

IS THE EMERGENCY ARBITRATOR PROCEDURE SUITABLE FOR INVESTMENT ARBITRATION?

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ABSTRACT

Due in part to the increasing cross-fertilization between commercial and investment arbitration, there has been an increasing overlap of procedural rules, substantive standards and remedies used in both disciplines.

In particular, the Emergency Arbitrator (EA) procedure, which has become a useful tool for parties in commercial arbitration to obtain urgent relief prior to the constitution of the tribunal, has also become available in investment arbitration under certain institutional rules. To date, there have been at least 5 known cases of EA appointments in investment arbitration, and it is not inconceivable that more will arise.

This paper provides a brief background to EA procedures and the current limited practice of EAs in investment arbitration. Because of its origins in commercial arbitration, the EA procedure presents a number of peculiar issues when used in investment arbitration: First, at the initiation of the EA case and from the respondent state's point of view, there is the question of the respondent state's consent to the EA procedure itself and, consequently, the reliefs awarded by an EA. Second, at the termination of the proceedings and from the investor claimant's point of view, the question arises as to the feasibility of enforcing an EA decision in a domestic court, particularly that of the host state. The paper presents the current discourse on the issues raised above.

Lastly, it is proposed that the following considerations must be taken into account in further refining the EA procedure for investment arbitration: (a) the availability of an enforcement mechanism of EA decisions that does not rely exclusively on the New York Convention; and (b) the provision of viable alternatives for states in the event of an adverse decision.

KEYWORDS: *emergency arbitrator, emergency arbitrators, investment arbitration, state consent, state sovereignty, urgent interim relief, emergency relief, damages, state parties, enforcement,*

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arbitration rules, enforcement in domestic courts