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ARTICLE 37—EMERGENCY MEASURES OF PROTECTION

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ARTICLE 37

1. Unless the parties agree otherwise, the provisions of this Article 37 shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after May 1, 2006.
2. A party in need of emergency relief prior to the constitution of the tribunal shall notify the administrator and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by e-mail, facsimile transmission or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.
3. Within one business day of receipt of notice as provided in paragraph 2, the administrator shall appoint a single emergency arbitrator from a special panel of emergency arbitrators designated to rule on emergency applications. Prior to accepting appointment, a prospective emergency arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts to the arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the administrator to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.
4. 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 relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceedings by telephone conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the

tribunal under Article 15, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Article 37.

5. The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measure may take the form of an interim award or of an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order for good cause shown.

6. The emergency arbitrator shall have no further power to act after the tribunal is constituted. Once the tribunal has been constituted, the tribunal may reconsider, modify or vacate the interim award or order of emergency relief issued by the emergency arbitrator. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise.

7. Any interim award or order of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.

8. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this Article 37 or with the agreement to arbitrate or a waiver of the right to arbitrate. If the administrator is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the administrator shall proceed as in Paragraph 2 of this article and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

9. The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

I. Introduction

37.01 Article 37 came into force on 1 May 2006 and, at the time, represented a groundbreaking innovation in how to resolve the intractable problem of providing emergency relief prior the appointment of a tribunal. Through the procedures detailed in Article 37, a party may apply to secure expedited emergency relief even before an arbitrator has been appointed. On receipt of such an application, the ICDR will appoint an emergency arbitrator, who is tasked with considering the application and who has the power to order interim awards, to protect or conserve property, and to make other orders of emergency relief. Prior to the advent of Article 37, a party requiring emergency relief before the tribunal was constituted had to approach the relevant national court for some form of preliminary relief. The court process could be time-consuming, costly, and unpredictable. More importantly, it left parties at the mercy of the local judiciary, the avoidance of which was often precisely why they had opted instead to go to arbitration. In addition, such applications could be rendered pointless in jurisdictions in which courts denied

applications for such relief as being inconsistent with the existence of an arbitration agreement.¹

Article 37 has its genesis in the analogous provision adopted in 1999 as part of the AAA Commercial Rules: the Optional Rules for Emergency Measures of Protection.² As the name suggests, parties had to opt in prospectively to avail themselves of this mechanism. In contrast, Article 37 applies automatically to all parties who entered into an arbitration clause or agreement covered by the ICDR Rules on or after 1 May 2006. **37.02**

Importantly, these emergency measures of protection exist separately from Article 21, which empowers the *arbitral tribunal*—if it has already been constituted—to order interim measures of protection. Further, and significantly, a party may still choose to go to a court of competent jurisdiction to obtain emergency relief, such as a preliminary injunction, a temporary restraining order, or an order to preserve evidence. The real utility of Article 37 lies in situations in which the tribunal has not yet been appointed and a party fears that the appropriate courts will not grant interim relief or it will be ineffective. **37.03**

According to ICDR senior management, as of October 2010, the Article 37 procedures had been formally invoked on 14 occasions, resulting in 11 interim awards being rendered (of the other cases, one was withdrawn, one settled, and one was pending at the time of inquiry). The time from filing of the application to issue of the interim order was, on average, approximately three weeks. Anecdotal evidence suggests that the threat of these procedures being invoked may also have influenced parties' behaviour such that formal recourse to Article 37 became unnecessary.³ Given that Article 37 is relatively new and that there is little publicly available information on its application, it is difficult to comment on its practical utility. Nevertheless, Article 37 has been the subject of many commentaries.⁴ **37.04**

In order to better appreciate Article 37, it is necessary briefly to give an overview of the other competing mechanisms offering emergency relief under other arbitration **37.05**

¹ See discussion of Art 21 at para 21.08 above (discussing jurisdictions in which courts were reticent to exert jurisdiction in the face of an arbitration clause).

² See AAA Commercial Rules, Optional Rules for Emergency Measures of Protection, available online at <<http://www.adr.org/sp.asp?id=22440#A10>>

³ Comments made by ICDR senior management (October 2010).

⁴ See eg G Dunning et al, 'Using Article 37 of the ICDR International Arbitration Rules: Obtaining Emergency Relief', *Disp Res J* 69, 71 (May/July 2007); G Lemenez and P Quigley, 'The ICDR's Emergency Arbitrator Procedure in Action Part I: A Look at the Empirical Data', *Disp Res J*, 60 (Aug/Oct 2008); G Lemenez and P Quigley, 'The ICDR's Emergency Arbitrator Procedure in Action Part II: Enforcing Emergency Arbitrator Decisions', *Disp Res J* (Nov 2008/Jan 2009); BH Sheppard and J Townsend 'Holding the Fort Until the Arbitrators Are Appointed: The New ICDR International Emergency Rules', 61(2) *Disp Res J* (2006); M Kantor, 'Arbitration Rules Update: Expedited Emergency Relief Under the AAA/ICDR, ICC and LCIA Rules', 21 *Mealey's Int Arb Rep* 25, 30 [2006]; I Meredith and M Birch, 'The ICC's Pre-arbitral Referee Procedure: How Valuable is It?', *Cross-border Quarterly* 49 (Jan/Mar 2008).

rules or laws. As an important starting point, since 1990, the ICC has offered a ‘Pre-arbitral Referee Procedure’ that permits parties to have a dispute submitted to a referee for, amongst other things, emergency orders.⁵ The referee, unless otherwise agreed, has the power:

- (a) to order any conservatory measures necessary to prevent either immediate damage or irreparable loss;
- (b) to order a party to make to a payment that ought to be made;
- (c) to order a party to abide by the party’s contractual obligations, including the signing or delivery of any document, or the procuring by a party of the signature or delivery of a document; and
- (d) to order preservation of evidence.⁶

However, to obtain the benefit of the Pre-arbitral Referee Procedure, the parties must have expressly incorporated the procedures into the arbitration clause or some other written agreement.⁷ While the referee’s orders are ‘binding’ on the parties until the referee or the tribunal decides otherwise,⁸ courts have held that the referee’s orders are *not enforceable*, because they are not ‘arbitral awards’ under the New York Convention.⁹

37.06 The LCIA has attempted to address the issue within its rules themselves by allowing a party to apply for ‘expedited formation’ of a tribunal.¹⁰ The LCIA may, in its complete discretion, abridge any time limit under the LCIA Rules for formation of the tribunal. The parties must then rely on the tribunal’s powers to make interim awards.¹¹ While the effect is to permit the LCIA to shorten the process of constituting the tribunal, there is still potential for considerable delay as the LCIA is *not* authorized to override the right of the parties to nominate party-appointed arbitrators.¹² The LCIA typically shortens the time limit within which the respondent must reply to the arbitration demand, but observers note that only rarely is the process significantly expedited.¹³

⁵ Available online at <<http://www.iccwbo.org/court/arbitration/id5095/index.html>>

⁶ ICC Rules for a Pre-arbitral Referee Procedure, Art 2.1.

⁷ See the ICC’s recommended clause at <<http://www.iccwbo.org/court/arbitration/id5095/index.html>>: ‘Any party to this contract shall have the right to have recourse to and shall be bound by the Pre-arbitral Referee Procedure of the International Chamber of Commerce in accordance with its Rules for a Pre-arbitral Referee Procedure.’

⁸ ICC Rules for a Pre-arbitral Referee Procedure, Art 6.3.

⁹ Meredith and Birch, *op cit*.

¹⁰ LCIA Rules, Art 9.

¹¹ *Ibid*, Art 25.

¹² *Ibid*, Art 9.3.

¹³ N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) paras 6-259–6-262. In one case, the LCIA required that the sole arbitrator be appointed by the parties within 48 hours of the arbitration demand.

The UNCITRAL Rules do not contain an analogous provision. Article 17 of the UNCITRAL Model Law does, however, provide another approach by encouraging states to adopt an arbitration law that deepens the arbitral tribunal's *post-constitution* powers to provide emergency relief. The Model Law was extensively revised in 2006 to acknowledge the importance of interim awards in arbitral proceedings and to include optional additional provisions for so-called 'preliminary orders'.¹⁴ Thus, pursuant to Article 17(B), a 'party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested'.¹⁵ The 2006 adoption of this expanded Article 17 was very controversial, with most criticism focused on the potential for making *ex parte* applications.¹⁶ Whatever the merits of this approach, most commentators conclude that concerns remain about the effectiveness of such 'preliminary orders', which are explicitly binding on the parties, but do *not* constitute an award and are *not* 'subject to enforcement by a court'.¹⁷ More fundamentally, in contrast to Article 37 of the ICDR Rules, the UNCITRAL Model Law does not provide a mechanism for emergency relief prior to the tribunal's constitution. **37.07**

The revised Rules of the Netherlands Arbitration Institute (NAI), effective 1 January 2010, allow for 'Summary Arbitral Procedures', under which parties in need of an immediate provisional measure can request that the NAI Secretariat appoint a tribunal to decide the summary proceedings.¹⁸ The NAI Summary Arbitral Procedures have much in common with Article 37—they allow for the appointment of a sole arbitrator who has the discretion to grant emergency awards before, if appropriate, a permanent arbitration panel charged with hearing the merits is constituted. Importantly, both the Rules¹⁹ and the Netherlands Arbitration Act²⁰ specifically state that decisions rendered in Summary Arbitral Procedures are regarded as 'arbitral awards' subject to immediate enforcement. **37.08**

In January 2010, the SCC modified its Arbitration Rules to incorporate procedures for the appointment of an emergency arbitrator with powers to issue interim awards **37.09**

¹⁴ <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>

¹⁵ UNCITRAL Model Law, 2006 Revisions, Art 17(B).

¹⁶ See eg, D Hacking, 'Ex Parte Interim Relief and the UNCITRAL Model Law, Edited Remarks', Disp Res J (Aug/Oct 2003); Y Derains, 'The View Against Arbitral Ex Parte Interim Relief: A Confirmation That the Best May Be the Enemy of the Good', Disp Res J (Aug/Oct 2003); JE Castello, 'Arbitral Ex Parte Interim Relief the View in Favor', Disp Res J (Aug/Oct 2003); VM Fraraccio, 'Ex Parte Preliminary Orders in the UNCITRAL Model Law on International Commercial Arbitration', 10 VJ 263 (2006); GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 2,016–19.

¹⁷ UNCITRAL Model Law, Art 17(C)(5).

¹⁸ Netherlands Arbitration Institute (NAI) Arbitration Rules, Section Four A, Art 42a ff.

¹⁹ Ibid, Art 42(I).

²⁰ Netherlands Arbitration Act, art 1051(3).

before an arbitration panel is appointed.²¹ The SCC Rules are also very similar to Article 37. Upon application for relief, a single emergency arbitrator is appointed by the SCC Board.²² The arbitrator may conduct proceedings as he or she sees fit,²³ but must issue a decision in five days absent an extension from the SCC Board.²⁴ That award is binding and enforceable, but subject to review by the emergency arbitrator and by the tribunal, once constituted.²⁵ Given the recent creation of this new provision, its effectiveness has yet to be determined.

37.10 In July 2010, the SIAC introduced Rules for Emergency Proceedings, both in the form of expedited procedures (Article 5) and a process to appoint an ‘emergency arbitrator’ empowered to give emergency relief prior to the tribunal’s appointment (Schedule 1). With respect to the latter, the SIAC chairman (or his or her deputy) appoints an emergency arbitrator within one business day of receipt of a party’s application;²⁶ within two business days of the appointment, the emergency arbitrator must set a schedule to consider the application.²⁷ The emergency arbitrator has power to order or award any interim relief that he or she deems necessary.²⁸ As long as the tribunal is constituted within 90 days of the interim award, the award is binding, but subject to review by the tribunal.²⁹ This SIAC initiative clearly draws on the Article 37 mechanism and it will be interesting to see how popular it becomes with arbitration users.

II. Textual commentary

A. Applicability (Article 37(1))

ARTICLE 37(1)

Unless the parties agree otherwise, the provisions of this Article 37 shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after May 1, 2006.

37.11 Article 37’s predecessor, the Optional Rules for Emergency Measures of Protection, was developed by the AAA in 1999 to provide temporary relief to parties after a case

²¹ SCC Rules (‘SCC Rules’), Appx II, Arts 1–10.

²² Ibid, Art 4(1)

²³ Ibid, Art 7.

²⁴ Ibid, Art 8(1).

²⁵ Ibid, Art 9.

²⁶ SIAC Rules, Sch 1(2).

²⁷ Ibid, (5).

²⁸ Ibid, (6).

²⁹ Ibid, (7)–(9).

was filed, but prior to the tribunal's constitution. Because the Optional Rules had to be agreed to by both parties, they were not frequently used.³⁰ Thus, a key feature of Article 37 is that it is applicable to all arbitrations conducted pursuant to agreements or clauses entered into on or after 1 May 2006, unless otherwise agreed.

B. Application for emergency relief (Article 37(2) and (3))

ARTICLE 37(2)

A party in need of emergency relief prior to the constitution of the tribunal shall notify the administrator and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by e-mail, facsimile transmission or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

ARTICLE 37(3)

Within one business day of receipt of notice as provided in paragraph 2, the administrator shall appoint a single emergency arbitrator from a special panel of emergency arbitrators designated to rule on emergency applications. Prior to accepting appointment, a prospective emergency arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts [as] to the arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the administrator to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

The application for emergency relief must come *after* the demand for arbitration has been filed (pursuant to Article 2), but *before* the panel is appointed. The SCC Rules, interestingly, do not require a request for arbitration prior to the request for emergency relief. The SCC considered this unnecessary, 'as it limits the usefulness of the provisions without providing any advantages'.³¹ **37.12**

Article 37(2) provides that the party seeking emergency relief shall notify the administrator and all other parties in writing of the nature of the relief sought, and the reasons why such relief is required on an emergency basis. The notice must include a statement 'certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties'. On its face, therefore, there is no provision for making such an application on an *ex parte* basis. Similarly, the NAI, SIAC, and SCC Rules all require notice to the opposing party.³² **37.13**

³⁰ BH Sheppard and J Townsend 'Holding the Fort Until the Arbitrators Are Appointed: The New ICDR International Emergency Rules', 61(2) Disp Res J (May/July 2006).

³¹ SCC, Draft New Rules with Notes, Appx II, Art 1, available online at <http://www.sccinstitute.com/filearchive/2/25690/Rules_on_an_Emergency_Arbitrator_on-Interim_Measures_NOTES.pdf>

³² NAI Arbitration Rules, Art 42d; SIAC Rules, Sch 1(1); see Rules, App II, Art 3.

In a situation in which there is concern that a party, once notified of the claim, will try to hide assets or otherwise take pre-emptive action, Article 37 can thus be cumbersome. In such a case, where available, *ex parte* judicial relief may be preferable.

- 37.14** While there is no prescribed form for the application, commentators have noted that the first four requests, filed between May 2006 and May 2008, were each approximately ten pages long and contained significant detail.³³ More recent information shows that the applications have ranged from a two-page letter to a 60-page formal application with 500 pages of supporting documentation.³⁴ In the absence of formal requirements and by analogy to a litigation procedure, some Article 37 applications are supported by affidavit evidence of the key facts and as to the ‘emergency’ nature of the application.³⁵ But the procedure is intended to be flexible and there is not yet any established practice.
- 37.15** Article 37(3) provides that the emergency arbitrator shall be appointed by the ICDR ‘administrator’, within one business day of the request for emergency relief. The first point to note is that, despite the use of ‘*shall*’ suggesting that the ICDR administrator is not intended to perform any ‘gatekeeper’ function, the ICDR will do a preliminary review to determine that the Article 37 requirements have been met. ICDR senior management then performs the task of selecting an appropriate arbitrator from the standing panel of qualified emergency arbitrators. The emergency panel list is not made available to the public, but it is made up of senior members of the global arbitration community, with at least 15 years’ experience (as is required of all members of the ICDR panel of arbitrators).³⁶ The emergency arbitrator is selected based on availability and area of expertise. Relying on somewhat vaguer language, the NAI requires the administrator to appoint an arbitrator ‘as soon as possible after the receipt of the request’. The new SCC provision, however, attempts to reduce any possible uncertainty in the timeline by specifying that the SCC Board has 24 hours after receipt of the application in which to appoint an emergency arbitrator.³⁷
- 37.16** Prior to accepting appointment, it is incumbent on the emergency arbitrator to disclose to the administrator any circumstance likely to give rise to justifiable doubts as to that individual’s impartiality or independence. This mirrors the standard of

³³ G Lemenez and P Quigley, ‘The ICDR’s Emergency Arbitrator Procedure in Action Part I: A Look at the Empirical Data’, *Disp Res J* 60, 64 (Aug/Oct 2008).

³⁴ Discussion with ICDR senior management (October 2010).

³⁵ *Ibid.*

³⁶ See discussion of arbitrator qualifications at para 6.13 above. See also G Dunning et al, ‘Using Article 37 of the ICDR International Arbitration Rules: Obtaining Emergency Relief’, *Disp Res J* 69, 71 (May/July 2007).

³⁷ SCC, Draft New Rules with Notes, Appx II, Art 4, available online at <http://www.sccinstitute.com/filearchive/2/25690/Rules_on_an_Emergency_Arbitrator_on-Interim_Measures_NOTES.pdf> (rejecting the, ‘one business day’ standard because of the uncertainty inherent in such a phrase).

arbitrator impartiality required by Article 7.³⁸ Article 37(3) requires that any challenge to the emergency arbitrator must be made within one business day of the administrator's communication of the appointment and of the circumstances disclosed. As with the appointment power, the duty to consider and rule on any challenge lies solely with the ICDR. Apparently, there have, to date, been a total of four challenges to emergency arbitrators, resulting in one case of removal and appointment of a new arbitrator.³⁹

By referring to the decision-maker as an 'arbitrator', Article 37 makes clear that the emergency relief procedure, the appointment of the emergency arbitrator, and the ultimate orders and awards are all to be treated as part of an 'arbitration' and therefore subject to the applicable local arbitration laws and international arbitration treaties. This is not the same in the ICC's 'referee' procedure, in which at least some courts have held that the referee is not an arbitrator.⁴⁰ **37.17**

C. The emergency arbitrator's powers (Article 37(4) and (5))

ARTICLE 37(4)

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 relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceedings by telephone conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Article 15, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Article 37.

ARTICLE 37(5)

The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measure may take the form of an interim award or of an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order for good cause shown.

As soon as possible, but in any event within two business days of appointment, the emergency arbitrator must establish a schedule for considering the merits of the emergency relief application. While, under these procedures, the arbitrator must **37.18**

³⁸ See discussion of Art 7 in Chapter 7 above.

³⁹ Information based on a discussion with ICDR senior management (October 2010). See also Lemenez and Quigley, *op cit*, 65 (noting that the ICDR upheld the challenge and within one business day a replacement was appointed, but that the replacement arbitrator resigned almost immediately, leading the ICDR to appoint a second replacement, again within one business day).

⁴⁰ See M Kantor, 'Arbitration Rules Update: Expedited Emergency Relief Under the AAA/ICDR, ICC and LCIA Rules', 21 *Mealey's Int Arb Rep* 25, 30 [2006]; I Meredith and M Birch, 'The ICC's Pre-arbitral Referee Procedure: How Valuable is It?', *Cross-border Quarterly* 49 (Jan/Mar 2008).

‘provide a reasonable opportunity to all parties to be heard’, a formal hearing is not required. The rules go on to specify that a phone conference or written submission may suffice.⁴¹ While Article 23(2) provides that, as long as the parties are ‘duly notified under [the] Rules’, the *tribunal* may proceed with the arbitration if a party fails to appear, it is unclear if Article 23(2) would extend to allow an *emergency arbitrator* to proceed with the hearing if a party fails to appear.

37.19 Article 37(4) makes clear that the emergency arbitrator has the powers provided under Article 15, including being entitled to rule on his or her own jurisdiction and on the applicability of Article 37.⁴² This is presumably intended to avoid any attempts by an unhappy respondent to undermine the Article 37 procedure by mounting a court challenge to the emergency arbitrator’s jurisdiction.

37.20 Article 37(5) grants the emergency arbitrator broad powers to order ‘any interim or conservancy measure . . . deem[ed] necessary, including injunctive relief and measures for the protection or conservation of property’. Importantly, paragraph (5) makes clear that any emergency measure ‘may take the form of an interim award or of an order’. The distinction between ‘interim awards’, ‘orders’, and other forms of decision has been addressed in the context of Article 27(7).⁴³ However, unlike their UNCITRAL counterparts, the intention of the Article 37 drafters was manifestly to ensure that the resulting ‘measures’ are immediately enforceable under the New York Convention or applicable local arbitration laws. Further evidencing the desire to ensure enforceability and consistent with the similar requirement in Article 27(2),⁴⁴ the interim award or order must be reasoned. US courts faced with such interim awards outside the Article 37 context have held that, where they have the requisite finality, they will be enforceable under the New York Convention.⁴⁵ In *Yonir Technologies, Inc v Duration Sys (1992) Ltd*,⁴⁶ the federal district court held that:

*Arbitrators have the authority to award interim relief in order to protect their final award from being meaningless . . . and equitable awards involving the preservation of assets related to the subject of arbitration are generally considered ‘final’ arbitral awards subject to judicial review.*⁴⁷

⁴¹ See discussion of what constitutes a ‘hearing’ for purposes of Art 20 at paras 20.04–20.05 above.

⁴² See discussion of Art 15 in Chapter 15 above. ICDR senior management advises that an emergency arbitrator has already had to rule on a challenge to jurisdiction (October 2010).

⁴³ See discussion of Art 27(7) at para 27.14 above.

⁴⁴ See discussion of Art 27(2) at para 27.06 above.

⁴⁵ See eg *Konkar Maritime Enterprises v Compagnie Belge d’Affretement*, 668 FSupp 267, 272 (SDNY 1987) (confirming that an order to establish an escrow account was enforceable). See also SM Widman, ‘When It’s Over Before It’s Completed: The Finality of Interim Awards’ (2006) 24 *Alternatives to the High Cost of Litigation* 97. See also *Sperry Intl Trade, Inc v Government of Israel*, 689 F2d 301, 306 (2d Cir 1982) (enforcing an interim award issued under the pre-amendment ICDR International Rules providing that disputed monies be paid into an escrow fund pending an award on the merits).

⁴⁶ 244 FSupp2d 195 (SDNY 2002).

⁴⁷ *Ibid*, 204. Similarly, in *Pacific Reinsurance Mgmt Corp v Ohio Reinsurance Corp*, 935 F2d 1019, 1023 (9th Cir 1991), the court held that a preliminary procedural award requiring the posting of a security was a final award subject to review.

While an Article 37 award or order has yet to be considered by any court, and this may depend on the subject matter of the relief granted, the US precedents support finding such emergency measures enforceable.⁴⁸ **37.21**

Pursuant to Article 37(5), the emergency arbitrator retains the power to modify or vacate the interim award or order for good cause shown. This is a pragmatic necessity given that, as with applications for emergency relief in court, the decision-maker has to respond very quickly to a potentially uncertain factual and legal scenario. It is quite conceivable that, before the full tribunal has been appointed, the emergency arbitrator will have to deal with an application to vacate or modify the emergency measure.⁴⁹ **37.22**

D. Tribunal may reconsider once constituted (Article 37(6))

ARTICLE 37(6)

The emergency arbitrator shall have no further power to act after the tribunal is constituted. Once the tribunal has been constituted, the tribunal may reconsider, modify or vacate the interim award or order of emergency relief issued by the emergency arbitrator. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise.

The emergency arbitrator becomes *functus officio* once the tribunal in the merits proceeding is constituted. The emergency arbitrator may not serve as a member of the tribunal unless otherwise agreed by the parties. Once in place, the tribunal may reconsider, modify, or vacate the interim award or order. Again, this acknowledges that, with a full tribunal in place and an opportunity for more comprehensive analysis, it may be decided that the initial interim award or order is no longer appropriate. **37.23**

E. Costs and security for costs (Article 37(7) and (9))

ARTICLE 37(7)

Any interim award or order of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.

⁴⁸ *Yonir Technologies Inc v Duration Sys*, 244 F Supp 2d 195 (SDNY 2002); *Pacific Reinsurance Mgmt Corp v Ohio Reinsurance Corp*, 935 F2d 1019 (9th Cir 1991); *Arrowhead Global Solutions v Datapath Inc*, 166 Fed Appx, 39 (4th Cir 2006).

⁴⁹ As of October 2010, ICDR senior management advises that an emergency arbitrator has not vacated his or her own emergency measure.

ARTICLE 37(9)

The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

- 37.24** Article 37(7) permits the emergency arbitrator to condition any emergency interim award or order on the applicant's provision of 'appropriate security'. No guidance is given on what may be appropriate security. Reference might be had to the practice in the courts of the place of arbitration in applications for interim relief. Any such determination is likely to be highly fact-specific. The ICDR advises that security has been ordered on an application for emergency measures.⁵⁰
- 37.25** While there is no filing fee associated with the application, the parties must pay the arbitrator's fee and expenses. The arbitrator is paid an hourly fee that is agreed to by the parties, the arbitrator, and the ICDR. According to commentators, the arbitrators in the first four cases spent between 10 and 40 hours on each case.⁵¹ Article 37(9) states that the emergency arbitrator decides the extent to which the costs of dealing with the application are to be apportioned between the parties. This therefore falls in the first instance to the emergency arbitrator's discretion, but is subject to the tribunal's ultimate power to make a final determination on apportionment of costs.

F. Party may seek judicial emergency relief (Article 37(8))

ARTICLE 37(8)

A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this Article 37 or with the agreement to arbitrate or a waiver of the right to arbitrate. If the administrator is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the administrator shall proceed as in Paragraph 2 of this article and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

- 37.26** Article 37(8) makes explicit that a party is still free to go to the appropriate courts to seek emergency relief in aid of the arbitration. Doing so is not to be considered a waiver of the right to arbitrate. This mirrors Article 21(3), in which it is confirmed that a request for judicial interim measures is not incompatible with the arbitration agreement.⁵²

⁵⁰ Discussion with ICDR senior management (October 2010).

⁵¹ G Lemenez and P Quigley, 'The ICDR's Emergency Arbitrator Procedure in Action Part I: A Look at the Empirical Data', *Disp Res J* 60, 69 (Aug/Oct 2008).

⁵² See discussion of Art 21(3) at para 21.08 above.

Article 37(8) also states that if a judicial authority directs the ICDR administrator to appoint a ‘special master’, the administrator shall do so in accordance with Article 37. This is an additional route to Article 37 that has its genesis in the AAA Commercial Rules’ Optional Rules for Emergency Measures of Protection. In the USA, Federal Rules of Civil Procedure, r 53(a)(1), provides that the court may appoint a special master to ‘perform duties consented to by the parties’. The special master presents a final report to the court, which becomes a final judgment absent appeal.⁵³ Under Article 37(8), anticipating that some courts will prefer to appoint a special master that has powers under the applicable arbitration rules, the special master shall take the role of the emergency arbitrator, but without producing an award. **37.27**

⁵³ Fed R Civ Pro 53(e).

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APPENDICES

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