, the emergency arbitrator system is more efficient in guaranteeing the efficiency of arbitration procedure than traditional arbitration that takes preservative measures until the arbitral tribunal is formed. Although arbitration has an efficient and rapid advantage over court trials, there is still a period of time between the start of arbitration process (the date the arbitration institution receives the arbitration application) and the formation of arbitral tribunal. Before the formation of arbitral tribunal, it is necessary to go through extremely complicated arbitration applications and acceptances. After the acceptance, there are many documents to be delivered. Then there is the reply and counterclaim. At this time, the arbitral tribunal may not have been formed. The arbitral tribunal is formally formed only after the arbitration applicant and respondent receive the arbitrator register and other documents, and the arbitrator has selected, designated or determined; the arbitration institution shall also notify the parties in writing of the composition of the arbitral tribunal. During this period, it may also involve the arbitrator's withdrawal. These are the complicated and cumbersome processes that need to go through before the arbitral tribunal is formed. The time of such experience may be a good opportunity for those who maliciously delay the arbitration time or intend to destroy, transfer or destruct the evidence. In order to ensure the smooth progress of the arbitration process and the smooth implementation of the arbitral award, the parties must deal with temporary security measures as soon as possible, such as sealing up, seizure, freezing or other methods prescribed by law. These emergency temporary relieves rely entirely on the role of the emergency arbitrator system.

Secondly, it can better maintain procedural justice in arbitration. Procedural justice corresponds to substantive justice, and is also known as "visible justice." The law must ensure that the parties are treated fairly in the refereeing process, which is the embodiment of procedural justice. The emphasis on procedural justice in arbitration is to prevent the parties from being unable to enjoy the rights they should enjoy because the arbitral tribunal is not formed; guaranteeing the procedural justice is also a prerequisite for ensuring the correct judgment of the entity.

Thirdly, it can guarantee the independence of arbitration process. Many international arbitration rules stipulate that unless the parties agree otherwise (some international arbitration rules even exclude such special agreement), the emergency arbitrator shall not serve as a formal member of arbitral tribunal or participate in the refereeing of entity dispute, so as to avoid dealing with the procedure part in emergency arbitration and affecting the fair refereeing of the entity part. It can be seen that the emergency arbitrator only solves the procedural problems, and can better guarantee fairness and justice due to the independence of the arbitration procedure.

Fourthly, it can make arbitration more economical. The arbitration cost of a case includes not only the simple economic costs such as the case acceptance fee and processing fee, but also the time cost and the resulting daily cost loss and even the corresponding interest loss of the parties, as well as the wrong referee cost, various economic losses caused by it and non-economic costs and the associated economic losses. The emergency arbitrator system controls from the root cause and forms arbitral tribunal quickly; the referee time is short, and once the decision is made, it can protect the parties.

III. THE JURISDICTION OF EMERGENCY TEMPORARY RELIEF

As mentioned above, the emergency arbitrator system embodies its characteristics and advantages through emergency temporary relief measures taken by the emergency arbitrator (making preservation ruling on relevant property, evidence, and even the actions of the parties). Because before the formation of arbitral tribunal, a party may transfer, destroy or conceal the evidence or property possessed, resulting in the ultimate failure to enforce the arbitral award. At this time, the arbitration institution must take temporary relief measures according to the written application of the other party. In this way, the latter's interests can be preserved. Of course, temporary relief measures are only temporary and emergency measures (the temporary relief measures are not binding on the formal arbitral tribunal later formed, and the arbitral tribunal has the right to referee again according to the actual situation, modify or abolish the part it thinks is wrong to render it ineffective; at the same time, the effectiveness of temporary relief measures may also be ineffective due to the arbitral tribunal's final award). This is also the need to reach a balance between the parties. In any case, this indicates that there is a close relationship between the emergency arbitrator system and the temporary preservative measures. The emergency arbitrator system has always been operated around the emergency temporary measures - starting with the application of emergency temporary measures and finally taking emergency temporary measures.

In general, the jurisdiction of arbitration shall be vested in the arbitral tribunal. However, on how to distribute the jurisdiction of emergency temporary relief, that is, who decides to take emergency temporary relief (i.e., the decision of the emergency arbitrator), the provisions of legislation and the arbitration rules of major arbitration institutions vary widely. All in all, the issuing authority of temporary measures is generally divided into three modes: court-specific mode, arbitration institution-specific mode, and the coexistence mode of court and arbitration institution.

First, it is the court-specific mode that was widely applied to countries in early stage. Under this mode, the court has the right to issue temporary measures. Article 101 of the Civil Procedure Law of China clearly stipulates that court is the sole subject to accept the application for preservation. The advantage of the court-specific mode is that by using the judicial coercive power of court, it ensures that the temporary preservation measures are effectively

implemented and better achieve the purpose of temporary preservation measures; the mode also has its limitations. The original intention of the parties to choose arbitration is to resolve disputes quickly and professionally without disclosing trade secrets, but this mode will run counter to the original intention of the parties and the development trend of modern arbitration.

Second, it is the arbitration institution-specific mode. Under the arbitration institution-specific mode, the right to issue temporary preservative measures is vested to the arbitration institution alone, and the court has no right to intervene. However, none of the arbitration legislation of various countries and the arbitration rules of major arbitration institutions has exclusively granted the right to issue temporary measures to arbitration institutions. Although this mode can exclude judicial intervention to the maximum extent and respect the parties' willingness to arbitrate, arbitration institution is not a national judicial organ, and the ruling made by the emergency arbitral tribunal simply relies on the conscious performance of the parties. Although the emergency arbitral tribunal may make adverse inferences or take compensation measures to parties who fail to perform the ruling, they are secondary indirect means with little effect. Therefore, the coexistence mode of arbitration institution and court is currently recognized by most countries.

IV. THE COMPOSITION OF THE EMERGENCY ARBITRATION TRIBUNAL

In theory, after the jurisdiction of emergency temporary relief is determined, the issues that should be discussed are the initiation of the emergency arbitrator process, the appointment of emergency arbitrator, and the rights and obligations of the emergency arbitrator.

A. *Initiation of the Emergency Arbitrator Procedure*

The initiation of the emergency arbitrator procedure includes three aspects: the agreement of the parties, the application for emergency temporary measures and its acceptance.

1) *The initiation of the emergency arbitrator procedure must comply with the agreement of the parties:* The autonomy of will of the parties (free will) is one of the necessary conditions for the initiation of the emergency arbitration procedure. However, if the parties are given too many free choices, the application rate of the emergency arbitrator procedure may be greatly reduced, which does not comply with the expectations for the system. The ICC has previously adopted the "consensus-incorporating" approach in the referee procedure, resulting in a very low application rate of the procedure in practice. Therefore, most emergency arbitrator systems apply the principle of explicit exclusion: the emergency arbitrator system should be automatically applied unless the parties agree in the arbitration agreement to explicitly exclude the application of the emergency arbitrator system. The way of automatically adding the emergency arbitrator term to arbitration agreement is also

known as the "optional exclusion" method. The advantage is that the parties usually do not make the arbitration pre-procedure special agreement when concluding the arbitration agreement for they cannot predict the future, and the emergency arbitrator system can still be initiated according to the application of the parties. In this way, the emergency arbitrator procedure can be universally applicable, and the parties can make appropriate choices between the emergency arbitrator system and judicial channels such as courts according to the principle of maximizing profits. In other words, although the arbitration agreement does not explicitly stipulate the application of the emergency arbitrator system, the arbitration rules agreed to be applied in the arbitration agreement stipulate the emergency arbitrator system. At this time, both parties may choose to apply the emergency arbitrator system or choose to seek temporary relief from the court. This will better protect the parties' arbitration rights to the greatest extent.

2) *Application for emergency temporary preservative measures:* The application for emergency arbitration by a party to arbitration institution is one of the necessary conditions for the initiation of emergency arbitration procedure. Without the application of the parties, the arbitration institution cannot initiate the emergency arbitrator procedure. Compared with the court, the autonomy of will of the parties is more obvious in arbitration. In terms of the application content of the parties, each arbitration institution generally requires to clarify the basic situation of the parties, and indicate the nature and type of emergency temporary relief measures. In terms of submitting time of the application, although various arbitration institutions have stipulated that the emergency arbitration application must be submitted before the arbitral tribunal is formed, the specific time may be different.

3) *Acceptance of emergency temporary preservative measures:* For an application for an emergency temporary preservative measure by a party, the arbitration institution shall conduct a preliminary examination based on the application submitted by the applicant, the arbitration agreement and relevant evidence, and then determine whether the emergency arbitrator procedure is applicable. Where it is determined to be applicable, the emergency arbitrator shall be designated. If it is determined to be not applicable, a written ruling of not accepting shall be made and then sent to the applicant.

B. Designation of Emergency Arbitrator

The appointment of emergency arbitrator is necessarily efficient and rapid due to the urgency and temporary nature of the procedure. Although the time for designating emergency arbitrators varies among arbitration rules, the arbitration institution will review as soon as possible after receiving an emergency arbitration application.

At the same time, although the emergency arbitrator is a "small arbitral tribunal" (also known as the "emergency arbitral tribunal") formed for procedural issues, the

emergency arbitrator can only designate a suitable candidate from the arbitrator list provided by the director of the arbitration institution, and the parties are not entitled to participate in the determination of the emergency arbitrator, which is all for the efficiency of the arbitration procedure, to avoid the time loss caused by the parties that cannot jointly select the emergency arbitrator and the economic losses caused to the parties. The root cause is the extreme urgency of the issue to be solved by the arbitrator and the extreme urgency of time requirements. However, in order to make up for the autonomy of will of the parties for arbitration, considering the impartiality and independence of arbitration, the emergency arbitrator has the obligation to disclose. If the parties believe that the circumstances disclosed by the emergency arbitrator may lead to unfair referee, they may apply for withdrawal. The right to apply for withdrawal is the party's arbitration right and it cannot cause the parties to be unable to obtain relief or cause worse outcomes due to time constraints.

C. The Rights and Obligations of Emergency Arbitrators

When handling temporary preservative matters, emergency arbitrators may determine whether the applicant needs guarantee, whether to grant the applicant temporary relief, whether to issue an emergency decision, and what content to issue in emergency decision according to the actual circumstances of the case. It can be seen that the emergency arbitrator has the same independent rights as the arbitral tribunal and enjoys a lot of discretion. However, in order to ensure the smooth progress of the emergency arbitrator process and the impartiality of the emergency arbitrators' decision, it is necessary and reasonable to appropriately limit their rights. For example, CIETAC stipulates that decisions made by emergency arbitrators cannot bind the arbitral tribunal, and the decision of emergency arbitrators is not final. The rights of emergency arbitrators are subject to the following restrictions: Firstly, both the emergency arbitrator and the arbitral tribunal have the right to terminate the temporary decision made by the emergency arbitrator. Secondly, if the director of the arbitration commission believes that the emergency arbitrator should withdraw but he / she does not withdraw automatically, the director of the arbitration commission may make a withdrawal decision. Thirdly, the rights of the emergency arbitrator are also subject to the arbitration agreement and time. Within 90 day after the emergency arbitrator makes the decision, or within the term extended by the arbitration agreement, if the arbitral tribunal is still has not formed, the emergency arbitrator's rights will end.

Emergency arbitrators also have corresponding obligations. The primary obligation is that emergency arbitrators must treat the parties equally. The emergency arbitrator shall sign a declaration when accepting the designation, and disclose in writing to the parties and the arbitration institution any facts and situations that may reasonably doubt the impartiality and independence, which are forwarded to the parties by the arbitration institution.

V. THE ISSUANCE OF EMERGENCY TEMPORARY RELIEF DECISIONS

The completion of the emergency arbitrator designation procedure indicates that an emergency arbitral tribunal that has made a decision on emergency temporary relief for temporary preservative matters has been formed. At this time, all matters concerning the case preservation and its materials will be transferred from the arbitration institution to the emergency arbitrator.

A. Conditions for Issuing the Emergency Temporary Relief

There is no uniform international practice regarding the conditions for issuing emergency temporary relief. Some scholars believe that the conditions for issuing emergency temporary relief are divided into three categories: prerequisite, guarantee condition and condition for submitting arbitration applications. Firstly, prerequisite means that the applicant needs to prove that he / she has the possibility of winning the arbitral tribunal support for the entity dispute, and proves that the serious consequences that may be caused if emergency temporary relief measures are not taken, and that the serious consequences are difficult to recover and repair. Secondly, the guarantee condition means that in order to ensure that the emergency arbitrator system is not abused and the arbitration institution has the right to require the applicant to provide certain guarantees, so as to avoid the casual application caused by the low-cost emergency arbitrator procedure, which will bring the unfair and unnecessary damage to the respondent. Thirdly, the condition for submitting arbitration application means that the applicant should submit an arbitration application within a certain period of time after the emergency arbitrator makes a decision on emergency temporary relief, otherwise the decision on emergency temporary relief will not be effective.

B. Trial Form of Emergency Arbitral Tribunal

As mentioned above, fast and efficient is also the purpose of this link. Therefore, the trial form of emergency arbitration can be flexibly operated according to the judgment of the emergency arbitrator on the case. In view of the urgency of the request by the parties to the emergency arbitrator procedure, the emergency arbitrator has less choice of the manner in which both parties and the arbitrator are present for formal court sessions. This way is too cumbersome and will increase unnecessary economic costs. The court session is opened on procedural issues only, and it can be judged on the basis of facts. Therefore, most will choose to exchange written statements or have telephone video conferences for trial.

C. Making an Emergency Decision

After the emergency arbitrator is appointed, the emergency arbitrator shall make the necessary decision on emergency temporary relief measures as soon as possible (within 15 to 30 days) for urgency. In the decision, the reasons for taking emergency relief measures shall be stated and it shall be signed by the emergency arbitrator, stamped by the arbitration tribunal of the arbitration commission or the arbitration tribunal of the branch/arbitration center. It

must be noted that emergency arbitrators should make reasonable efforts to ensure that decisions are made legally and validly.

Of course, the emergency arbitrator's decision is binding on both parties. The parties may apply to the court of competent jurisdiction for enforcement according to the relevant laws of the country or region where the enforcement is conducted.

D. Changes in Emergency Decisions Under Specific Conditions

Under specific conditions, emergency decisions made by emergency arbitrators may be subject to changes such as modification, suspension or termination. This is a means of relief designed for the emergency arbitrator system, also to prevent the emergency arbitrator system from being abused by malicious emergency arbitration applicants. The changes in the decision of the emergency arbitrator may be made by the emergency arbitrator at the request of the parties and with sufficient reasons, or by the arbitral tribunal after its formation. Since the emergency decision made by the emergency arbitrator is not binding on the formal arbitral tribunal, the arbitral tribunal has the right to judge again according to the actual situation, to modify or abolish the part that it considers wrong to make it ineffective, and the emergency decision made by the emergency arbitrator will also be invalidated due to the arbitral tribunal's final decision. Therefore, the results of the emergency arbitrator system are not final but only temporary, which is a decision taken to prevent immediate emergencies. Therefore, a correct understanding of the nature of the emergency arbitrator procedure is also conducive to the smooth progress of the entire arbitration procedure.

VI. DEFICIENCY IN THE OPERATION OF THE EMERGENCY ARBITRATOR SYSTEM

Although the emergency arbitrator system can solve the problems that traditional arbitration cannot solve, it has deficiency that affects its applicability and implementation in operation.

Firstly, it has not been recognized by most countries in legislation. Although the explicit exclusion principle followed by the emergency arbitrator system can expand the application of the emergency arbitrator system to a certain extent, it has not been recognized by most countries in legislation, and many countries have not entitled arbitral tribunals to issue emergency temporary relief measures. It is difficult for the emergency arbitrator system to exert its advantages, which is a big limitation.

Secondly, the enforcement of emergency temporary relief decisions issued by emergency arbitrators is not guaranteed. Even though some arbitration rules stipulate that emergency arbitrators can take temporary measures, most countries' legislation does not explicitly stipulate that arbitral tribunals have the power to issue temporary measures and does not stipulate the implementation of the temporary measures. According to the final report on the emergency arbitrator procedure issued by the International Chamber of Commerce

on April 1, 2019, since the emergency arbitrator procedure in the ICC Arbitration Rule has been in use from January 1, 2012, only Austria, Hong Kong, New Zealand and Singapore have made specific provisions for the implementation of emergency arbitrator decisions in their laws. The report emphasizes that in most cases the parties will voluntarily comply with the decision of the emergency arbitrator to avoid non-compliance with the decision and avoid negative impact on the entity trial of the arbitration case. The report concludes that the emergency arbitrator procedure is being used more and more throughout the world, which indicates that the enforceability of the emergency arbitrator's procedure decision does not prevent the arbitration parties from using the mechanism. However, in order to give emergency temporary relief a practical meaning, it should be given the enforcement power to make it equivalent to the ruling made by the general arbitral tribunal so that the court can enforce according to "ruling".

VII. CONCLUSION

In short, the emergency arbitrator system can make up for the deficiency that the traditional arbitration system cannot provide relief for emergencies before the arbitral tribunal is formed. It is a procedural system that can protect the legitimate rights and interests of the parties; therefore, its existence is fairly legitimate and has become a latest development phenomenon in international arbitration legislation. China's academic circles should base on the current emergency arbitrator legislation in the world, and conduct sufficient research on them to make necessary theoretical preparations for the emergency arbitrator legislation in China.

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