

A Mechanism for Expedited Relief in Arbitration: the Emergency Arbitrator

Inside Arbitration | Vardar Şanlı



The constitution of an arbitral tribunal necessarily takes a certain amount of time. However, in some disputes, the need for interim relief may be too urgent to await the constitution of the arbitral tribunal. The dissipation or transfer of assets, loss of evidence, an irreversible alteration of the status quo or a demand for payment under a guarantee may be cited as examples of circumstances in which an urgent need for interim relief may arise. The emergency arbitrator mechanism was developed to address such urgent requests for interim relief arising before the constitution of the arbitral tribunal. The role of the emergency arbitrator is not to finally determine the merits of the dispute, but to provide the interim protection required until the arbitral tribunal is constituted. Accordingly, the emergency arbitrator's authority is essentially temporary in nature. Once the arbitral tribunal has been constituted, the measures ordered by the emergency arbitrator may, depending on the applicable rules, be modified or revoked. The arbitral tribunal is also generally not bound by the Emergency Arbitrator's findings on the merits of the dispute.

The Emergency Arbitrator mechanism does not preclude the parties from seeking interim relief from state courts.

Emergency arbitration is neither a mandatory nor an exclusive substitute for interim relief available from state courts. Indeed, major institutional arbitration rules, including Article 9 of Appendix IV to the ICC Arbitration Rules, Article 9(13) of the LCIA Arbitration Rules and Article 1(3) of the ISTAC Emergency Arbitrator Rules, preserve the parties' right to seek interim measures from competent state courts notwithstanding the availability of the Emergency Arbitrator mechanism.

From the perspective of Turkish international arbitration law, Article 6 of Law on International Arbitration (Law No. 4686) (the "IAL") similarly provides that a party's application to a court for an interim measure or an interim attachment, whether before or during the arbitral proceedings, is not incompatible with the arbitration agreement. At the same time, Article 6 imposes certain limitations on the powers of arbitrators to grant interim relief. According to this provision, arbitrators may not order interim measures or interim attachments that must be enforced by execution authorities or other public authorities or that are binding on third parties.

Against this background, the choice between applying to an emergency arbitrator and seeking relief from state courts should not be assessed solely by reference to which forum may provide a decision more quickly. The nature of the relief sought, whether the measure is intended to operate only between the parties to the arbitration agreement or also against third parties, whether its implementation requires the involvement of enforcement authorities or other public authorities and the approach of the relevant jurisdiction to enforcement should all be considered.

Institutional arbitration rules provide for different arrangements regarding the operation of the emergency arbitrator mechanism.

Although emergency arbitration is available under the rules of many arbitral institutions, the operation of the mechanism varies from one institution to another. One of the most important differences concerns the time limits for the appointment of the emergency arbitrator and the issuance of the decision. Under the ICC Arbitration Rules, the emergency arbitrator is appointed as soon as possible, normally within 2 days of the Secretariat's receipt of the application and must issue the order no later than 15 days from the date on which the file is transmitted to the emergency arbitrator. Under the LCIA Arbitration Rules, the emergency arbitrator is appointed within 3 days of the LCIA Registrar's receipt of the application, while the application for emergency relief must be decided no later than 14 days following the appointment. The ISTAC Emergency Arbitrator Rules provide for the appointment of the Emergency Arbitrator within 2 working days of the Secretariat's receipt of the application and require the decision to be rendered no later than 7 days after the file is transmitted to the emergency arbitrator. Under the SIAC Rules, the emergency arbitrator is to be appointed within 24 hours, with an order or award to be issued within 14 days of the appointment. The differences between institutional rules are not limited to timing. For example, the ICC Arbitration Rules allow a party to request a preliminary order intended to prevent another party from frustrating the purpose of the emergency application, and such request may be determined without prior notice to the other parties. Where such an order is granted, the other parties must thereafter be given a reasonable opportunity to present their case without delay. The SIAC Rules similarly provide for a protective preliminary order mechanism. Such a request may be made without prior notice to the other parties, and the emergency arbitrator is required to determine the request within 24 hours of appointment. By contrast, the LCIA Rules require the emergency application to be delivered or notified to the other parties. Accordingly, the choice of arbitral institution may affect not only how quickly a party can obtain access to an emergency arbitrator but also the procedure to be followed once an urgent dispute arises.



Binding Effect and Enforceability of Emergency Arbitrator Decisions

Institutional arbitration rules generally provide that decisions rendered by an Emergency Arbitrator are binding on the parties or require compliance with them. However, the binding nature of a decision does not necessarily mean that it is directly enforceable through state authorities. Under Turkish law, Article 6(3) of the IAL allows a party to seek assistance from the competent court where an interim measure is not complied with. However, the IAL does not specifically regulate Emergency Arbitrators or clearly define the scope of the court's review. It therefore remains debated whether Emergency Arbitrator decisions fall within Article 6(3) and whether courts should give them direct enforceable effect or independently assess the requirements for interim relief. A similar debate arises in relation to the recognition and enforcement of foreign Emergency Arbitrator decisions under the 1958 New York Convention. In this context, an arbitral decision is generally expected to be binding and to finally determine the matter in order to qualify for enforcement. The debate concerning Emergency Arbitrator decisions focuses primarily on the requirement of finality. While one view considers such decisions insufficiently final because they may subsequently be modified or revoked, another argues that they may nevertheless be final as to the specific interim relief granted and that the Convention places greater emphasis on binding effect than on formal finality. The 11th Civil Chamber of the Turkish Court of Cassation has similarly emphasized binding effect over formal finality in the context of partial arbitral awards, an approach regarded as supportive of the enforceability of Emergency Arbitrator decisions.

Emergency arbitration should be considered when drafting the arbitration agreement and selecting the arbitral institution.

A separate provision is not always required for the Emergency Arbitrator mechanism to apply. Under institutional rules such as those of the ICC, LCIA and ISTAC, the mechanism generally applies subject to the relevant requirements, while the parties may expressly opt out of it. Accordingly, when drafting the arbitration agreement, the scope of the emergency relief mechanism offered by the chosen institution and whether the parties wish to retain or exclude that mechanism should also be considered.