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Ex Parte Relief in Emergency Arbitration: Protective Preliminary Orders under the 2025 Singapore Arbitration Centre (SIAC) Rules

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Abstract

This paper examines the emergence of ex parte interim relief in international arbitration, focusing on the introduction of Protective Preliminary Orders under Schedule 1, Rule 25 of the 2025 SIAC Arbitration Rules. Traditionally, arbitral tribunals have refrained from granting relief without notice due to concerns regarding party consent, due process, and enforceability. This study evaluates whether such concerns remain valid in light of recent institutional developments. It argues that the consent objection is overstated, as parties effectively accept procedural powers including ex parte measures through the incorporation of institutional rules into arbitration agreements. Similarly, the due process objection can be mitigated where the respondent's right to be heard is deferred rather than denied, supported by safeguards such as short expiry periods and prompt inter partes hearings. However, the paper identifies the arbitrator's lack of coercive power as a fundamental structural limitation. Unlike national courts, arbitral tribunals cannot compel third parties or enforce compliance through sovereign authority, limiting the practical effectiveness of ex parte relief in urgent situations involving asset dissipation or evidence preservation. A comparative analysis demonstrates that arbitral and judicial standards for granting interim relief are largely aligned in both procedural and substantive aspects. The paper concludes that while the 2025 SIAC Rules represent a significant advancement in arbitral practice, ex parte emergency relief cannot fully replace judicial intervention. Instead, it should be understood as a complementary mechanism, enhancing the flexibility and responsiveness of arbitration while preserving the essential role of national courts.

I. INTRODUCTION

The tension between party autonomy and effective dispute resolution runs through the architecture of international arbitration. Seldomly is this tension more acute than in the field of interim relief, where the practical demands of commercial justice—preventing asset dissipation, preserving evidence, maintaining the *status quo*—must be reconciled with arbitration's consensual foundation. Given that under prominent theories of arbitration, the arbitrator's authority originates from the parties' agreement,[1] and given that the right to be heard constitutes one of arbitration's mandatory norms,[2] the

[1] *See* e.g. Kun Fan, Chapter 32: Arbitrator's Contract, in *Cambridge Compendium of International Commercial and Investment Arbitration*32.2.2, 32.2.3 (Stefan M. Kröll et al. eds., 2023) noting that "[a]s the hybrid theory acknowledges both the contractual origin and the jurisdictional function in international arbitration, most writers have accepted it.".
[2] Andrea Kay Bjorklund & Lukas Vanhonnaeker, Chapter 33: The Powers, Duties, and Rights of International Arbitrators, in *Cambridge Compendium of International Commercial and Investment Arbitration* § 33.2.2.1 (Stefan M. Kröll et al. eds., 2023).

prospect of arbitrators acting without notice to the respondent raises fundamental questions about the nature and limits of arbitral power.

This paper concerns *ex parte* interim relief in international commercial arbitration: the authority of arbitrators, and particularly emergency arbitrators, to grant protective measures without prior notice to the party against whom relief is sought. Despite being routinely issued by national courts, where such orders are recognized as essential to prevent the frustration of judicial process,[3] *ex parte* measures have remained largely unavailable under institutional arbitration rules.[4]

This absence of arbitral *ex parte* powers is entirely not the product of oversight. The issue was extensively debated during the preparation of the 2006 revisions to the UNCITRAL Model Law, revealing a sharp divide between those who emphasized the practical necessity of "surprise" relief and those who maintained that proceeding without notice would violate the fundamental principle of *audi alteram partem*.[5] The compromise that emerged—the "preliminary order" mechanism under Articles 17B and 17C—was a carefully circumscribed compromise.[6] Such orders were made binding on the parties but expressly non-enforceable by courts.[7] Major arbitral institutions declined to adopt these provisions, and scholarly commentary remained divided on whether *ex parte* relief was theoretically defensible within the arbitral framework.[8]

The introduction of Protective Preliminary Orders under Schedule 1, rule 25 of the 2025 SIAC Arbitration Rules mark a significant departure from this institutional hesitation. For the first time, a major commercial arbitration institution has provided parties with the ability to seek *ex parte* interim relief from an emergency arbitrator. This development invites renewed examination of the theoretical foundations and practical limits of arbitral interim relief. Can *ex parte* measures be reconciled with the principle that arbitral authority derives from party consent? Do such measures violate mandatory procedural norms? And even if theoretically permissible, can they be practically effective given the structural limitations of arbitral authority, most notably, the absence of coercive power?

This paper argues that *ex parte* interim relief is compatible with the nature of arbitration, provided adequate procedural safeguards are maintained. However, it also identifies a fundamental limitation that theoretical arguments struggle to overcome: the arbitrator's lack of coercive power. Unlike national courts, arbitral tribunals have limited enforcement power over the parties, and cannot compel third parties such as banks to freeze accounts, meaning that even where *ex parte* relief is theoretically

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[3] *PT Bayan Res. TBK v. BCBC Sing. Pte Ltd*., [2015] HCA 3643 (Austl.).

[4] Cameron Sim, *Emergency Arbitration*1.76 (Oxford Univ. Press 2021) (noting that ex parte relief is "unavailable under almost all Emergency Arbitration Rules").

[5] UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, annex I (1985), as amended in 2006, U.N. Doc. A/61/17, annex I (2006) [hereinafter UNCITRAL Model Law (2006)]; *See also* Rep. of the Working Grp. on Arbitration and Conciliation on the Work of Its Forty-First Session,15–16, U.N. Doc. A/CN.9/569 (Oct. 4, 2004) [hereinafter 41st Session]; Rep. of the Working Grp. on Arbitration on the Work of Its Thirty-Seventh Session,18, U.N. Doc. A/CN.9/523 (Apr. 7, 2003) [hereinafter 37th session].

[6] *See* Rep. of the Working Grp. on Arbitration on the Work of Its Thirty-Seventh Session,27, U.N. Doc. A/CN.9/523 (Apr. 7, 2003) (noting "wide agreement" that *ex parte* measures "might be more acceptable" only "by strengthening and increasing the safeguards"); *see also* Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*5.37 (7th ed. 2015) (describing Article 17B as "a compromise" providing for preliminary orders subject to strict procedural safeguards including a twenty-day time limit and non-enforceability by courts).

[7] UNCITRAL Model Law 2006, art. 17C(5).

[8] Gary B. Born, *International Commercial Arbitration*17.02[G][10] (3d ed. 2021) (Kluwer Law International) (last updated Feb. 2024) (online version).

justified, its practical effectiveness remains dependent on voluntary compliance or recourse to national courts for enforcement.

Part 1 examines the theoretical foundations of arbitral authority, addressing the consent objection, the mandatory norm objection, and the structural limitation arising from the absence of coercive power. Part 2 compares the procedural and substantive standards for ex parte relief in arbitration with those applied by national courts. The paper concludes that while the SIAC's innovation represents a welcome step toward more comprehensive arbitral dispute resolution, the enforcement gap ensures that national courts will retain an essential role in the most urgent cases.

II. DISCUSSION

2.1 The Arbitral Tribunal's Power

It is trite that the authority of an arbitral tribunal originates from the arbitral agreement between the parties.[9] However, the tribunal's power after consent is established is trickier. Many authors now accept that arbitration is something more than purely contractual.[10] As explained in Redfern and Hunter, international arbitration is of a hybrid nature, starting as a private agreement, but ultimately implemented with the support of public authorities as expressed through national law.[11] Since national arbitration laws are normally silent on the issue of *ex parte* interim measures, we are left only with the will of the parties, existing within the framework of contract law and arbitral norms.

A number of arguments as to why such relief is *not* permissible appear in literature, three of which will be reviewed here. First, the argument that *ex parte* decisions violate the principle of consent. Second, that *ex parte* decisions violate mandatory norms of arbitration.[12] Third, it is argued, going more to its viability rather than permissibility, that the arbitrator lacks coercive power in order to make such decisions actually effective.[13]

Consent

First, a central objection during the UNCIRAL II discussions was based on consensual nature.[14] This is exemplified by Hans van Houtte's argument that *ex parte* relief by its nature contradicts the consensual nature of arbitration.[15] He contends that "[i]t is very likely that, if asked whether or not their arbitrator should be entitled to order measures ex parte, the parties categorically would refuse him such power."[16] However, this argument assumes a particular view of party preferences that is both theoretically and empirically contestable.

[9] Kun Fan, *Op. Cit.,* 1.
[10] *Ibid.*
[11] Nigel Blackaby et al., *Op. Cit.,* 6, at 1.92.
[12] 41st Session, *Op. Cit.,* 5,16.
[13] Gary Born, *Op. Cit.,* 8, noting that "under existing international arbitration regimes, an arbitral tribunal's orders generally have no direct coercive effects and therefore cannot accomplish the basic purpose of ex parte relief.".
[14] 41st Session, *Op. Cit.,* 5,16, 20; Rep. of the Working Grp. on Arbitration and Conciliation on the Work of Its Thirty-Ninth Session,52, U.N. Doc. A/CN.9/545 (Dec. 8, 2003),52.
[15] Hans van Houtte, *Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration*, 20 Arb. Int'l 85, 89 (2004).
[16] *Ibid.,* at p. 89.

The theoretical difficulty is that van Houtte's assumption inverts the logic of why parties choose arbitration. Commercial parties ordinarily desire that their arbitration agreements provide efficient, centralized dispute resolution mechanisms for all disputes relating to a particular transaction.[17] A bifurcated system, in which courts handle interim relief while arbitrators determine the final award, fragments precisely what arbitration is designed to consolidate. This preference for centralization is reflected in party behavior: under the principle of concurrent jurisdiction, both courts and arbitral tribunals presumptively have power to order provisional measures.[18] It therefore cannot be assumed that parties choosing Singapore as their arbitral seat would intend for courts, which both can and do issue *ex parte* relief, to handle injunctive relief while arbitrators determine the merits. The opposite inference, that parties want comprehensive arbitral authority, is more consistent with why they chose arbitration in the first place.

The empirical difficulty is equally stark. The 2012 QMUL survey found that a majority of practitioners (51 percent) support the possibility of arbitrators ordering ex parte interim measures, while 43 percent oppose it.[19] While far from unanimous, this division contradicts van Houtte's assertion of categorical refusal based on parties' intention.

Second, one might ask what it actually means for arbitration to be consensual in nature, or for the tribunal's authority to derive from the parties' agreement. Van Houtte's objection appears to presuppose that parties must explicitly consent to each procedural power the arbitrator possesses. Yet this sets a demanding standard. Demonstrating every procedural detail through contractual principles would require finding implied terms, which face a high threshold,[20] or express agreement, which parties seldom provide for granular procedural matters.[21]

Consider what the contractual model would require. Under implied terms doctrine, a term is implied only where it spells out what the instrument objectively means—it must be necessary for business efficacy, must "go without saying," and must be capable of clear expression.[22] Now consider the routine procedural decisions arbitrators make: bifurcation, scheduling, scope of document production, time allocation, order of witnesses, admission of evidence. Could any of these satisfy that threshold? They do not "go without saying." They are not strictly "necessary"—the arbitration could proceed differently. Reasonable parties might well disagree on each. Yet, it is not demanded that arbitrators justify these powers through contractual principles of consent, and courts do not annul awards because the tribunal bifurcated proceedings or admitted hearsay evidence without express contractual

[17] Gary Born, *Op. Cit.,* 8,17.04[C], noting that "[t]he overwhelming weight of national arbitration legislation and judicial authority provides that both arbitral tribunals and national courts may (absent contrary agreement) issue provisional measures in connection with an international arbitration.".
[18] *Id.* at § 17.04[C][5], noting that "an arbitration agreement does not, by itself, constitute an exclusion or waiver of a party's rights to seek interim relief in aid of arbitration in a national court.".
[19] Queen Mary University of London, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* 18 (Queen Mary University of London, 2012).
[20] *See Attorney Gen. of Belize v. Belize Telecom Ltd*. [2009] UKPC 10, [21]–[27]; *See also* Edwin Peel, Treitel on the Law of Contract6-052–6-066 (15th ed. 2020).
[21] Julien Fouret & Christophe Seraglini, Chapter 40: Provisional Measures by Arbitrators and Emergency Arbitrators, in *Cambridge Compendium of International Commercial and Investment Arbitration*40.2.1 (Stefan M. Kröll et al. eds., 2023).
[22] *Op. Cit.,* 20.

authorization.[23] If van Houtte's purely contractual model were correct, arbitration as we know it could not function. Procedural powers must derive, at least in part, from sources beyond the four corners of the parties' agreement.

In this regard, Mills offers a helpful distinction. He explains that consent to arbitration effectively involves opting in to a private alternative to the public functions of courts, and thus "might … be viewed as procedural or jurisdictional in character, rather than an ordinary substantive contractual obligation."[24] If this characterization is correct, then the nature of consent to an arbitration agreement differs from consent to an ordinary commercial contract. Requiring explicit agreement to each arbitral power would arguably conflate these two distinct forms of consent.

This distinction may explain why incorporation of institutional rules is so prevalent in practice. When parties adopt a set of procedural rules by reference, they effectively incorporate the institution's entire rulebook into their arbitration agreement.[25] Courts and tribunals generally treat this as acceptance of the procedural framework as a whole, rather than requiring item-by-item consent. Most emergency arbitrator provisions operate on precisely this basis: unless otherwise agreed, they apply automatically when the parties have agreed to arbitrate under the relevant rules, without requiring separate consent to the emergency procedure.[26] It follows that if a set of rules permits *ex parte* measures, and parties incorporate those rules into their arbitration agreement, the requirement of consent is, in the author's view, sufficiently established.

Mandatory Norms

The second objection is the violation of mandatory norms. During the drafting of the 2006 amendments to the UNCITRAL Model Law, delegates objected that *ex parte* measures would be "extremely difficult to reconcile," given that parties shall be treated equally and "a full opportunity of presenting [their] case."[27] Certain mandatory norms limit what can be determined through party autonomy; these are generally limited to basic due process requirements, such as ensuring fair and equal treatment and that each party is given an opportunity to be heard.[28]

This norm finds clear expression in Article V(1)(b) of the New York Convention, which provides that recognition and enforcement of awards may be refused if "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."[29]

At first glance, this provision poses a serious obstacle. Yet Article V confers discretion on enforcing courts. The permissive language, namely "*may* be refused," admits of a

[23] Nigel Blackaby et al., *Op. Cit.,* 6, at5.14.
[24] Alex Mills, *Party Autonomy in Private International Law* 274 (Cambridge Univ. Press 2018).
[25] Nigel Blackaby et al., *Op. Cit.,* 6, at1.156–1.157.
[26] Cameron Sim, *Op. Cit.,* 4, at2.52 (Oxford Univ. Press 2021).
[27] These requirements were set out by art, 18 of the UNCITRAL Model Law (2006), *Op. Cit.,* 5; *see also* 41st Session, *Op. Cit.,* 5, at16; *see also* Rep. of the Working Grp. on Arbitration on the Work of Its Thirty-Sixth Session,77, U.N. Doc. A/CN.9/508 (Mar. 17, 2002).
[28] Bjorklund & Vanhonnaeker, *Op. Cit.,* 2.
[29] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(b), June 10, 1958, 330 U.N.T.S. 3.

contextual assessment judicial discretion rather than automatic refusal. This interpretation aligns with the Convention's pro-enforcement object and purpose.

Moreover, Article V(1)(b) is not transposed verbatim into national arbitral frameworks. Section 33(1)(a) of the Arbitration Act 1996, for instance, requires the tribunal to "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent."[30] The question, then, is whether a "reasonable opportunity" necessarily precludes an *ex parte* temporary order, or whether that opportunity to be head may be afforded shortly after. Under the SIAC Rules, a protective preliminary order expires after 14 days,[31] an inter partes hearing must follow "at the earliest practicable time,"[32] and the emergency arbitrator must "decide promptly" on any objections.[33] It may well be argued that a brief deferral of the respondent's opportunity to be heard—where preliminary evidence satisfies the arbitrator that the relief sought would otherwise be frustrated—does not offend the principle, so long as a full hearing follows without delay.

Coercive Power

The arbitrator's lack of coercive power represents a fundamental structural limitation that transcends questions of party consent. Arbitral tribunals generally lack direct coercive power to compel compliance with their orders; under virtually all national arbitration regimes, a tribunal cannot itself apply enforcement measures to obtain compliance with its provisional measures.[34] This limitation derives from the nature of arbitral authority. Courts exercise coercive power constituting "an eminent prerogative of sovereignty" over which they maintain a "monopoly."[35] Arbitrators, by contrast, possess only the consensual authority granted through private agreement.[36] Under SIAC rules, parties are deemed to have agreed that emergency arbitrator orders are binding and must be carried out "immediately and without delay,"[37] having waived rights to appeal or review. Yet this contractual framework, however comprehensive, cannot transcend its own nature to create sovereign enforcement powers.

The practical consequences of this limitation become most acute in precisely those circumstances where *ex parte* relief is appropriate. Born notes that "the contractual nature of the arbitral process implies that the tribunal's authority is limited to the parties to the arbitration," meaning a tribunal "may not order the attachment of assets in the custody and control of a non-party."[38] This creates a critical enforcement gap, as when a respondent's assets are held by banks, maintained by custodians, or controlled through corporate structures involving third parties, the arbitrator's orders, no matter how urgent or justified, cannot directly reach these entities. The tribunal may order a party to direct its subsidiary to

[30] Arbitration Act 1996, c. 23, s 33(1)(a).
[31] SIAC Rules (2025), sched. 1, para. 33.
[32] *Id.* sched. 1, para. 31.
[33] *Id.* sched. 1, para. 32.
[34] Gary Born, *Op. Cit.,* 13.
[35] Fouret & Seraglini, *Op. Cit.,* 21.
[36] Kun Fan, *Op. Cit.,* 1.
[37] SIAC Rules 2025, sch 1, r 36.
[38] Gary Born, *Op. Cit.,* 8, at17.02[A][5][a].

preserve assets, but as Born observes, "[s]uch orders test the limits of arbitral powers" and depend entirely on the party's voluntary compliance.[39]

In contrast, national courts can deploy comprehensive coercive mechanisms that extend beyond the immediate parties. Courts issue Mareva injunctions with worldwide effect, compelling banks to freeze accounts and threatening criminal contempt for non-compliance.[40] The only direct consequence of non-compliance with emergency arbitrator decisions is the potential for potential liability for damages. But as the ICC Task Force Report reveals, among the first 80 ICC emergency arbitrator proceedings, "there is only one known case where an arbitral tribunal granted damages for failure to comply with an EA's Order."[41] Even then, damages require establishing "a direct causal link between the party's non-compliance with the Order and the damage that has allegedly been suffered."[42]

In an award, the arbitrator retains certain indirect powers through adverse inferences and cost allocations, yet these mechanisms operate retrospectively and lack the immediate compulsive force necessary to prevent asset dissipation or evidence destruction. Arbitration, therefore, despite its sophistication as a dispute resolution mechanism, remains fundamentally dependent on voluntary compliance or court assistance.

To conclude the first part, the theoretical objections to *ex parte* relief in emergency arbitration are surmountable. The consent objection rests on a demanding premise, namely that parties must explicitly agree to each procedural power the arbitrator possesses. This standard finds limited support in arbitral practice. When parties incorporate institutional rules permitting *ex parte* measures, consent is sufficiently established. The mandatory norms objection is similarly answerable. A brief deferral of the respondent's opportunity to be heard does not offend due process principles, provided adequate safeguards ensure a prompt inter partes hearing. The SIAC framework, with its fourteen day expiry, mandatory follow up hearing, and prompt determination of objections, satisfies this requirement.

The coercive power limitation presents a more significant challenge. Arbitrators cannot compel third parties to freeze assets, cannot threaten contempt proceedings, and cannot deploy the enforcement mechanisms available to courts. This structural gap means that *ex parte* relief will be less effective in circumstances requiring immediate third party compliance. However, the limitation should not be overstated. *Ex parte* measures can still retain utility as a procedural tool, effective against cooperative parties and creating a record of non-compliance relevant to subsequent proceedings.

2.2 The Standard

Having established that *ex parte* relief is theoretically permissible in emergency arbitration, the question turns to the conditions under which such relief should be granted. Comparison with national court standards is important because courts remain the forum to which parties most frequently turn for urgent interim relief. Such comparison reveals whether emergency arbitration

[39] *Ibid.,* at17.02[A][5][a]-[b].
[40] *Mareva Compania Naviera SA v. Intl Bulkcarriers SA* [1975] 2 Lloyd's Rep. 509.
[41] ICC Comm'n on Arbitration & ADR, *Emergency Arbitrator Proceedings: Report of the ICC Commission on Arbitration and ADR Task Force on Emergency Arbitrator Proceedings*, ICC Publication No. 895-0 (2019) [hereinafter ICC Report],213.
[42] *Ibid.,*212.

has developed adequate safeguards against abuse, and whether substantive thresholds diverge meaningfully from those applied by courts. If the standards are materially equivalent, parties face a genuine choice between fora. If they diverge, parties must weigh the differences against the structural limitations identified in Part 1.

Section 2.1 examines procedural safeguards, focusing on disclosure and security requirements. Section 2.2 compares the substantive criteria applied by emergency arbitrators and courts.

Procedural Standard

Common law jurisdictions, with the exception of the US,[43] universally adopt the same standard for *ex parte* orders. Courts require applicants to show three things to grant an *ex parte* application 1) cross-undertaking in damages, 2) full and frank disclosure, and 3) good arguable case.[44] The requirements applied by arbitral tribunals are similar in also requiring disclosure and a *prima facie* case on the merits is also necessary. However, as to cross-undertaking in damages, the positions differ. Although all major institutional rules grant arbitrators the power to condition relief on the posting of security,[45] they are rarely ordered.

For instance, for the first 80 ICC emergency arbitrations, not one emergency arbitrator issued a security order.[46] In one case, the emergency arbitrator considered requiring security to be posted to mitigate the risk that the emergency relief might disrupt the status quo, thus guaranteeing compensation for any potential damage resulting from the measure.[47] According to the emergency arbitrator, security posting is ordinarily necessary for measures that alter the existing situation between the parties, such as orders to transfer possession or carry out demolition.[48] Overall, the evidence suggests thar arbitrators are reluctant to require security.[49]

Initially, the arbitral approach, when compared with the judicial approach, appears to be prone to abuse. Security posting discourages abuse and ensures that a respondent unduly harmed by an interim measure may be compensated. However, the underlying logic appears to be that measures that are not easily reversible will require security. Measures that preserve the status quo do not require security, because if they are not justified, they may just be lifted.

Substantive Standard

When deciding on whether to grant interim relief, emergency arbitrators may opt for either applying the applicable law of the *lex arbitri* or an "international arbitration

[43] Born, *Op. Cit.,* 8; but some jurisdictions take exception, *see* for example N.Y. C.P.L.R. §§ 6313, applied to arbitration in *SG Cowen Sec. Corp. v. Messih*, 224 F.3d 79, 83–84 (2d Cir. 2000), the court noting that "[s]ection 7502(c) was intended to provide preliminary relief in state court that had previously been unavailable but to condition that relief—when available under the criteria set out in Article 63—to cases where an arbitration award might otherwise be rendered ineffectual.").
[44] *Fundo Soberano de Angola v. Jose Filomeno Dos Santos* [2018] EWHC 2199.
[45] ICC Rules: Appendix V, Art. 6(7)ICDR Rules: Art. 7(6); HKIAC Rules: Schedule 4, para. 11; SIAC Rules: Schedule 1, para. 11; LCIA Rules: Art. 9.14, applying Art. 25.1; SCC Rules: Appendix II, Art. 1(2).
[46] ICC Report, *Op. Cit.,* 41,173.
[47] ICC Report, *Op. Cit.,* 41,174.
[48] *Ibid.*
[49] *Ibid.,*176.

standard."[50] Emergency arbitrators may also apply the international "a useful guide" where national law is silent.[51] Because most arbitration rules do not offer guidance as to substantive standards, arbitrators often draw from the UNCITRAL Model Law or Arbitration Rules.[52] The most frequent criteria for interim applied by emergency arbitrators for interim relief generally include 1) the likelihood of success on the merits (*fumus boni iuris*), 2) the risk of irreparable harm (*periculum in mora*) and 3) proportionality/balance of equities.[53] The first two criteria are reflected in Article 17A(1)(a) and (b) of the UCNITRAL Model Law, and Article 26(3)(a) and (b) of the UNCITRAL Arbitration Rules.

Common law doctrine adopts the *American Cyanamid* test, namely that there is 1) serious issue to be tried, 2) adequacy of damages and 3) the balance of convenience lies.[54] These three criteria appear similar but differ in wording. In the following section, the arbitral and common law equivalents will be compared.

a. "Likelihood of Success"/ "Serious Issue to be Tried"

   Common law doctrine asks whether "*the claim is not frivolous or vexatious*." While some evidence suggests some arbitrators may understand "*likelihood of success*" to be a higher threshold than "*serious issue to be tried*,"[55] emergency arbitrators will in any case not undertake any comprehensive assessments as to the merits of a claim before the constitution of the tribunal.[56] Therefore, it is unlikely that there is any substantial difference between the respective thresholds.

b. "The Risk of Irreparable Harm"/ "Adequacy of Damages"

   The second criterion diverges more than the first. Common law jurisdictions presume damages as adequate compensation. Only if enforcement is futile or if specific performance is warranted is this threshold reached. However, as explained by Gary Born, in nearly all commercial arbitrations, "the award of money damages can, at least in theory, rectify nearly all commercial losses."[57] Instead, arbitrators tend to apply a more liberal threshold of "substantial harm."[58] In an SCC case, the emergency arbitrator explained that "[i]t is generally accepted that this need not rise to the level of 'irreparable harm' as the term is used in some domestic legal systems. But it must normally be harm of more than a purely monetary nature."[59] In Redfern and Hunter it is explained that reputational damages, loss of business, may fall under this head.[60]Peran saksi ahli dalam sengketa konstruksi juga sangat signifikan. Mengingat sifat sengketa yang teknis, majelis arbiter seringkali memerlukan bantuan ahli untuk

[50] *Beyond Gravity Sweden AB v. Ensign-Bickford Aerospace & Def. Co*., ICC Case No. 29155/HBH, Emergency Arbitrator's Order,81 (Feb. 6, 2025).
[51] *Ibid.,*82-85.
[52] Gary Born, *Op. Cit.,* 8, at 17.02 [A][4][e].
[53] ICC Report, *Op. Cit.,* 41,33.
[54] Fouret & Seraglini, *Op. Cit.,* 21, at40.3.3.
[55] ICC Report, *Op. Cit.,* 41,33.
[56] Cameron Sim, *Op. Cit.,* 4,7.110.
[57] Gary Born, *Op. Cit.,* 8,17.02[G][3][b][i].
[58] *Ibid*.
[59] SCC Case No. EA 2016/046, in *SCC Practice Note: Emergency Arbitrator Decisions Rendered 2015-2016*.
[60] Nigel Blackaby et al., *Op. Cit.,* 6, at7.45.

menjelaskan aspek *engineering* yang berada di luar pengetahuan umum. Saksi ahli dapat memberikan penjelasan mengenai standar *engineering* yang berlaku, penyebab kegagalan pekerjaan, apakah deviasi teknis masih dalam batas toleransi yang dapat diterima, serta apakah metode perbaikan yang dilakukan telah memadai. Dalam banyak sengketa konstruksi, perbedaan pendapat antara para pihak mengenai mutu pekerjaan atau penyebab kerusakan hanya dapat dijembatani melalui penilaian ahli yang independen dan objektif. Majelis harus menilai keterangan ahli secara kritis dengan mempertimbangkan metodologi yang digunakan, independensi ahli, serta konsistensi keterangan ahli dengan dokumen dan fakta lapangan.

c. "Proportionality/Balance of Equities"/ "The Balance of Convenience"

The third criterion requires the tribunal to weigh the harm to the applicant if relief is denied against the harm to the respondent if relief is granted. There is no meaningful difference between the standard applied by emergency arbitrators and that applied by courts.[61] In making this assessment, both arbitrators and judges may consider the impact on third parties.[62] However, there is reason to think arbitrators should approach third party effects differently than courts. A court can weigh third party interests knowing it retains jurisdiction to protect those interests if necessary. An arbitrator, by contrast, lacks power over non-parties and cannot remedy harm caused to them, suggesting that arbitrators should exercise additional caution where emergency relief may affect third parties. On the other hand, an arbitrator's duty runs to the parties before it, not to third parties, whereas a court's duty extends more broadly to the administration of justice. These competing considerations remain largely unexplored in scholarship.

Urgency

Finally, the urgency criterion distinguishes emergency arbitration from ordinary interim measures applications. Though not specific to ex parte measures, they must be briefly discussed to understand the full nature of an *ex parte* application under the framework contemplated here. While a tribunal considering interim measures asks whether relief can await the final award, an emergency arbitrator asks the narrower question: whether relief can await the constitution of the arbitral tribunal.[63] This has been characterized as "the most difficult standard to meet," and insufficient urgency is "a very common basis" for dismissal of applications.[64] The standard is strictly applied across institutions.[65] Courts applying *ex parte* standards do not face this particular difficulty, as urgency in that context is typically subsumed within the irreparable harm inquiry. In emergency arbitration, by contrast, urgency stands as a distinct and demanding requirement that reflects the exceptional nature of the procedure. This

[61] *Ibid.,* at 7.45.
[62] I.C.F. Spry, *Equitable Remedies* 472–74 (9th ed. 2014).
[63] Cameron Sim, *Op. Cit.,* 4,7.40.
[64] *Ibid.*,7.41.
[65] ICC Report, *Op. Cit.,* 41,8; *SCC Practice: Emergency Arbitrator Decisions* 1 January 2010–31 December 2013.

heightened threshold serves an important gatekeeping function, ensuring that emergency arbitrators do not usurp the role of the arbitral tribunal by granting relief that could properly await the tribunal's consideration.

III. CONCLUSION

The introduction of Protective Preliminary Orders under the 2025 SIAC Rules provides an opportunity to revisit longstanding debates about *ex parte* relief in international arbitration. This paper has argued that such relief is compatible with the nature of arbitration. The consent objection demands a standard that arbitral practice does not support. The mandatory norms objection is answered by procedural safeguards ensuring the respondent's opportunity to be heard is deferred rather than denied. The arbitrator's lack of coercive power presents a more significant limitation but does not render such measures without value.

The comparison of arbitral and judicial standards reveals substantial alignment. Emergency arbitrators apply comparable procedural safeguards, and the substantive criteria are materially similar. The framework is well equipped to address concerns about abuse and fairness.

The greater challenge is adoption. For arbitral *ex parte* relief to fulfill its potential, broader acceptance is necessary, whether through national legislative support or coordinated efforts among arbitral institutions. SIAC's initiative is a welcome step, and whether other institutions follow will determine whether *ex parte* relief in emergency arbitration becomes a practical reality.

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