LEGAL STATUS OF THE EMERGENCY ARBITRATOR UNDER THE SIAC 2010 RULES

Neither Fish nor Fowl?

The Singapore International Arbitration Centre released its new arbitration rules in July 2010. These new rules contain an innovative provision for an "Emergency Arbitrator" to hear applications for interim relief made in the time before the tribunal is constituted. Certain features of the Emergency Arbitrator may cast doubt over its legal status, and the legal effect of its orders. Also unresolved is the nature of the legal relationship between the Emergency Arbitrator and the eventual tribunal. In this article, the authors postulate that the Emergency Arbitrator and the eventual tribunal are part of the same arbitral tribunal within the meaning of the International Arbitration Act (Cap 143A, 2002 Rev Ed), and that the orders of the Emergency Arbitrator are legally enforceable under that statute.

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I. Introduction

1 As in litigation, parties in an international arbitration[1] occasionally require urgent interim relief. In some cases, interim relief can be a vital tool used by parties to preserve assets as well as to protect other rights.[2] Such interim relief can manifest itself in a variety of forms, ranging from requiring the respondent not to initiate any actions before national courts and not to disseminate information regarding the dispute to the press, to enjoining the claimant from preventing the respondent from removing its equipment from a disputed work site.[3]

2 In Singapore, as in other modern jurisdictions, the approach is to empower the tribunal to deal with interim relief applications[4], rather than to rely on national courts to provide interim relief. In Singapore, the courts' position is that where the tribunal has the power to order interim relief, the courts will not hear applications for such relief[5] and will refer the parties instead to the tribunal.

3 Leaving interim relief applications to the tribunal does create a jurisdictional void if a party wishes to make an application for interim relief before the tribunal has been constituted. Typically, it may take a few weeks from the start of the arbitration to constitute the tribunal. Until recently, in Singapore, the parties' main form of recourse for such interim relief prior to the constitution of the tribunal was by making applications for interim relief to the Singapore court.[6] Any such court-

1 The scope of this article is international arbitration under the Singapore International Arbitration Act (Cap 143A, 2002 Rev Ed) and the 1958 United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). The article does not explore domestic arbitration which is subject to a different regime.

2 Laurie E Foster & Nathalie Holme Elsberg, "Two New Initiatives for Provisions Remedies in International Arbitration,: Article 17 of the UNCITRAL Model Law on International Commercial Arbitrations and Article 37 of the AAA/ICDR International Dispute Resolutions Procedures" (2006) 5 Transnational Dispute Management discuss that "the effectiveness of international arbitration often depends on the availability of provisional measures to maintain the status quo or to preserve assets pending resolution by the tribunal".

3 See G Lemenez & P Quigley, "The ICDR's Emergency Arbitrator Procedure in Action" Dispute Resolution Journal (August–October 2008) 60.

4 See International Arbitration Act (Cap 143A, 2002 Rev Ed) s 12A.

5 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 12A (6): "[T]he judge … shall make an order [for interim relief] only if or to the extent that the arbitral tribunal … has no power or is unable for the time being to act effectively." The Singapore Court of Appeal in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 also made it clear that the court's powers to make interim orders should only be used in support of arbitration and that the primary source for interim relief should be the arbitral tribunal.

6 See International Arbitration Act (Cap 143A, 2002 Rev Ed) s 12A.

granted relief is a temporary measure and generally lapses upon constitution of the tribunal[7].

4 Some other international arbitration institutions[8] in modern jurisdictions have sought to reduce the involvement of national courts through the introduction, in various forms, of an "arbitrator" to whom the parties can apply for emergency interim relief in the period prior to the constitution of the tribunal. This is not a new idea. For example, the International Chamber of Commerce ("ICC") rules on the Pre-Arbitral Referee were issued in 1990. However, since the extensive revision of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("Model Law") provisions on interim measures in 2006,[9] there has been a growing trend in international arbitration towards using non-court regimes to deal with interim relief applications made before the constitution of the tribunal.[10]

5 In July 2010, the Singapore International Arbitration Centre ("SIAC") adopted new rules. These were the SIAC Rules (4th Ed, 1 July 2010) ("SIAC 2010 Rules"). These new rules allow the referral of early applications for interim relief to a non-court forum. The effect of this rule change is that parties to an SIAC arbitration making interim relief applications before the constitution of the tribunal (as defined in the SIAC 2010 Rules) can now seek urgent interim relief from a body other than the Singapore court.[11]

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7 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 12A (7): "[An interim] order made by the High Court or a Judge thereof … shall cease to have effect in whole or in part (as the case may be) if the arbitral tribunal, or any such arbitral or other institution or person having power to act in relation to the subject-matter of the order, makes an order which expressly relates to the whole or part of the order."

8 See the arbitration rules of, *inter alia*, the Arbitration Institute of the Stockholm Chamber of Commerce, the American Arbitration Association, the International Centre for Dispute Resolution, the International Institute for Conflict Prevention and Resolution, and the International Chamber of Commerce Rules for a Pre-Arbitral Referee Procedure which all contain a variation of the emergency arbitrator procedure.

9 United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration, 1985 ("Model Law"), as amended in 2006 ("Model Law 2006").

10 See, for example, the revised arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce (in particular Art 32 and Appendix II), which were effective from 1 January 2010.

11 It is expressly provided in the Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) ("SIAC 2010 Rules") that parties may still seek interim relief before the constitution of the tribunal from the national courts, and such request for interim relief is not incompatible with the SIAC 2010 Rules: r 26.3.

6 This article will examine the legal status of the Emergency Arbitrator and the legal effect of an interim relief order made by the Emergency Arbitrator.

II. The Emergency Arbitrator regime under the SIAC 2010 Rules

7 A party requiring emergency interim relief prior to the constitution of the tribunal may make an application for emergency interim relief concurrently with, or following, the filing of the notice of arbitration.[12] The requesting party is required to notify the Registrar of the SIAC and all other parties in writing of the application (in particular, the type of relief sought) and the reasons supporting the application.[13]

8 If the Chairman of the SIAC determines that the SIAC should accept the application, he will appoint a person to determine the application (the Emergency Arbitrator). The Chairman of the SIAC will seek to make this appointment within one business day of receipt by the Registrar of the application (and payment of any fee required under the SIAC 2010 Rules).[14]

9 The Emergency Arbitrator shall, as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency interim relief.[15] This schedule shall "provide a reasonable opportunity for all parties to be heard, but may provide for proceedings by telephone conference or on written submissions as alternatives to a formal hearing".[16]

10 The Emergency Arbitrator has the powers vested in a tribunal pursuant to the SIAC 2010 Rules, including the authority to rule on its own jurisdiction.[17] However, the Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless agreed by the parties.[18]

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12 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 1.

13 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 1.

14 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 2.

15 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 5.

16 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 5.

17 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 5.

18 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 4.

11 The Emergency Arbitrator has the power to order any interim relief it deems necessary, and shall give reasons for its decision in writing.[19] It may also modify or vacate its interim orders if good cause is shown.[20] The Emergency Arbitrator will have no further power to act after the tribunal tasked with hearing all aspects of the dispute submitted to it (and not only any application for interim emergency relief) is constituted.[21] In this article, the tribunal tasked with hearing all aspects of the dispute submitted is termed the "Merits Tribunal". The Emergency Arbitrator may make its order conditional upon provision of security by the party seeking the interim relief.[22] The SIAC 2010 Rules also expressly state that the parties agree to comply with the Emergency Arbitrator's order without delay.[23]

12 The Merits Tribunal has the power to reconsider, modify or vacate the Emergency Arbitrator's order for interim emergency relief, and is not bound by the reasons given by the Emergency Arbitrator.[24] The Emergency Arbitrator's order shall, in any event, cease to be binding if the Merits Tribunal is not formed within 90 days of the order, or when the Merits Tribunal makes a final award, or if the claim is withdrawn.[25]

III. Legal status of the Emergency Arbitrator and the legal effect of the orders for interim relief of the Emergency Arbitrator – Source of the doubts

13 There are several legal peculiarities about the Emergency Arbitrator not commonly associated with a normal tribunal. These peculiarities may give rise to doubts as to the legal status of the Emergency Arbitrator, and consequently, the legal effect of an order made by an Emergency Arbitrator.

14 The first peculiarity about the Emergency Arbitrator is that its orders are not final.

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19 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 6.

20 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 6.

21 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 7.

22 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 8.

23 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 9.

24 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 7.

25 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 7.

15 The second peculiarity about the Emergency Arbitrator is that it is apparently not empowered under the SIAC 2010 Rules to rule on the substance of the dispute.

16 The combined effect of these two peculiarities raises questions as to whether the Emergency Arbitrator is an "arbitral tribunal" within the terms of the International Arbitration Act[26] ("IAA"), and whether the orders of the Emergency Arbitrator are "arbitral awards" under the 1958 United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

17 These are questions of practical importance. If the Emergency Arbitrator is not an "arbitral tribunal" within the terms of the IAA,[27] its orders cannot be enforced in Singapore. If the orders of the Emergency Arbitrator are not "arbitral awards" under the New York Convention, those orders cannot be enforced outside of Singapore under that convention.

18 *Orders not final* – the SIAC 2010 Rules, Sched 1 para 7, state that "the Tribunal may reconsider, modify or vacate the interim award … any order or award … shall … in any event, cease to be binding if the Tribunal is not constituted within 90 days of such order or award or when the Tribunal makes a final award or if the claim is withdrawn". The SIAC 2010 Rules also state at Sched 1 para 6 that "the Emergency Arbitrator may modify or vacate the interim award or order for good cause shown".

19 On a plain reading, it seems clear the "order or award" made by the Emergency Arbitrator is not final. There are some arguments to the contrary, and those are discussed below.[28] However, the starting position seems to be that the orders of the Emergency Arbitrator are not final.

20 *Apparent inability to rule on the substance of the dispute* – there is a degree of uncertainty regarding the exact jurisdiction of the Emergency Arbitrator under the SIAC 2010 Rules. The Emergency Arbitrator has jurisdiction to "order or *award* any interim relief that [it] deems necessary" [emphasis added].[29] The Emergency Arbitrator may "modify or vacate the interim *award* or order for good cause shown" [emphasis added].[30] The word "*award*" is defined in r 1.3[31] as "any

26 Cap 143A, 2002 Rev Ed.

27 International Arbitration Act (Cap 143A, 2002 Rev Ed).

28 See the discussion at paras 78–81 of this article.

29 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 6.

30 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 6; for similar provisions in other international arbitration

(*cont'd on the next page*)

decision of the Tribunal on the *substance* of the dispute" [emphasis added]. On a purely textual approach, this suggests the Emergency Arbitrator has the power to rule on the substance of the dispute.

21 However, a reading of the entirety of Sched 1 shows the whole tenor is to limit the role of the Emergency Arbitrator to making orders of emergency interim relief. This interpretation better expresses the intention of the SIAC 2010 Rules as opposed to an interpretation based on the out of context reading of the word "award" in Sched 1 para 6.[32] Also, at least intuitively, it seems sensible that an award on the substance of the dispute should be final, whereas it seems from Sched 1 para 7[33] that the order of the Emergency Arbitrator is not final.

22 The apparent lack of finality in the Emergency Arbitrator's decisions, the doubt over whether the Emergency Arbitrator can rule on the substance of the dispute, and the fact that its role is only temporary[34] mean that the institution of the Emergency Arbitrator has some curious features that set it apart from a normal tribunal. This exceptional nature of the Emergency Arbitrator raises some interesting questions with regard to the legal status of its decisions.

23 The benchmark of success for the Emergency Arbitrator regime will be its ability to deliver expeditious and enforceable[35] interim relief. The importance of speed has been well recognised by the various international arbitration institutions with pre-arbitral regimes.[36] In all

centres, see the Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules Appendix II Art 1(2), the International Centre for Dispute Resolution Rules Art 37(5), the International Institute for Conflict Prevention and Resolution Rules r 14.9, and the International Chamber of Commerce Rules for Pre-Arbitral Referee Procedure Art 2.1 and Art 2.2.

31 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010).

32 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010).

33 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010).

34 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 4. The Emergency Arbitrator will not become a member of the Merits Tribunal unless all parties to the arbitration agree otherwise.

35 Christopher Boog, "Swiss Rules of International Arbitration – Time to Introduce an Emergency Arbitrator Procedure?" (2010) 28(3) ASA Bulletin 462 at 474 argues that "tribunal-ordered measures are of real value only if they are enforceable".

36 See the arbitration rules of, *inter alia*, the Arbitration Institute of the Stockholm Chamber of Commerce, the American Arbitration Association, the International Centre for Dispute Resolution, the International Institute for Conflict Prevention and Resolution, and the International Chamber of Commerce Rules for a Pre-Arbitral Referee Procedure which all contain a variation of the emergency arbitrator procedure.

but one (which is even faster),[37] the arbitrator to decide on the application for emergency relief is appointed within one business day of receipt of a request from a party seeking relief. The important practical question is whether or not this interim relief will be enforceable in Singapore and internationally.

24 The importance of enforceability is reinforced by the view held by certain commentators that the party against whom the measure is directed does not have the incentive of not upsetting the tribunal which will ultimately decide the merits of the case[38] and so will be less likely to comply with the measure voluntarily.[39]

25 Enforceability turns on whether the Emergency Arbitrator is an "arbitral tribunal" and whether its orders of interim relief are "arbitral awards". If the Emergency Arbitrator is an "arbitral tribunal" within the meaning of the IAA,[40] then its orders for interim relief are enforceable in Singapore. If the Emergency Arbitrator's interim relief orders are "arbitral awards" as defined under the New York Convention, then those orders can be enforced outside Singapore under the New York Convention.

IV. Are the orders made by the Emergency Arbitrator enforceable in Singapore?

A. Summary

26 In brief:

(a) In Singapore, the IAA[41] provides that only orders of an "arbitral tribunal" within the meaning of the IAA are enforceable.

(b) The strongest reading of the SIAC 2010 Rules is that the Merits Tribunal and the Emergency Arbitrator are part of a single "arbitral tribunal". The Merits Tribunal is a continuum of

37 The Stockholm Chamber of Commerce will appoint the Emergency Arbitrator within 24 hours of receipt of the request (Appendix II Art 4(1) of the Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules 2010).

38 See Emmanuel Gaillard & Philippe Pinsolle, "The ICC Pre-Arbitral Referee: First Practical Experiences" (2004) 20(1) Arbitration International 13 at 19; see also Christopher Boog, "Swiss Rules of International Arbitration – Time to Introduce an Emergency Arbitrator Procedure?" (2010) 28(3) ASA Bulletin 462 at 475.

39 See Christopher Boog, "Swiss Rules of International Arbitration – Time to Introduce an Emergency Arbitrator Procedure?" (2010) 28(3) ASA Bulletin 462 at 475.

40 International Arbitration Act (Cap 143A, 2002 Rev Ed).

41 International Arbitration Act (Cap 143A, 2002 Rev Ed).

the arbitral tribunal first constituted by the Emergency Arbitrator.

(c) If the Emergency Arbitrator and the Merits Tribunal are part of a single "arbitral tribunal", the Emergency Arbitrator is an arbitral tribunal within the meaning of the IAA. Orders made by the Emergency Arbitrator are enforceable in Singapore as orders or directions made by an arbitral tribunal under the IAA.

B. Introduction

27 Pursuant to the IAA,[42] both "orders or directions" and "awards" made by an arbitral tribunal in an international arbitration seated[43] in Singapore are enforceable by the Singapore courts.[44]

28 In respect of "orders or directions", s 12(6) of the IAA[45] states that "[a]ll orders or directions made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the High Court or a Judge thereof, be enforceable in the same manner as if they were orders made by a court and, where leave is so given, judgment may be entered in terms of the order or direction".

29 In respect of "awards", s 19 of the IAA[46] states that "[a]n award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award".

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42 International Arbitration Act (Cap 143A, 2002 Rev Ed).

43 See David St John Sutton, Judith Gill & Matthew Gearing, *Russell on Arbitration* (London: Thomson Sweet & Maxwell, 23rd Ed, 2007) at pp 84–85, para 2-100 which explains that the "seat" of an arbitration is "its 'juridical seat', which is the place to which it is legally attached" therefore it "is the legal, rather than the physical, place of arbitration proceedings … The 'seat' of the arbitration is often specified in the arbitration agreements by the selection of a particular place or country in which the arbitration is to be held … The choice of seat prescribes the procedural law of the arbitration and the choice of a procedural law will determine the seat. The parties' choice of a seat is therefore extremely important, not simply in relation to the proper law of the contract, but also because the law of the seat may contain provisions which have important consequences for the conduct of the proceedings".

44 See s 19 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) in respect of the enforcement of arbitral "awards", and s 12(6) in respect of the enforcement of "orders and directions".

45 International Arbitration Act (Cap 143A, 2002 Rev Ed).

46 International Arbitration Act (Cap 143A, 2002 Rev Ed).

30 It is clear from s 12(6) of the IAA[47] that only "orders or directions" made or given by an arbitral tribunal will be enforced in accordance with this section. Similarly, s 19 of the IAA can only apply where the "award" is made by an arbitral tribunal. This is put beyond doubt by the definition of "award" in the IAA,[48] which requires an "award" to be a "decision of the arbitral tribunal".[49]

31 Therefore, if the Emergency Arbitrator is an "arbitral tribunal" under the IAA,[50] the Emergency Arbitrator's orders on interim relief made pursuant to the terms of r 26 and Sched 1 to the SIAC 2010 Rules will be enforceable by the Singapore courts, regardless whether such decisions are characterised as "orders or directions" or "awards" under the IAA.

32 The critical issue is whether the Emergency Arbitrator is an "arbitral tribunal" under Singapore law. This issue will be discussed first, and then whether the Emergency Arbitrator's decisions are "orders or directions" or "awards" under the IAA[51] will be considered.

C. Legal characteristics of an arbitral tribunal

(1) Statutory definitions

33 The IAA defines an "arbitral tribunal" in the following terms:[52]

> 'arbitral tribunal' means a sole arbitrator or a panel of arbitrators or a permanent arbitral institution.

34 For the purpose of determining whether a particular body is an "arbitral tribunal", this definition is not immediately illuminating. However, it is useful to note that it is drafted widely. The terms "sole arbitrator" or "arbitrators" are not defined anywhere in the IAA[53] or the Model Law.[54]

35 It seems logical that if the Emergency Arbitrator regime contained in the SIAC 2010 Rules can be classified as an "arbitration" under the IAA,[55] then the Emergency Arbitrator would be an *"arbitral*

47 International Arbitration Act (Cap 143A, 2002 Rev Ed).
48 See International Arbitration Act (Cap 143A, 2002 Rev Ed) s 2.
49 See International Arbitration Act (Cap 143A, 2002 Rev Ed) s 2.
50 International Arbitration Act (Cap 143A, 2002 Rev Ed).
51 International Arbitration Act (Cap 143A, 2002 Rev Ed).
52 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 2.
53 International Arbitration Act (Cap 143A, 2002 Rev Ed).
54 The Model Law (except ch VIII) forms part of the International Arbitration Act (Cap 143A, 2002 Rev Ed) as Sched 1, by virtue of s 3 of the International Arbitration Act.
55 International Arbitration Act (Cap 143A, 2002 Rev Ed).

tribunal" within the meaning of the IAA. Unfortunately, there is also no useful definition of the term "arbitration" in the IAA or the Model Law.[56] This is in line with other international instruments and national statutes – Born observes that "virtually no international or national instrument attempts expressly to define these critical terms [*ie*, "arbitration" and "arbitration agreement"]".[57]

(2) Non-statutory definitions

36 There is no universally accepted list of characteristics that serves as a touchstone of whether something is an arbitration or not.[58] However, leading commentators have attempted variously to define and/or identify the characteristics of an arbitration. These attempts provide useful insight.

37 Born states what he believes to be the "common core definition"[59] of an arbitration ("Common Core Definition"), which he formulates from varying definitions of the term "arbitration" adopted by national courts from different jurisdictions and various commentaries:[60]

> There is general, albeit not complete, agreement among national courts, arbitral tribunals and commentators on what the term 'arbitration' means for purposes of both international arbitration conventions and national arbitration legislation. With some incidental variations, *virtually all authorities would accept that arbitration is a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard.* [emphasis added]

38 There is nothing in this Common Core Definition which is inconsistent with the conclusion that the Emergency Arbitrator regime is an "arbitration". In particular, this Common Core Definition does not require the decision by the arbitrator to be on the substance of the

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56 Article 2 of the Model Law defines an "arbitration" as "any arbitration whether or not administered by a permanent arbitral institution".

57 G B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at p 214. However, it should also be noted that the same author notes that, "the absence of any statutory definition of the term 'arbitration' is analytically unsatisfying but causes no practical difficulty in the vast majority of cases".

58 See Mustill & Boyd, *Commercial Arbitration* (London: Butterworths, 2nd Ed, 1989) at p 39, an observation repeated in their *2001 Companion* at p 119.

59 G B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at p 218.

60 G B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at p 216.

dispute, nor does it require the decision of the arbitrator to be final or non-reviewable.

39 Mustill and Boyd also provide a list of attributes which they believe *must* be present before a particular process qualifies as arbitration,[61] and some of these lend support to the proposition that an arbitration must resolve the substance of the dispute between the parties.[62] In particular, Mustill and Boyd state that "[t]he procedural agreement [*ie*, the arbitration agreement] must contemplate the process will be carried on between those persons whose substantive rights are determined by the tribunal".[63] The IAA also states that an "award" is to be a decision by the arbitral tribunal "on the substance of the dispute".[64]

40 The above seems to offer some support for the proposition that the Emergency Arbitrator is not an arbitral tribunal within the meaning of the IAA,[65] as the Emergency Arbitrator does not rule on the substance of the dispute.

41 There are also some commentaries which cast doubt on the possibility of having an arbitration which will not result in a decision which possesses the element of finality.[66] One would normally expect an arbitrator to be empowered to issue an "award" in an arbitration process. Given that the general understanding is that an "award" has to be final in nature,[67] this again casts some doubt as to the status of the Emergency Arbitrator due to the non-final nature of its decision.

42 For reasons that will be explained later in this article, the authors believe the Emergency Arbitrator is an arbitral tribunal. However, it is not possible to discuss this question by considering the Emergency Arbitrator in isolation from the Merits Tribunal. The SIAC

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61 But note the qualification in the book itself that this list is "almost certainly incomplete": Mustill & Boyd, *Commercial Arbitration* (London: Butterworths, 2nd Ed, 1989) at p 41.

62 Mustill & Boyd, *Commercial Arbitration* (London: Butterworths, 2nd Ed, 1989) at p 41.

63 Mustill & Boyd, *Commercial Arbitration* (London: Butterworths, 2nd Ed, 1989) at p 41; see also Reinmar Wolff, "Party Autonomy to Agree on Non-final Arbitration?" (2008) 26(3) ASA Bulletin 626 and Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) at p 122.

64 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 2.

65 International Arbitration Act (Cap 143A, 2002 Rev Ed).

66 See, *eg*, Reinmar Wolff, "Party Autonomy to Agree on Non-final Arbitration?" (2008) 26(3) ASA Bulletin 626 whose commentary is discuss in detail at paras 71–77 of this article; Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) at p 122, where it is suggested that a difference between an emergency arbitrator (*ie*, someone issuing orders of interim relief) and a typical arbitrator is that the emergency arbitrator does not "finally resolve substance of a dispute".

67 See the detailed discussion at paras 100 and 109–114 of this article.

2010 Rules work in such a way that the role of the Merits Tribunal and the role of the Emergency Arbitrator are bound up in a single process regulated under the SIAC 2010 Rules. In order to characterise the legal status of the Emergency Arbitrator, we must first establish the legal relationship between the Emergency Arbitrator and the Merits Tribunal.

D. The legal relationship between the Emergency Arbitrator and the Merits Tribunal

43 There are two main ways to characterise the relationship between the Emergency Arbitrator and the Merits Tribunal:

> (a) Position (A) – The Emergency Arbitrator and the Merits Tribunal are part of a single arbitral tribunal, albeit having different members at various times (and possibly different numbers of arbitrators in the case of a three-member Merits Tribunal). The Merits Tribunal is a continuum of the arbitral tribunal first constituted by the Emergency Arbitrator and part of the overall arbitral process.
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> (b) Position (B) – The Emergency Arbitrator and the Merits Tribunal are two separate decision-making bodies, but these decision-making bodies do not co-exist in time. The decision-making body in the form of the Emergency Arbitrator is dissolved upon the constitution of the decision-making body in the form of the Merits Tribunal.[68]

44 Both of these possibilities will be discussed, and the conclusion reached that the better characterisation is Position (A) above.

(1) Position (A): A single arbitral tribunal

45 The key to Position (A) is that an arbitral tribunal does not have to be one individual, or three individuals with similar powers. An arbitral tribunal can be a number of individuals each having a different

68 There is theoretically a third way to characterise the relationship between the Emergency Arbitrator and the Merits Tribunal. That is that the Emergency Arbitrator and the Merits Tribunal are two separate arbitral tribunals, and they co-exist in time, but that the parties have referred separate issues to each of these arbitral tribunals (the Emergency Arbitrator and the Merits Tribunal separately) for decision, *ie*, there is no overlap in the issues to be determined by the two. There is no support for this characterisation either in the Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) ("SIAC 2010 Rules"), or elsewhere. For one thing, the fact that the SIAC 2010 Rules provide that the Emergency Arbitrator has no further power to act once the Merits Tribunal is constituted seems fatal to this characterisation. For this reason, this potential third characterisation is not discussed here.

role and different powers, provided the rules which govern those roles and powers are known to and accepted by the parties to the arbitration.

46 One manifestation of this idea is in the definition of "arbitral tribunal" in the IAA. This extends the concept of an arbitral tribunal beyond "a sole arbitrator or a panel of arbitrators" to include "a permanent arbitral institution".[69] Similarly in the New York Convention, which does not expressly define "arbitral tribunal", the definition of "arbitral awards" includes "awards … made by permanent arbitral bodies".[70]

47 These definitions suggest that the concept of an "arbitral tribunal" under the New York Convention and the IAA[71] is wide enough to extend beyond the one person or three people designated to decide a dispute. The use of the words "arbitral bodies/institutions" contemplates an arbitral tribunal fixed not to named individual arbitrators, but fixed to a procedure (known to and accepted by the parties to the arbitration) which will deliver a decision.

48 The interlocking roles of the Emergency Arbitrator and the Merits Tribunal are both part of the procedure of the SIAC. The procedure is expressly adopted by the parties. The SIAC is a "permanent arbitral body" and "a permanent arbitral institution". The SIAC 2010 Rules ascribe different and distinct roles to the Emergency Arbitrator and the Merits Tribunal, but the efforts of both these bodies are required to deliver a decision. Reasoned in this way, the Emergency Arbitrator and the Merits Tribunal are two separate components of the same "arbitral tribunal".

49 Conceptually, this result is sustainable under the definitions of "arbitral awards" and "arbitral tribunal" under the New York Convention and the IAA,[72] respectively. However, there are portions of the SIAC 2010 Rules which do not fit entirely naturally with the single arbitral tribunal characterisation. These textual challenges are explored below, and it will be explained why the authors believe they can be overcome.

50 Rule 26.2 of the SIAC 2010 Rules reads: "A party in need of emergency interim relief *prior to the constitution of the Tribunal* may

69 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 2(1).
70 New York Convention Art I(2).
71 International Arbitration Act (Cap 143A, 2002 Rev Ed).
72 International Arbitration Act (Cap 143A, 2002 Rev Ed).

apply for such relief pursuant to the procedures set forth in Schedule 1 [*ie*, the Emergency Arbitrator regime]." [emphasis added][73]

51 This seems to suggest that there are two separate decision-making bodies, since if the Emergency Arbitrator and the Merits Tribunal were one arbitral tribunal, the time of appointment of the Emergency Arbitrator would also be the time of constitution of the arbitral tribunal which also includes the Merits Tribunal.

52 In the authors' view, such an interpretation wrongly ascribes to the term "Tribunal" in r 26.2 of the SIAC 2010 Rules[74] the meaning of an "arbitral tribunal" as under the IAA[75] and New York Convention. The more likely interpretation is that this reference to the "constitution of the Tribunal" refers to the appointment of the Merits Tribunal. On the authors' analysis, this is the stage where the composition of the single arbitral tribunal changes from being the person appointed as the Emergency Arbitrator to the person(s) appointed as the Merits Tribunal.

53 Paragraph 4 of Sched 1 to the SIAC 2010 Rules states that "[a]n Emergency Arbitrator may not act as an arbitrator in any *future arbitration* relating to the dispute, unless agreed by the parties" [emphasis added].

54 It might be argued that this implies that there are two separate regimes, which again supports the view that there are two decision-making bodies.

55 The authors do not follow that argument. The fact the procedure provides that the person who is appointed the Emergency Arbitrator may not without both parties' consent serve as a member of the Merits Tribunal is a rule of good practice. It anticipates any discomfort the parties may have in having a person who has heard applications for urgent interim relief later taking a role in deciding the

73 See similar language at Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 1.

74 The term "'Tribunal' includes a sole arbitrator or all the arbitrators where more than one is appointed": r 1.3 of the Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) ("SIAC 2010 Rules"). The definitions of a "Tribunal" under the SIAC 2010 Rules and the concept of a tribunal under the International Arbitration Act (Cap 143A, 2002 Rev Ed) and the New York Convention are different. The definition of a "Tribunal" under the SIAC 2010 Rules suggests that the members of that "Tribunal" are natural persons. This is in contrast to the definition of "arbitral tribunal" under the International Arbitration Act, which is wider and clearly contemplates a "permanent arbitral institution" as an "arbitral tribunal". Similarly, under the New York Convention, "arbitral awards" includes awards rendered by "permanent arbitral bodies" (and not just natural persons). See also the discussion at paras 45–49 of this article.

75 International Arbitration Act (Cap 143A, 2002 Rev Ed).

merits of the case. It is no comment either way on whether the institution of the Emergency Arbitrator is or is not the same decision-making body as the Merits Tribunal.

56 Under para 7 of Sched 1 to the SIAC 2010 Rules, the Merits Tribunal has the power to "reconsider, modify or vacate the interim award or order of emergency relief issued by the Emergency Arbitrator".[76] One may find this slightly inconsistent with the concept of having the Emergency Arbitrator and the Merits Tribunal being a single arbitral tribunal, as this would mean that the same tribunal is re-opening an issue and possibly reversing its previous decision.

57 However, the emergency relief made by the Emergency Arbitrator is in the form of interim orders. Even in normal arbitral tribunals, it is common for an arbitral tribunal to discharge or vary an interim order upon further arguments from the parties.

58 The useful effect of characterising the Emergency Arbitrator and the Merits Tribunal as part of a single arbitral tribunal is that it solves most of the conceptual problems related to the Emergency Arbitrator. It will avoid the uncertainty associated with the status of the Emergency Arbitrator regime if it were characterised as a standalone dispute resolution procedure.

59 This characterisation means that this single arbitral tribunal is empowered to decide on the substance of the dispute and also to make final and binding awards. This single arbitral tribunal therefore does not have the same *legal peculiarities* which a standalone Emergency Arbitrator regime would have. Characterised in this way, there would be no doubt the interim relief orders made by the Emergency Arbitrator will be legally enforceable under the IAA.[77]

60 As discussed,[78] careful construction of the SIAC 2010 Rules is sufficient to resolve any textual problems with such a characterisation. Such construction is in accordance with the likely intention behind the SIAC 2010 Rules, and the presumed objective intention of the parties adopting those rules, which must surely be for the Emergency Arbitrator's decisions to be enforceable by the Singapore courts.

76 See Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 7.

77 International Arbitration Act (Cap 143A, 2002 Rev Ed).

78 See the discussion at paras 49–57 of this article.

61 It follows that if the Emergency Arbitrator and the Merits Tribunal are part of a single arbitral tribunal, then the Emergency Arbitrator is an "arbitral tribunal" within the meaning of the IAA.[79]

(2) Position (B): Two separate decision-making bodies which do not co-exist in time

62 The main attraction of this characterisation of the relationship between the Emergency Arbitrator and the Merits Tribunal is that it fits some of the language of the SIAC 2010 Rules better than the single arbitral tribunal characterisation above.

63 The proviso at para 7 of Sched 1 states:[80] "The Emergency Arbitrator shall have no further power to act after the Tribunal is constituted." The fact that the parties intend the Emergency Arbitrator to be discharged after the constitution of the Merits Tribunal suggests that the Emergency Arbitrator and the Merits Tribunal are not part of the same arbitral tribunal.

64 Characterising the Emergency Arbitrator and the Merits Tribunal as two separate decision-making bodies which do not co-exist in time is also one way of explaining why it is possible for the Emergency Arbitrator and the Merits Tribunal to decide on similar requests for interim relief. However, as explained above, it is not the only way to explain this.[81] Indeed, it is not even the most convincing way.[82]

65 However, characterising the Emergency Arbitrator and the Merits Tribunal as two decision-making bodies separated in time increases the uncertainty over whether the Emergency Arbitrator is an "arbitral tribunal" within the terms of the IAA.[83] This is for the reasons discussed above. It is also a more complicated and unwieldy mechanism for achieving the same result as compared to Position (A). This makes it less likely that it was the characterisation intended by the SIAC 2010 Rules.

E. Treated on a standalone basis, is the Emergency Arbitrator an arbitral tribunal?

66 As explained above, the strongest reading of the SIAC 2010 Rules is Position (A) – that the Merits Tribunal and the Emergency

79 International Arbitration Act (Cap 143A, 2002 Rev Ed).
80 Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010).
81 See the discussion at paras 45–49 of this article.
82 See the discussion at paras 58–61 of this article.
83 International Arbitration Act (Cap 143A, 2002 Rev Ed).

Arbitrator are part of a single "arbitral tribunal", the Merits Tribunal being a continuum of the arbitral tribunal first constituted by the Emergency Arbitrator. As such, the Emergency Arbitrator is an arbitral tribunal within the meaning of the IAA.

67 However, for the sake of completeness we should discuss the legal status of the Emergency Arbitrator if contrary to what has been argued, the Emergency Arbitration regime is tested on a standalone basis (Position (B)).

68 We discuss in this section whether the Emergency Arbitrator, if considered in isolation from the Merits Tribunal, is an arbitral tribunal within the meaning of the IAA.[84] As stated above,[85] it is logical that, if the Emergency Arbitrator regime constitutes an "arbitration" within the terms of the IAA,[86] then the Emergency Arbitrator is an arbitral tribunal within the meaning of the same statute. Essentially, the issue is whether a process, by which parties agree for a decision-maker to issue binding (but perhaps not final) decisions regarding interim relief, constitutes an "arbitration".

69 This is not a simple question. In the words of Born, "there are nearly as many definitions of arbitration as there are commentators or courts addressing the subject".[87] The problem does not arise in most cases, as one can usually intuitively (or by experience) recognise an arbitration even if one cannot define the concept.[88]

70 Unfortunately, whether or not the Emergency Arbitrator regime is an *arbitration* is not immediately apparent by recourse to intuition or experience. As discussed above, this is primarily because the Emergency Arbitrator deviates from a normal arbitration in two key areas – the Emergency Arbitrator does not appear to decide on the substance of the dispute,[89] and the Emergency Arbitrator's decisions are not final (*ie*, they are subject to revision by the Merits Tribunal or the Emergency Arbitrator himself, and would lapse upon certain events occurring).[90]

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84 International Arbitration Act (Cap 143A, 2002 Rev Ed).

85 See the discussion at para 35 of this article.

86 Which includes the Model Law (the Model Law (except ch VIII) forms part of the International Arbitration Act (Cap 143A, 2002 Rev Ed) as Sched I, by virtue of s 3 of the International Arbitration Act).

87 G B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at p 251.

88 Recall Lord Justice Scrutton's well-known observation on the definition of an elephant in *Merchants Marine Insurance Co Ltd v North of England Protecting & Indemnity Association* [1926] 26 Lloyd's Rep 201.

89 See the discussion at para 20 of this article.

90 See the discussion at para 18 of this article.

71 With regard to the requirement of finality, there has been academic commentary by Wolff to the effect that parties should not be able to agree on a "non-final arbitration".[91] However, to place that view in its proper context, Wolff was discussing the issue whether a dispute resolution procedure which allowed each party to request a national court to review the decision *de novo* after issuance of the award could properly be considered an arbitration.[92]

72 In that context, Wolff's conclusion was that there are limits to the extent to which parties can modify an arbitral process, beyond which the process can no longer legitimately be called an arbitration.[93] Where parties choose to have a non-final award which could be (at a party's request) subject to post-award national court review on the merits, this effectively places the dispute resolution mechanism in between conciliation and arbitration, as "while the award's finality as such is pre-agreed on paper, each party can at its discretion opt out".[94] In Wolff's view, such an agreement is closer to conciliation than arbitration, as "given the dichotomy of arbitration (finality of the award) and conciliation (finality of a solution only by way of settlement agreement), an arbitration agreement involving expanded judicial review is closer to conciliation since the parties in fact agree (or disagree) with the proposed solution after the award is rendered".[95] Wolff goes on to note that: "For the same reason the ICC Rules for a Pre-Arbitral Referee Procedure do not categorize the temporary solution provided by the referee's order as arbitration."[96]

73 On the point that the decision of an Emergency Arbitrator is not final, the arguments that can be made against this are, firstly, that the ability to deliver a final decision is not a vital quality in an arbitral tribunal, and secondly, that viewed in a certain way, the decisions of the Emergency Arbitrator are final.

74 The academic opinion on whether or not the ability to deliver a final decision is a vital quality in an arbitral tribunal is not unanimous.

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91 Reinmar Wolff, "Party Autonomy to Agree on Non-final Arbitration?" (2008) 26(3) ASA Bulletin 626.

92 Reinmar Wolff, "Party Autonomy to Agree on Non-final Arbitration?" (2008) 26(3) ASA Bulletin 626. Wolff did this by using two apparently inconsistent decisions (one from Germany and one from the US) as the backdrop of the discussion.

93 Reinmar Wolff, "Party Autonomy to Agree on Non-final Arbitration?" (2008) 26(3) ASA Bulletin 626 at 631.

94 Reinmar Wolff, "Party Autonomy to Agree on Non-final Arbitration?" (2008) 26(3) ASA Bulletin 626 at 633.

95 Reinmar Wolff, "Party Autonomy to Agree on Non-final Arbitration?" (2008) 26(3) ASA Bulletin 626 at 633.

96 Reinmar Wolff, "Party Autonomy to Agree on Non-final Arbitration?" (2008) 26(3) ASA Bulletin 626 at 633.

It appears from the above Common Core Definition[97] that, even if the decision rendered in a particular procedure is binding but not final, the process could still constitute arbitration. The authors agree with Wolff's view that there are limits to how much parties can structure a procedure, beyond which it will no longer be considered an arbitration. However, this does not mean that a review mechanism or a lack of finality *ipso facto* negates the possibility that a dispute resolution procedure is an arbitration.

75 In discussing whether a person who is issuing emergency interim relief ought to be considered an arbitrator, it appears that Yesilirmak does not consider "finality" to be a vital quality in an arbitral tribunal:[98]

> This author believes that the emergency arbitrator, whether it is referred to as referee or any other title should be considered an arbitrator. The emergency arbitrator who is a neutral person determines, in a judicial manner, the issues before him in a binding decision, which by agreement may be an order or an award.

76 Academic opinion aside, there is nothing express in the IAA[99] (or indeed in the New York Convention) that stipulates that the ability to render a final decision is necessary to constitute an arbitral tribunal. Given that the intention behind s 12(6) of the IAA is clearly to enforce orders and directions made by a tribunal in the course of an arbitration, and the growing use of Emergency Arbitrator-like provisions in institutional rules (including of course the SIAC 2010 Rules), there is no sense in importing this requirement when it is not express in the IAA.

77 A strong policy reason in support of this conclusion can be found in the following passage from Born:[100]

> Finally, the question whether a particular dispute resolution clause constitutes an 'arbitration agreement' should also leave ample scope for effectuating the parties' intentions and wishes. If parties intend that the legal regime applicable to 'arbitration agreements' will apply to their dispute resolution procedure, it is difficult to see why this should not ordinarily be accommodated, even if they have not, strictly speaking, agreed to 'arbitrate'. This is consistent with principles of party autonomy in international commercial matters, while, at the same time, there would only appear to be limited public policy interests in preventing commercial parties from applying the

97 See para 37 of this article.

98 Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) at pp 144–145.

99 International Arbitration Act (Cap 143A, 2002 Rev Ed).

100 G B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at pp 252–253.

procedural and legal protections of national arbitration legislation to such forms of dispute resolution as they wish.

78 Accepting for a moment that the Emergency Arbitrator cannot be an arbitral tribunal unless it can issue final decisions, arguments can be made that the decisions made by the Emergency Arbitrator are in fact final.

79 As an initial point, it is important to note that, even if the Emergency Arbitrator's decision can be varied or terminated, it is *binding*.[101] This is expressly stated in Sched 1 r 9 of the SIAC 2010 Rules. This is in contrast with a recommendation by a conciliator. The conciliator does not issue an order which purports to mandate the parties carry out certain acts, whereas the Emergency Arbitrator does. It may be argued that the Emergency Arbitrator's order is, in reality, non-binding as it may be vacated or modified by the Merits Tribunal, or would lapse upon the occurrence of certain events.[102] In the authors' view, the *temporal* limit on the effect of the Emergency Arbitrator's order does not render it any less binding during the period in which it subsists.

80 As an additional point, even if an order by the Emergency Arbitrator is varied or terminated by a subsequent order (for example by the Merits Tribunal), that variation or termination has no retrospective effect. In short, a subsequent variation or termination does not invalidate the Emergency Arbitrator's order *ab initio*, it merely regulates affairs starting from the time of the order of variation or termination. This is in sharp contrast to the situation postulated by Wolff,[103] where parties choose to have a non-final award which can be (at a party's request) subject to post-award national court review on the merits. There, the effect of the national court coming to a different decision from the tribunal will be to invalidate the decision of the arbitral decision *ab initio*.

81 The finality of an arbitrator's decision must be tested against the question the arbitrator was asked to decide. If, as suggested by Sched 1 to the SIAC 2010 Rules, the question the Emergency Arbitrator is asked to decide is whether a certain type of interim relief should be ordered

101 See Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 9, which expressly states that the decision of the Emergency Arbitrator is "binding".

102 *Eg*, where the Merits Tribunal is not constituted within 90 days of the decision by the Emergency Arbitrator, or when the Merits Tribunal makes a final award, or if the claim is withdrawn: Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) Sched 1 para 7.

103 Reinmar Wolff, "Party Autonomy to Agree on Non-final Arbitration?" (2008) 26(3) ASA Bulletin 626 at 631.

for the period allowed by Sched 1,[104] then the order by the Emergency Arbitrator is "final" within those terms.

82 In the authors' view, the point that the Emergency Arbitrator is not empowered to decide the substance of the dispute,[105] is subject to all the weaknesses of the artificial division between substance and procedure. As an example, if one construes the "dispute" between the parties as a dispute over whether emergency interim relief ought to be granted, the Emergency Arbitrator is then actually deciding on the substance of that particular dispute.

83 What is a far more pertinent question in international arbitration is whether the "tribunal" is empowered to issue a binding decision on the dispute that has been referred to that tribunal for resolution.

84 The dichotomy between substance and procedure is all the more unhelpful in an area of law like international arbitration, where any proposed legal test must work under multiple legal traditions. It would be fanciful to expect that civil law and common law systems will come to the same conclusion on whether a particular issue is one of substance or procedure.

85 There have been decisions and commentaries on the emergency interim relief regimes under the rules of other arbitral institutions, which may be relevant to this discussion.[106] Those commentaries are divided.[107]

86 The only reported decision in respect of a similar emergency interim relief regime of which the authors are aware is a decision by the Paris Court of Appeal on the ICC Pre-Arbitral Referee Procedure.[108] This

104 Which is to say until the constitution of the Merits Tribunal, or for 90 days if no Merits Tribunal is constituted by then, or until further order by the Emergency Arbitrator.

105 This is the language used in the definition of an "award" in the International Arbitration Act (Cap 143A, 2002 Rev Ed).

106 See the arbitration rules of, *inter alia*, the Arbitration Institute of the Stockholm Chamber of Commerce, the American Arbitration Association, the International Centre for Dispute Resolution, the International Institute for Conflict Prevention and Resolution, and the International Chamber of Commerce Rules for a Pre-Arbitral Referee Procedure which all contain a variation of the emergency arbitrator procedure.

107 See the observation in para 41 of this article; Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) at p 144 and the accompanying footnote 165.

108 An English translation of the decision is appended to Emmanuel Gaillard & Philippe Pinsolle, "The ICC Pre-Arbitral Referee: First Practical Experiences"

(*cont'd on the next page*)

is a case involving Société Nationale des Pétroles du Congo and Republic of Congo (collectively, the "claimants"), against Total Fina Elf E & P (Congo) ("defendant") ("*Congo Case*").[109]

87 In the *Congo Case*, the claimants had entered into an agreement with the defendant for the sale of crude oil in September 2001. The agreement provided for the ICC Pre-Arbitral Referee Procedure and for arbitration. The defendant commenced a Referee Procedure when the claimants sought to terminate the agreement, and the Referee made an order enjoining the claimants from impeding the performance of the agreement for the sale of oil, or from suspending or unilaterally terminating the agreement until the merits of the matter had been decided by an arbitral tribunal.

88 The claimants then filed a request for setting aside the Referee's order, arguing, *inter alia*, that the Referee's order is an arbitral award and is therefore subject to various setting-aside provisions under French law.

89 In rejecting the claimants' setting-aside application, the Paris Court of Appeal held that an order by the Referee could not be an arbitral award, on the basis that the ICC Pre-Arbitral Referee procedure is *not* an arbitration procedure and that (accordingly) the Referee in that case was not an arbitrator. The brevity of the reasoning accompanying this award has been criticised.[110]

90 The Paris Court of Appeal essentially found that the ICC Pre-Arbitral Referee procedure is not an arbitration procedure on the following grounds:

> (a) the terms of the Rules for Pre-Arbitral Referee Procedure indicate that these are not arbitral rules and that the Pre-Arbitral Referee Procedure is not an arbitration;[111] and
>
> (b) the binding nature of the referee's order was derived solely from the parties' agreement, and had not more effect than that of a contractual provision.[112]

91 The first ground of the Paris Court of Appeal's decision has been criticised. Lecuyer-Thieffry notes that it is for the court to

(2004) 20(1) Arbitration International 13; a brief report of this case in English is also available in Albert Jan van den Berg (2003) 21(3) ASA Bulletin 662–666.

109 Cour d'appel [Court of Appeal], Paris, 29 April 2003.

110 Emmanuel Gaillard & Philippe Pinsolle, "The ICC Pre-Arbitral Referee: First Practical Experiences" (2004) 20(1) Arbitration International 13 at 22.

111 Emmanuel Gaillard & Philippe Pinsolle, "The ICC Pre-Arbitral Referee: First Practical Experiences" (2004) 20(1) Arbitration International 13 at 21.

112 Emmanuel Gaillard & Philippe Pinsolle, "The ICC Pre-Arbitral Referee: First Practical Experiences" (2004) 20(1) Arbitration International 13 at 22.

characterise a particular order (and presumably a dispute resolution process) despite the labels given to it by the parties or the arbitral tribunal.[113] This should also be the case with respect to labels to a process given by the parties.[114]

92 The second ground has also been criticised; as an arbitral award is also derived from the parties' agreement, this reason cannot be relied upon to disqualify the Pre-Arbitral Referee Procedure from being an arbitration.[115]

93 Whilst some commentators have supported the Paris Court of Appeal's conclusion, they have done so essentially on the basis that the Pre-Arbitral Referee Procedure does not result in a final determination.[116] The authors' views in respect of such an argument are set out above.[117]

94 There are also other commentators who are of the view that the ICC Pre-Arbitral Referee should be considered an arbitrator.[118] Yesilirmak states as follows:[119]

> This author believes that the emergency arbitrator, whether it is referred to as referee or any other title should be considered an arbitrator. The emergency arbitrator who is a neutral person determines, in a judicial manner, the issues before him in a binding decision, which by agreement may be an order or an award.

95 Interestingly, Yesilirmak appears to adopt the same essential characteristics of an "arbitration" as the Common Core Definition adopted by Born above.[120]

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113 See Christine Lecuyer-Thieffry, "First Court Ruling on the ICC Pre-Arbitral Referee Procedure" (2003) 20(6) Journal of International Arbitration 599 at 603.

114 Interestingly, if the test adopted by the Paris Court of Appeal were applied to the Emergency Arbitrator regime under the Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010) ("SIAC 2010 Rules"), the label used by the SIAC 2010 Rules will lead to the conclusion that the Emergency Arbitrator is an arbitrator.

115 Christine Lecuyer-Thieffry, "First Court Ruling on the ICC Pre-Arbitral Referee Procedure" (2003) 20(6) Journal of International Arbitration 599 at 603.

116 Christine Lecuyer-Thieffry, "First Court Ruling on the ICC Pre-Arbitral Referee Procedure" (2003) 20(6) Journal of International Arbitration 599 at 603.

117 See the discussion at paras 73–81 of this article.

118 Emmanuel Gaillard & Philippe Pinsolle, "The ICC Pre-Arbitral Referee: First Practical Experiences" (2004) 20(1) Arbitration International 13 at 22 note that, "[i]n our view, the referee does render a jurisdictional decision unlike, for example, an expert [and] this view is shared by many French authors".

119 Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) at pp 144–145.

120 See para 37 of this article.

96 In summary, whilst the answer is not certain, the authors take the view that an argument can be made that the Emergency Arbitrator regime, even if considered as a standalone procedure, is an arbitration, and the Emergency Arbitrator is an arbitral tribunal, under the IAA.[121]

F. Does the Emergency Arbitrator issue "orders", "directions" or "awards"?

97 In this section, it is discussed whether the interim relief orders made by the Emergency Arbitrator are "orders and directions" or "awards" under the IAA.[122] One question that arises is whether the characterisation of the Emergency Arbitrator's decisions differs according to whether the Emergency Arbitrator and the Merits Tribunal are construed as part of a single "arbitral tribunal" or as two "arbitral tribunals".

98 Essentially, it is the authors' view that interim relief orders made by the Emergency Arbitrator are "orders or directions" and enforceable in Singapore under s 12(6) of the IAA.[123] This is the case whether or not the Emergency Arbitrator and the Merits Tribunal are construed as part of a single "arbitral tribunal", or as two "arbitral tribunals".

99 An "award" is defined as follows in the IAA:[124]

> [A]ward means a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award *but excludes any orders or directions made under section 12* [of the IAA]. [emphasis added]

100 The preponderance of opinion is that a particular decision will only be an "award" under the New York Convention if it was "final".[125] This view is also echoed by Professor Lawrence Boo: "All awards are final in their terms in that in so far as relating to the issues decided therein, they are final."[126] It is also difficult to see why the Legislature would have intended for the concept of an "award" under the IAA[127] to be dissimilar

121 International Arbitration Act (Cap 143A, 2002 Rev Ed).
122 International Arbitration Act (Cap 143A, 2002 Rev Ed).
123 International Arbitration Act (Cap 143A, 2002 Rev Ed).
124 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 2.
125 See also the discussion at paras 109–114 of this article as to why the Emergency Arbitrator's decisions are not "*awards*" under the New York Convention – the reasons there are likely to be similarly applicable to the issue why the Emergency Arbitrator's decisions are not "*awards*" under the terms of the International Arbitration Act (Cap 143A, 2002 Rev Ed).
126 See Professor Lawrence Boo, *Halsbury's Laws of Singapore* vol 2 (Arbitration, Building and Construction) (Singapore: Butterworths Asia, 1998) at para 20.095.
127 International Arbitration Act (Cap 143A, 2002 Rev Ed).

to the prevailing view of what an "award" is under the New York Convention.

101 As discussed above, whilst arguments can be made that the orders made by the Emergency Arbitrator are final, the plain reading of Sched 1 to the SIAC 2010 Rules suggest they are not. If the plain reading is the correct position, the decisions made by the Emergency Arbitrator will not be awards regardless of whether the Emergency Arbitrator and the Merits Tribunal are one single "arbitral tribunal", or two.

102 It also follows that the Emergency Arbitrator's decision should be enforceable by the Singapore courts pursuant to s 12(6) of the IAA[128] as "orders or directions".

V. Are the Emergency Arbitrator's orders enforceable outside of Singapore?

A. Summary

103 In brief:

(a) The primary means by which awards of arbitral tribunals are enforced outside of Singapore is by way of the New York Convention.

(b) The orders or directions made by an Emergency Arbitrator are not "arbitral awards" within the meaning of the New York Convention, and so cannot be enforced outside of Singapore under the New York Convention. This is the case regardless of whether the Emergency Arbitrator is by itself an "arbitral tribunal", or is part of an arbitral tribunal together with the Merits Tribunal.

(c) However, depending on the laws of the foreign state, the orders or directions made by an Emergency Arbitrator may be enforceable under the domestic law of that foreign state. This would be the case if the domestic law of the foreign state followed the Model Law 2006.

B. Introduction

104 International enforcement of arbitral awards falls under the regime of the New York Convention. Provided that the country in which

128 International Arbitration Act (Cap 143A, 2002 Rev Ed).

enforcement is sought is a signatory to the New York Convention,[129] parties can apply to the national courts in that country to enforce their award.

105 Orders of an arbitral tribunal may be enforced even if they are not within the scope of the New York Convention, provided there is national legislation in the country where enforcement is sought that allows such enforcement.

106 The focus of this section will be whether an order for interim relief made by the Emergency Arbitrator is enforceable under the New York Convention, and if not, whether or not it might nonetheless remain enforceable by other means.

C. Is the Emergency Arbitrator an "arbitral tribunal" within the terms of the New York Convention?

107 There is no definition of the term "arbitral tribunal" or any of its derivatives under the New York Convention. Article I(2) sets out that the New York Convention applies to "awards made by arbitrators". We have discussed above at length the definition of "arbitral tribunal", "arbitration" and "arbitrators" under the IAA.[130] The arguments concerning whether or not the Emergency Arbitrator is an "arbitral tribunal" under the New York Convention are largely similar.

108 We therefore proceed on the premise that the Emergency Arbitrator is an "arbitral tribunal" under the New York Convention. In this portion, whether or not the interim relief ordered by the Emergency Arbitrator qualifies as an "arbitral award" under the New York Convention will be discussed.

109 The New York Convention provides in the very first sentence that: "This Convention shall only apply to the recognition and enforcement of arbitral awards."[131] It proceeds to define "arbitral awards" as "[including] not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted."[132]

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129 At time of writing (23 November 2010) 145 Nations were listed as signatories to the New York Convention, see <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> (accessed 3 January 2011).

130 International Arbitration Act (Cap 143A, 2002 Rev Ed). See paras 33–38 and 46–52 of this article.

131 New York Convention Art I(1).

132 New York Convention Art I(2).

110 The words of the New York Convention do not assist with the interpretation of the words "arbitral award". However, the prevailing opinion amongst commentators is that under the "Convention only final awards fall under this definition of 'arbitral awards' and are therefore enforceable".[133] For example, Hobér states, when discussing orders for interim relief, that "such orders, while enforceable in the jurisdiction where rendered, are not internationally enforceable".[134]

111 Otto takes the same view:[135]

> Courts are often reluctant to enforce interim measures … Whilst there is considerable development in many national laws to assist with the enforcement of interim orders by arbitration tribunals, *there is a consensus that the New York Convention does not address nor cover the enforcement of interim measures*, but at the same time does not restrict national laws from providing assistance to arbitration, such as by permitting procedural and/or interim orders of arbitration tribunals to be enforced. [emphasis added]

112 According to Williams QC, it also appears that interim orders for relief are not enforceable under the New York Convention due to their provisional nature:[136]

> [S]ome arbitrators have deliberately described such orders as interim awards in order to increase their chances of enforceability. However, categorising decisions of arbitral tribunal granting interim measures as awards for the purposes of the New York Convention is controversial given the provisional nature of an interim measure. *The prevailing view is that such orders are not enforceable as an award under the New York Convention.* [emphasis added]

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133 See, *eg*, Jean-Paul Beraudo, "Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals" (2005) 22(3) Journal of International Arbitration 245. See also Jean-François Poudret & Sebastien Besson, *Comparative Law of International Arbitration* (London: Thomson, Sweet & Maxwell, 2nd Ed, 2007) ch 10.

134 Kaj Hobér, "Interim Measures by Arbitrators" in *International Council for Commercial Arbitration, International Arbitration 2006: Back to Basics?* (Albert Jan Van Den Berg ed) (ICCA Congress Series No 13, Montreal 2006) (Kluwer Law International, 2007) p 721, at p 731.

135 Dirk Otto, "Article IV" in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Herbert Kronke, Patricia Nacimiento, *et al* eds) (Kluwer Law International, 2010) p 143, at p 156. At p 157, Otto does, however, go on to qualify his argument: "However, the label attached to a decision is not always decisive; it is the substance that counts. For example, courts have occasionally interpreted "orders" by arbitration tribunals to be awards, provided they are final decisions on an issue."

136 David A R Williams QC, "Interim Measures" in *The Asian Leading Arbitrators' Guide to International Arbitration* (Michael Pryles & Michael J Moser eds) (New York: JurisNet LLC, 2007) p 225, at p 244.

113 One example of this approach is the Australian case of *Re Resort Condominiums International*[137] in which the Supreme Court of Queensland ruled that a foreign "award" granting interim relief was not an "award" as it did not finally determine the rights of the parties.

114 However, whilst the above authors suggest that there is consensus that an order for interim relief does not constitute an "arbitral award" under the New York Convention (unless it is a final decision on an issue), the case law suggests that there are exceptions to this consensus and "prevailing view". For example, Lemenez and Quigley[138] have noted that numerous district courts within the Second Circuit in New York State have held that interim orders for prejudgment security are final as a matter of law for enforcement under the New York Convention.[139]

115 In addition, as explained above,[140] there are arguments that can be made to the effect that the orders made by the Emergency Arbitrator are in fact "final". It must be pointed out, however, that a particular problem for these arguments is r 6 of Sched 1 to the SIAC 2010 Rules, which allows the Emergency Arbitrator to modify or vacate its own orders.

D. Enforcement outside of the New York Convention?

116 Writing in 2004, Veeder noted of interim measures in arbitration[141] that "the lack of a universal regime for cross-border enforcement is a curious gap in the modern system of international commercial arbitration".[142] It appears that today the position is improving, even if still not perfect. Now, even if the order for interim relief cannot be enforced under the New York Convention as an "arbitral award" within the meaning of that convention, an order for interim

137 (1993) 118 ALR 655.

138 G Lemenez & P Quigley, "The ICDR's Emergency Arbitrator Procedure in Action: Part II: Enforcing Emergency Arbitrator Decisions" Dispute Resolution Journal (November 2008–January 2009).

139 G Lemenez & P Quigley, "The ICDR's Emergency Arbitrator Procedure in Action: Part II: Enforcing Emergency Arbitrator Decisions" Dispute Resolution Journal (November 2008–January 2009). See also the cases cited by Alan Scott Rau, "Provisional Relief in Arbitration: How Things Stand in the United States" (2005) 22(1) Journal of International Arbitration 1.

140 See paras 78–83 of this article.

141 This includes both orders for interim relief ordered by the national courts and arbitral tribunals.

142 V V Veeder, "The Need for Cross-border Enforcement of Interim Measures Ordered by a State Court in Support of the International Arbitral Process" in *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (ICCA Congress Series, Beijing 2004) (Kluwer Law International, 2005) p 242, at p 269.

relief may still be enforceable, depending on the legislation in the country in which enforcement is sought.[143]

117 The 2006 amendments to the Model Law attempt to address the problem of international enforcement of orders for interim relief by expressly providing for the enforcement of interim measures:[144]

> An interim measure issued by an arbitral tribunal shall be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17I.

118 For nations which have adopted the Model Law 2006 as part of their domestic arbitration legislation, foreign orders for interim relief will be enforceable by national courts of those nations even if these interim orders are not "arbitral awards" within the meaning of the New York Convention.

119 Several countries have adopted this Model Law 2006 in one form or another[145] and other countries, including Switzerland, Germany, Austria and the Netherlands,[146] have legislation that expressly provides for the treatment of interim orders as "awards". It is beyond the scope of this article to undertake an in-depth analysis of each of these jurisdictions. It is sufficient for our present purposes to note that a party without recourse to enforcement under the New York Convention may have the option of relying on the national legislation of these jurisdictions for enforcement.

VI. Residual issues

120 The discussion above is in the context of international arbitrations seated[147] in Singapore, However, there is nothing preventing

143 See David A R Williams QC, "Interim Measures" in *The Asian Leading Arbitrators' Guide to International Arbitration* (Michael Pryles & Michael J Moser eds) (New York: JurisNet LLC, 2007) p 225, at p 244.

144 Model Law 2006 Art 17H(1).

145 See <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> (accessed 3 January 2011) for a list of the countries that have adopted legislation using the Model Law 2006 as a basis. It is beyond the scope of this article to undertake an in-depth analysis of the jurisdictions in which an Emergency Arbitrator's interim order for relief might or might not be enforceable. However, in light of the fact that these countries have adopted the Model Law 2006 there is a significant likelihood that enforcement will be possible.

146 Under Art 183.2 of the Swiss Private International Law Act, para 1041(2) of the German Civil Procedure Code, para 593(3)–(5) of the Austrian Civil Procedure Code and Art 1051(3) of the Dutch Code of Civil Procedure, respectively.

147 See David St John Sutton, Judith Gill & Matthew Gearing, *Russell on Arbitration* (London: Thomson Sweet & Maxwell, 23rd Ed, 2007) at pp 84–86, paras 2-100–2-101

(*cont'd on the next page*)

the parties to an international arbitration from adopting the SIAC 2010 Rules for an arbitration seated outside Singapore. Whilst such cases are comparatively rare, this does raise some issues regarding the enforceability of the Emergency Arbitrator's orders in such arbitrations.

121 Where, pursuant to an arbitration under the SIAC 2010 Rules in a foreign jurisdiction, the Emergency Arbitrator orders interim relief, the question of whether or not the interim orders will be enforceable in that jurisdiction will fall to be decided by the national laws of that jurisdiction. The key issue in the foreign jurisdiction will be whether the Emergency Arbitrator regime is considered an "arbitration".

122 Given Born's observation that there are a considerable number of different definitions of an arbitration derived from various courts and commentators in numerous jurisdictions,[148] it appears impossible to predict generally the view of foreign courts on this point. The position in each country would have to be determined individually following a detailed analysis of that country's laws.[149]

123 For the enforcement of the Emergency Arbitrator's interim orders outside the country in which the arbitration is seated, recourse will need to be taken under either the New York Convention[150] or favourable national legislation.[151]

VII. Conclusion

124 Whilst there may be a few infelicitous word choices in Sched 1 to the SIAC 2010 Rules, the overall intention of Sched 1 is clear. Legally, the Emergency Arbitrator is an arbitral tribunal within the meaning of the IAA.[152]

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which explains that the "seat" of an arbitration is "its 'juridical seat', which is the place to which it is legally attached" therefore it "is the legal, rather than the physical, place of arbitration proceedings … The 'seat' of the arbitration is often specified in the arbitration agreements by the selection of a particular place or country in which the arbitration is to be held … The choice of seat prescribes the procedural law of the arbitration and the choice of a procedural law will determine the seat. The parties' choice of a seat is therefore extremely important, not simply in relation to the proper law of the contract, but also because the law of the seat may contain provisions which have important consequences for the conduct of the proceedings".

148 See para 69 of this article.

149 It is beyond the scope of this article to attempt such an analysis.

150 See paras 107–115 of this article.

151 See paras 116–119 of this article.

152 International Arbitration Act (Cap 143A, 2002 Rev Ed).

125 There is some scope for a debate over the exact nature of the legal relationship between the Emergency Arbitrator and the Merits Tribunal. It is submitted that the better view is that the Merits Tribunal and the Emergency Arbitrator are part of a single "arbitral tribunal", the Merits Tribunal being a continuum of the arbitral tribunal first constituted by the Emergency Arbitrator.

126 It follows that the orders made by an Emergency Arbitrator are enforceable under s 12(6) of the IAA[153] as orders or directions made by an arbitral tribunal. This will give effect to the likely objective intention of the parties.

153 International Arbitration Act (Cap 143A, 2002 Rev Ed).