EMERGENCY ARBITRATOR PROCEEDINGS

Wednesday, 28 April 2021

(6.00 pm)

MR TAYLOR: Sorry, hold on. It might be a technical issue of mine, but I can't hear you at the moment.

MODERATOR: I'm sorry. I guess -- oh, yes. Perhaps let me just reverse back two sentences. I was about to introduce Edward Taylor, our keynote speaker tonight.

Edward -- he started his career with Linklaters in London and Hong Kong. And then he joined Shearman & Sterling International Arbitration team back in 2013 in London. Then he returned back to Hong Kong with Shearman & Sterling back in 2019, after spending some time in their Singapore office.

As you can see by now, Edward has quite a wide spectrum of arbitration experience and multi-jurisdiction experience in this respect.

Also, Edward has experience of emergency arbitration, both as counsel on emergency arbitration proceedings and also as arbitral tribunal secretary to emergency arbitration. And he has particular experience of emergency arbitration proceedings under the Hong Kong IAC -- ICC rules in relation to private equity finance and commodity disputes. And also, Edward has contributed to emergency arbitration reform as

well.

Well, on a side note, on a personal note, despite his work is full of excitement, full of emergency moments, he enjoys running and hiking, like you and me. I guess at leisure time. So without further ado, I pass the microphone -- I pass the forum to our keynote speaker tonight, Edward.

Thank you, Edward.

MR TAYLOR: Thank you very much. Thank you very much, Vod, and I will just try to share my screen now so I can show you the slides that I've prepared.

Would the administrator be able to hook up the share screen option? I seem to be having difficulty showing slides. Here we go. Oh, perfect. Hopefully, everyone can see the slides now.

So thank you again for the kind introduction. It's a real honour to have this opportunity to deliver this presentation to the Hong Kong Institute of Arbitrators. I would like to thank everyone at the institute who has helped organise the presentation, and also thank you to everyone who is attending.

The topic of my presentation, as you can see, is "Emergency Arbitration Proceedings in the Asia Pacific". And there are three reasons why I think this topic is an interesting and timely one.

First, emergency arbitrator proceedings are increasingly popular in the Asia Pacific. There were 20 SIAC and 14 HKIAC application for emergency arbitration in 2020.

Second, as we will see during the course of the presentation, Asia Pacific jurisdictions have adopted a pioneering approach to emergency arbitration proceedings, particularly in relation to the enforceability of emergency arbitrator's decisions, and the availability of ex parte and interim relief.

Third and finally, emergency arbitration proceedings are undergoing some interesting developments in India at the moment, with a case adjusting their enforceability currently heading to India's Supreme Court.

As Vod mentioned, I have experience with emergency arbitration proceedings as counsel and also as tribunal secretary to emergency arbitrators. And I've tried to incorporate those experiences into this presentation.

In terms of the structure of this presentation and the topics I will be covering, it's in three parts. First, we'll look at the problem that emergency arbitrator mechanisms are intended to solve. And I will also consider alternatives to emergency arbitration, including obtaining interim relief for national courts or from pre-arbitral referees.

We will also look at methods for expediting

a constitution of arbitral tribunals so they can provide interim relief more quickly.

In section 2, I will outline some key practical, legal and strategic considerations that often arise in emergency arbitration proceedings.

And in section 3, we'll look at four areas where emergency arbitration mechanisms could benefit from reform.

If you have any questions, please send them using the chat box, and I will try my best to answer them during the presentation or at the end.

Now, when a dispute arises, it can often take several weeks or even months for a tribunal to be constituted. This delay can be due to a range of factors. The party's appointed mechanism in their arbitration agreement can often take several weeks to work through with each party nominating and then a need for the parties or their co-arbitrators to appoint a president. The conflict check and disclosure process of arbitrators. And sometimes the internal processes of arbitral institutions. And all of these things can create situations where it takes a long time for the tribunal to be constituted.

This delay in the constitution of the tribunal can create a particular problem if a party urgently needs interim measures, since the party is unable to make that interim

measure application to the tribunal, for so long as the tribunal is not constituted. And if a party is forced to wait until the tribunal has been constituted in order to obtain the interim measures it needs, it may prevent a fair and effective arbitration from taking place.

So what can a party do if it needs interim measures in a period before a tribunal has been constituted? Four emergency arbitration mechanisms are widely available, but there's generally only one option: apply to a national court for interim relief.

But this might not always be possible, depending upon the jurisdiction which the parties and their assets are located. Also, a party who has chosen to arbitrate their dispute may prefer not to have to involve a national court in obtaining interim relief.

The introduction of the emergency arbitration mechanisms helps to fix this problem by bridging the gap that can exist between the dispute arising and the tribunal being constituted. It provides alternatives to national courts for the parties who urgently need interim relief before the tribunal has been constituted.

In this section, we will start by looking at the process for obtaining interim relief from emergency arbitrators and national courts. We will then also briefly look at

pre-arbitral referee procedures, which we can sort of see as a precursor to modern emergency arbitration mechanisms. And we will also look at some interesting mechanisms that institutions are starting to introduce into their rules, the expedited formation of arbitral rules, which helps reduce the problem that emergency arbitration mechanisms are intended to resolve by meaning that tribunals can be constituted more quickly, and, therefore, decide for themselves whether interim relief is required.

So first, what does an emergency arbitrator do? An emergency arbitrator is appointed by an institution upon a party's application. The EA does not rule on the merits of the parties' case. Instead, the EA has the power to grant interim relief in circumstances where, one, the interim relief is urgently required and cannot wait for the tribunal's constitution; and, two, the tribunal has not already been constituted.

Emergency arbitrators generally have a considerable degree of flexibility and discretion, particularly in relation to the procedure of the arbitration, as we will see a bit later on in this presentation.

Importantly, the EA's role ends as soon as the tribunal has been constituted, and any decision that the EA has issued doesn't bind the tribunal. Accordingly, once the tribunal

has been constituted, the tribunal is free to modify or terminate the decision.

And when are EAs available? Well, the most important thing is that the party's arbitration agreement must apply arbitration rules containing an EA mechanism. EA mechanisms are found in the majority of modern institutional arbitration rules. And EA mechanisms will generally apply on an opt-out basis. In other words, they apply by default if a party chooses an institution's arbitration rules in their arbitration agreement, unless the parties have expressly excluded the EA mechanism in their agreement.

As we see from this slide, emergency arbitrator mechanisms were first introduced in the 2006 arbitration rules of the International Centre for Dispute Resolution, which is the international division of the American Arbitration Association.

Shortly afterwards, the Singapore International Arbitration Centre and the Arbitration Institute of the Stockholm Chamber of Commerce followed suit in 2010. And over the past decade, EA mechanisms have been rapidly adopted by other arbitral institutions.

In the Asia Pacific, the HKIAC and AIAC, formerly the KLRCA, introduced EA mechanisms in 2013. CIETAC followed in 2015. And the Korean Commercial Arbitration Board adopted

an EA mechanism in 2016.

So very few arbitral rules these days do not include an EA mechanism. One example I've seen, however, is the British Virgin Island IAC 2016 rules. Those do not include an EA mechanism, and the rationale for that seems to be that the BVI IAC considers that the BVI courts are very well suited to providing interim relief and, therefore, it's not necessary to include an EA mechanism.

Now, different arbitral rules adopt slightly different approaches to EA mechanisms, but they generally all share certain standard features, which I will describe over the next few slides.

In particular, arbitral institutions will tend to appoint an EA within one to two days of the party filing an application, and the parties to the arbitration agreement are then notified of the application. And this is important, because one drawback -- or, at least perceived drawback of emergency arbitrator applications is they are not ex parte. And the reason they are not ex parte is because under nearly all modern institutional rules, all parties to the arbitration agreement have to be notified of the application as soon as it's made. And this is different from interim relief under -- from certain national courts where ex parte relief can be obtained, which can be very helpful where knowledge

of the application itself may help to undermine the very purpose for which the application was made.

And generally under institutional rules, the EA is required to issue a decision on an application within a set time limit. Typically this is 14 to 15 days from the appointment of the EA by the institution.

And on this slide, I've set out a timeline of the typical procedure for emergency arbitration. As we can see, on day 0, the party will submit an application to an institution, requesting the appointing of an EA. Applications are typically made by claimants, but they can also be made by respondents. For example, if a claimant files a request for arbitration with an institution, it's possible that the respondent could reply by filing a request to the institution to appoint an emergency arbitrator.

Typically, however, it's the other way around, and the claimant will file an emergency arbitration application along with its request for arbitration, or even under some rules before the request for arbitration has been filed. As we will talk about a little bit later.

Now, moving on in the timeline, away from day 0, on day 1 to 2, the EA would generally be appointed by the institution. And institutions tend to only appoint highly experienced arbitrators as emergency arbitrators, given the demanding

and time-constrained nature of EA proceedings. And one example of this is the HKIAC who maintain a list of experienced arbitrators who can be appointed as EAs under the HKIAC rules.

Parties are generally able to challenge an EA's appointment, for example, on the ground of conflict of interest, but are normally required to do so within one to two days of the EA's appointment. Upon being appointed, one of the EA's first jobs will be to establish a procedural timetable for the EA proceedings. EAs will then generally receive written submissions from the parties in accordance with that timetable, and may hold an oral hearing, although this is not always necessary.

Finally, the EA will issue a decision on the emergency relief within 14 to 15 days of appointment. For example, a party might have requested a freezing injunction be applied to another party to the arbitration agreement's assets, and a decision will rule on whether or not that freezing injunction should be made.

While the period for the EA to issue a decision is typically 14 to 15 days, it is shorter under most rules. In particular the Stockholm SCC rules only give the EA five days to issue its decision, although this can be extended in certain situations by the institution.

Also, although the EA will issue -- is required to issue

its decision within typically 14 to 15 days of their appointment, the EA's role does not terminate upon issuing that decision. EAs generally stay in post until the tribunal has been constituted. And this is really to give the parties an opportunity to apply to the EA to amend or terminate the decision. For example, I was recently involved in a case where a freezing injunction was issued, and the respondent then -- the respondent believed that the freezing injunction was too strict and was able to apply to the EA to vary that injunction to allow certain assets to be used for certain purposes.

And this wouldn't have been possible if the EA's role had been terminated upon their issuing the decision. So they will stay there as a kind of goalkeeper until the tribunal is finally constituted.

Now, in terms of the procedure that the EA may request the parties to follow, EAs tend to have significant discretion under arbitral rules, subject to due process considerations. For example, the HKIAC rules provide that -- provide for significant flexibility, subject to ensuring that each party has a reasonable opportunity to be heard on the application. And this flexibility is a good thing because it enables EAs to meet the particular challenges of the case which can vary significantly, depending upon the particular facts.

In terms of powers that EAs have, they are generally the same as tribunals when it comes to granting interim relief. For example, an EA may issue interim measures to maintain or restore the status quo, prevent current or imminent harm, preserve assets, preserve evidence or refrain a party from initiating or continuing legal proceedings.

EAs generally also have the power to fix a proportion of the EA proceedings' costs in its decision.

Recent statistics from arbitral institutions show that EA mechanisms are popular, and it appears to be increasingly so.

We can see that in the past -- well, for the ICC, the 2020 statistics don't seem to be available, but we can see from 2017 to 2019 there were 68 applications for further ICC to appoint an EA. In HKIAC, there were 17 between 2018 and 2020, and 14 of those came in 2020. For SIAC, there were 42 in the past three years, with 20 of those coming last year. And finally, the CIETAC, the figures are unknown, but it's likely that there are fewer EA applications.

In terms of the advantages of EA mechanisms, many of these are the same reasons -- or, the same advantages that explain why parties tend to choose arbitration over litigation. For example, speed, confidentiality, neutrality, expertise, flexibility. And in addition, there

can also be very strong incentives for a party to comply with an EA decision. So even though EA decisions can create some difficulties in enforceability for national courts, as we will come to later, there is still a strong incentive for parties to comply with decisions. Because if they fail to comply, you can create a very negative impression in front of the tribunal who will be appointed to hear the remainder of the dispute.

And finally, a recent report issued by the ICC suggests that EA decisions can help to encourage settlement. The EA process tends to be very tense and results in a decision after only two weeks. And that process of forcing the parties to present their case and the EA issuing a decision on that case, even if it only concerns part of it and not the full -- you know, not the full sort of range of dispute, it still seems to be a catalyst in certain situations to encourage settlement of the full dispute.

I wanted to highlight here with this slightly confusing diagram one particular advantage of EA mechanisms, which is when you have parties and their assets spread across multiple jurisdictions. And if you did not have the benefit of an EA mechanism in this situation, you might be forced to go to national courts in multiple jurisdictions which, you know, could be very expensive and take a lot of time.

With an EA mechanism, you avoid that problem because with one EA decision, you bind parties and their assets across multiple jurisdictions. So it can be a very time-efficient way of obtaining a binding decision.

Now, in terms of the disadvantage of EA mechanisms, there are commenters who tend to focus on three specific problems. The first is the absence of ex parte relief. And that is true of nearly all arbitral rules. The only exception -- the only main exceptions that I've found are under the New Zealand Arbitration Act which appears to give emergency arbitrators the power to issue preliminary orders which are a type of ex parte relief. And also under the Swiss rules of international arbitration of 2012, which give emergency arbitrators the power to issue ex parte relief.

Another related point we will come on to is the availability of interim-interim relief. And interim-interim relief is not ex parte relief, because the party will still have notice of an application having been made. But it allows the tribunal -- an emergency arbitrator to issue a form of relief before hearing the submissions of that party. So what it can do in practice is, from the tribunal being constituted until the tribunal issues its decision which, as I have said, can be around 14 days, it provides a way for the emergency arbitrator to issue interim

relief that applies during that period. There's a sort of additional sort of step of ensuring that the decision will be effective.

And we will come back to that. But that's something that the SIAC rules allow. But other rules are largely silent on whether emergency arbitrators have that power.

The second point is third parties are not bound by decisions of emergency arbitrators. And that's not surprising. That just reflects the fact that nonparties to arbitration agreements cannot be bound.

And third, the enforceability of decisions is uncertain in many jurisdictions. And as we will see later on, Hong Kong, Singapore and New Zealand are among Asia Pacific jurisdictions that have sought to rectify this by introducing express legislation dealing with the enforceability of EA decisions. But that's quite pioneering, and most other jurisdictions have not done so.

And there's also an issue here of whether enforceability is actually a problem. Because research shows that normally for EA decisions, there is voluntary compliance. So the fact that there is uncertainty about enforceability decisions in some jurisdictions may not really be much of an issue in practice.

And here is a quote from a recent ICC report that makes

this very point, that in the vast majority of cases parties comply voluntarily with EA decisions.

Now, the focus of this presentation is on the use of emergency arbitrator mechanisms in international commercial arbitration. But I thought it would be interesting to note that EA proceedings have also been used in investment treaty arbitrations.

This is something of a controversial issue, though, as it can be very difficult for states to respond to EA applications within the short timelines the EA rules require. And it can also create some difficult jurisdictional issues.

Perhaps for these reasons not all arbitration rules allow EA mechanisms to be used in the context of investment treaty disputes. For example, the ICC rules expressly disapply the EA mechanism to treaty disputes. And that exclusion can be found at article 29(6)(c) of the 2021 ICC rules.

But there are still some reported examples of EA decisions for investment treaty arbitrations, particularly under the SCC rules. And I've listed four of them here.

Now, moving on to national courts which are another form of getting -- of obtaining interim relief before the tribunal has been constituted and therefore an alternative to emergency arbitration proceedings. On this -- on this slide, I explain that, you know, Hong Kong and Singapore, among

courts in many jurisdictions, are able to provide interim relief in support of arbitral proceedings.

And key advantages of obtaining interim relief from national courts can include availability of ex parte relief, the fact that decisions can be binding on third parties, and that they can also be enforceable. So really these are mirror-image to the disadvantages of EA proceedings.

And another point I wanted to mention in this context is, particularly for Hong Kong-seated arbitrations, the arrangement that came into force on 1 October 2019. And this has proved to be a very effective way for parties to Hong Kong-seated arbitrations to obtain interim measures from the courts in mainland China. As of February 2021, HKIAC had processed 37 applications on an ex parte basis to mainland courts, seeking to preserve assets worth approximately US$1.9 billion.

On the other hand, it may not always be possible or desirable to obtain interim relief from a national court. Interim relief may not be available, depending on the jurisdiction or the local court. You know, some jurisdictions, their national courts are unable to grant interim relief. Interim relief may also be unlikely to be granted. For example, national courts may apply a very strict test for the grant of interim relief. Or,

alternatively, if you are dealing with a state-owned entity, it may be that you have concerns about the neutrality of the national court in some jurisdictions to give you the interim relief that you sought. And, indeed, that may well be the reason you picked arbitration originally over litigation to resolve disputes.

There can also be time considerations. Court proceedings may be slow, particularly if ex parte relief is not available. And in some jurisdictions, court services may have been interrupted or delayed due to COVID-19.

In terms of costs, it can also be expensive to instruct local orders or court applications in addition to arbitration counsel for the dispute itself. And it can be particularly expensive if the relevant assets or entities are spread across multiple jurisdictions, as it may be necessary to pursue multiple court applications, which would require multiple sets of local orders.

And finally, there may be some confidentiality concerns with respect to going to national courts.

Moving on, I want to briefly touch on pre-arbitral referee procedures. And we've seen that the ICC introduced an EA mechanism into its arbitration rules in 2012. This wasn't actually the ICC's first attempt to introduce a mechanism for obtaining pre-arbitral relief. In 1990, the

ICC introduced a pre-arbitral referee procedure that is still in force today. And it was arguably ahead of its time. It was intended to provide a third way of approaching the national courts -- a third way of obtaining interim relief, independent of approaching national courts or waiting for the tribunal's constitution.

Unfortunately, the procedure only applied on an opt-in basis. The parties had to expressly agree that it would apply, and it was not particularly fast, taking up to 30 days. This perhaps explains why it was rarely used in practice, having been only applied 10 times from 1990 to 2011.

But it is still occasionally used today. I was involved in an arbitration last year where the referee procedure was used, albeit unsuccessfully.

And just a final point on this slide. The ICDR also introduced a similar mechanism: the optional rules for emergency protection in 1999. But that also seems to have been used infrequently.

Now, one other area that's currently developing at the moment, and it's quite interesting, is the approach to expedited formation of tribunals under institutional rules. In the LCIA rules, there's a specific mechanism for expediting the formation of a tribunal where there's exceptional emergency, and that can be found in article 9A.

This is quite a unique mechanism, but there are similar mechanisms in other rules. For example, in the SIAC and HKIAC rules, there are expedited arbitration proceedings. And these may offer the potential to speed up the appointment of a tribunal. For example, under the SIAC rules, the tribunal -- the institution has the power to override the parties' choice for three-arbitrator tribunal and instead select only a single arbitrator.

Ultimately, however, even if it is possible to obtain an expedited formulation of the tribunal, there will still be a period of time where the tribunal is not able to grant a request for interim relief. Accordingly, even if these rules do develop further and allow a very fast formation of the tribunal, it's likely that there will still be a need for emergency arbitrators and national courts.

Moving on to section 2 of my presentation. In this section, I outline some practical, legal, and strategic considerations that may be of assistance in either making or defending emergency arbitration applications.

First, give advance warning to institutions. And this is because the time limits the institutions are working under tend to be very strict, particularly when it comes to the need for an institution to appoint an emergency arbitrator within one to two days. So in my experience, institutions

very much appreciate being given a heads up that an application will be coming. And indeed this is recorded in the ICC's notes to parties where they say that the parties who wish to file application for emergency measures should inform the secretary as soon as possible and preferably before submitting the application.

The second point, and this is a very important point, is the applicable test that applies to an emergency arbitrator in deciding a request. And identifying the applicable test is essential in successfully making or defending an emergency arbitrator application. And while there's a degree of flexibility under most arbitration rules, emergency arbitrators tend to apply a two-part test, split into threshold issues and substantive standards. The threshold issues look at things like the emergency arbitrator jurisdiction, the admissibility of the emergency arbitration application, and the applicability of the EA mechanism.

The second part of the test tends to address the substantive stance of the grant of the interim measures by the EA. In other words, assuming the emergency arbitrator does have jurisdiction over the dispute and the EA mechanism applies, what test should the emergency arbitrator actually apply in deciding whether or not to grant the interim relief that's requested by the party?

So in terms of threshold issues, I've split it here into three different points. First, whether EA mechanism applies; second, whether the EA has jurisdiction; and, third, whether the EA application is admissible.

In practice, however, these tend to overlap quite significantly. So it's to try and sort of show how they've been applied in different institutional rules. In the next few slides, I give some examples from the ICC rules to show what these threshold issues actually mean in practice. And we can see here that under article 29(1) of the ICC rules, it establishes an admissibility requirement.

And what we can see from this provision is that urgency is treated as an issue of admissibility. A party can only make an EA application if they require urgent interim or conservatory measures that cannot wait the constitution of a tribunal. So if an application is not urgent, it would fail the admissibility requirement under the ICC rules.

A second part of the admissibility test under the ICC rules relates to situations where the EA mechanism will not apply. And those are outlined in article 29(5) and article 29(6) of the ICC rules. And they cover situations where the parties are not signatories to the arbitration agreement. The arbitration agreement was concluded before the relevant rules came into effect. The parties have agreed

to opt out of the emergency arbitration provisions. Or the emergency arbitration agreement -- or the arbitration agreement upon which the application is based arises from a treaty. And if any of these criteria are met, then the EA mechanism will not apply and the parties will not be entitled to make an application for emergency relief.

And we have here the ICC emergency arbitrator order checklist. And I thought this gave a helpful summary of the points that an emergency arbitrator will look at under the ICC rules in deciding whether the admissibility and jurisdiction requirements for the EA application are met. And we can see at point B the admissibility point that goes to urgency. The emergency measures must be so urgent they cannot wait for the constitution of the arbitral tribunal. And at point C we see the issues I just mentioned on the previous slide in relation to article 29(5) and article 29(6). The parties must be signatories and successors to the arbitration agreement. The arbitration agreement must be concluded after 1 January 2012. And so on.

I also wanted to draw attention to point D. Any other issue regarding admissibility/jurisdiction. And that's the sort of catch-all category that covers other issues regarding admissibility/jurisdiction. For example, a party might attempt to challenge the appointment of EA on the basis of

a multitiered dispute resolution clause was not adhered to. That's the type of issue that might arise for an emergency arbitrator's consideration under section D of this checklist.

Moving on from threshold issues. The second main part of the test that an emergency arbitrator will apply relates to substantive standards for the EA to grant emergency relief. In other words, what does an applicant for emergency relief need to show to an emergency arbitrator in order for it to grant the interim relief that's requested?

Now, arbitration rules tend to provide some guidance here. The first is establishing urgency again. So as we've seen under the ICC rules, urgency is an admissibility requirement, and also it's a substantive standard. So a party must show that the interim measures are urgently required.

And secondly, the arbitration rules may require an emergency arbitrator to apply the same test that an arbitral tribunal would apply when considering whether to grant interim relief. For example, harm not adequately reparable by an award of damages, if the issue measure is not ordered.

And finally, EAs may also be guided by domestic law standards, particularly in order of the seat. For example, any requirements covering interim relief under arbitration legislation, or tests applied by national courts to the grant

of interim relief. But I wish to emphasise here that EAs tend to not consider this as something they need to follow. It's just something that may be helpful to follow in reaching that decision.

And we can see here under the HKIAC rules, it sets out really a two-limb approach to substantive standards. First, there's the urgency requirement. And then secondly, there's a requirement that the EA apply the same test for interim measures as an arbitral tribunal would apply, which involves taking into account the circumstances of the case with relevant factors, including but not limited to harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and there being a reasonable possibility that the requesting party will succeed on the merits of the claim.

Now, this report -- this ICC commission report -- was based on the ICC's review of 80 ICC EA applications that were filed in the six-year period from the introduction of the EA mechanism to 38 for 2018. And it's a really helpful guide for seeing how emergency arbitrators have approached the substantive standards for granting interim relief. And one finding of the report is that a failure to meet the urgency requirement is a common reason for request for interim relief to be rejected.

So what this shows is that it's really essential when a party makes application for the appointment of an emergency arbitrator that they outline very clearly and specifically why it is that their application is urgent. Because if they fail to do so, it's very likely that the emergency arbitrator will simply reject the request on the basis that it's an application that the tribunal, once it's constituted, can hear. There's no need for it to be decided by the emergency arbitrator before the tribunal has been constituted.

Now, in terms of other considerations that relate to filing an application for the appointment of emergency arbitrator, one issue is whether to include witness statements. And generally, witness statements are not used in EA proceedings. Although -- although I have seen several cases where they have been. And I think that the reason for that is it can be very difficult for an EA to decide a case based on witness evidence, because there isn't necessarily the opportunity for the witness evidence to be tested by, for example, cross-examination.

Another consideration in relation to witness statements is exercising caution in terms of the scope. I mean, it can be very tempting early on in an arbitration for the parties to put in a very extensive witness statement. But it can be inadvisable, because witness statements will obviously

remain part of the record for the entirety of the arbitration. And sometimes, you know, a witness statement that has been prepared very quickly for the purpose of an emergency arbitration may not be as complete as it should be and can create problems further down the line. So I would just say exercising caution with the use of witness statements is something that's worth bearing in mind.

Another point when preparing an application for emergency arbitration is whether it's offered security for grant of interim measures. It may well be that if an applicant is seeking a very strict freezing injunction, for example, an EA may feel more inclined to grant that if the parties offered security upfront.

And the third point I would make on this slide is just to make sure when preparing an application that all of the arbitration rule requirements are met. For example, the HKIAC rules require that any third-party funding arrangement is disclosed. I understand this is to ensure that there are no conflicts. So just make sure that, you know, all of the requirements in the rules are met before you file the application.

Now, as you may remember, I mentioned earlier this issue of interim-interim relief. And as I explained, what this does is it allows an emergency arbitrator to issue a temporary

form of interim relief that protects the applicant in the period from the emergency arbitrator being appointed until the emergency arbitrator issues its decision.

And the SIAC rules are the only rules that I'm aware of that expressly give EAs the power to grant this form of interim-interim relief. And as we can see here in schedule 1, paragraph 8, it's described as a preliminary order. And they say here:

"Preliminary orders may be made pending any hearing, telephone or videoconference or written submissions by the parties."

So what this means is that the emergency arbitrator can in theory issue a preliminary order before it's heard from the other parties in order to ensure that the status quo is preserved before the decision is issued.

Other rules tend to be silent on whether EAs have this power. So there is certainly flexibility for EAs under other rules to issue interim-interim relief or preliminary orders, as are described under SIAC rules, if they are persuaded of the urgency for such relief.

Another point I wanted to address is the issue of whether an EA application should be filed before the request for arbitration. And this is an option that is permitted under certain arbitral rules. For example, the ICC rules and HKIAC

rules both allow a party to file its application before it has filed its request for arbitration. In contrast, the SIAC rules do not allow this.

And the advantages of filing an EA application before an RFA are three-fold. One, it can mean the EA application can be filed more quickly, because it's not necessary to file -- to also prepare the request for arbitration and file it at the same time. Instead the party's counsel can focus on preparing an EA application, file that, and then prepare the request for arbitration and file it later.

Although one point I would make is that the request for arbitration does need to be filed shortly after the EA application has been filed. Under certain rules it needs to be filed within 10 days of the filing of the EA application. So that's something to bear in mind.

There also may be strategic reasons to delay the filing of a request for arbitration. A party may consider it helpful to file an EA application, see how the other side responds before it then files its request for arbitration, because it might be that the respondent's response to the EA application gives some helpful information that can then be used to develop the request for arbitration.

Finally, everyone's favorite subject: filing and payment logistics. It's very tempting in emergency arbitration

proceedings to just focus on preparing the application, when there are actually under most rules quite specific requirements for filing and arranging payment. And if those aren't dealt with upfront, it can delay the appointment of the emergency arbitrator.

So, for example, does -- do the institutional rules require hard copy or electronic filing of the application? And has this changed following COVID-19? Certain institutions, such as the ICC have introduced specific protocols for how documents should be filed. And those should be carefully followed to ensure that the appointment of the EA is not delayed.

Second: Is the application of the institution responsible for serving the application of respondent?

Third: Has the applicant paid the fees to the institution and provided evidence of payment? Under most institutional rules, it's a precondition to the emergency arbitrator's appointment that these fees have been paid to the institution. So unless that payment has been made and evidenced, the EA won't be appointed.

On this slide, I deal with some procedural considerations. And as I have mentioned, EAs tend to have significant discretion in deciding -- in deciding the procedure that will follow in the EA proceeding.

One key issue is whether the EA application will be decided on paper or following an oral hearing. In all of the cases I've been involved with, the application has been decided on paper. But there may well be situations where an oral hearing is required. For example, if a party has put in witness evidence and the other side, you know, believes that cross-examination is essential, that may be a situation where an oral hearing would take place.

But as I've noted here, cross-examination of witnesses is generally very rare in emergency arbitrator proceedings. And on top of that, the hearing could substantially increase the cost of an emergency arbitration proceeding.

Now, in terms of the form of the emergency arbitrator's decision, it may take different forms depending on the arbitration rules. For example, under the ICC rules, it has to be an order. There's no discretion. Whereas under the SIAC rules, an emergency arbitrator will have -- will be able to decide whether to issue its decision in the form of an order or an award. And this can be important because it can impact the enforceability of the decision for national courts. In certain jurisdictions, a national court may be more inclined to enforce a decision if its title is an award rather than an order.

While on the other hand, national courts tend to focus

on substance over form. So it may actually end up not making much difference either way. But in any case, if -- if possible, if enforcement is something that may be an option, it might well be worth an applicant requesting that an emergency arbitrator issue the decision in the form of an award, just to increase the likelihood of enforcement.

Another issue that's come up on several emergency arbitrations I've been involved with is, once the EA application has been filed, the other parties, indicating that they're prepared to agree to follow the -- you know, agree to preserve the status quo or cease -- you know, cease performing the action that was subject to the interim request, before the EA has issued the decision and that can be very tempting in terms of reducing cost and time, because obviously if the other parties say they will adhere to the application, it can mean the EA decision doesn't need to proceed and so that will avoid all of that process.

On the other hand, it is an issue that does require a lot of care, because just because another party, for example, signs an agreement saying that it won't do a certain action or, you know, it will perform a contract, it may not really be binding and enforceable.

So in these kind of situations where a party offers to, you know, adhere to the interim measures, it can often be

worth requesting that the emergency arbitrator issue an agreed consent decision recording the parties' agreement to adhere to the interim measures. Because then you do get some protection from that consent decision having been issued.

Now, turning to -- turning to enforcement, this is a, you know, complex issue and one that's generated a lot of controversy among arbitration practitioners. And effectively, given that emergency arbitrator mechanisms are still relatively new, most jurisdictions' arbitration rules do not include express provisions dealing with the enforceability of EA decisions.

And this has led to significant debate about whether an EA decision is enforceable, particularly since it's only an interim decision rather than a final award.

Fortunately, jurisdictions in the Asia Pacific have taken lead on dealing with this. And Hong Kong, Singapore and New Zealand have all introduced mechanisms providing for the enforcement of emergency arbitrators' decisions.

In Hong Kong, EA decisions from an EA seated both in Hong Kong and outside of Hong Kong can be enforced by the courts. For example, there are reports in 2010 of an EA decision issued in a mainland China-seated arbitration under the Beijing Arbitration Commission Rules being enforced by

the Hong Kong courts. And interestingly, it is reported that the Hong Kong courts held that the effect of the enforcement order should be extended to third parties.

So this was -- appears to be an example of a situation where an emergency arbitrator's decision was not only enforced but applied to third parties, which shows that emergency arbitrator decisions can be extremely powerful in certain situations.

In mainland China, there's no express emergency arbitrator legislation, and it appears that EA decisions are likely to not be enforceable.

In India, as I mentioned at the start of the presentation, the situation is shifting significantly. And although there's no express EA legislation, a recent case, Amazon v FRL proceedings, which appears to be heading to the Indian Supreme Court, has clarified the situation somewhat.

And this case involved a situation where there was a SIAC EA seat in India who -- and a party applied for that decision to be enforced before the Indian courts. And following that decision, it appears that where an emergency arbitrator is seated in India, a decision issued by the emergency arbitrator will be enforceable within India. But that case is now heading to the India Supreme Court, so the position may well change.

And I just want to emphasise that the position is much less clear on the enforceability of a foreign EA decision in India. It seems that an EA decision from a foreign-seated arbitral tribunal would not be enforceable in India at present.

Now, finally, I think we are running out of time, but I will just quickly wrap up a couple of points on reform.

One area where we are likely to see some reform in Hong Kong over the next few months or perhaps year relates to outcome-related fee structures. And the present subcommittee report before this being issued would allow emergency arbitrator proceedings to be subject to outcome-related fee structures. And I've written an article for Kluwer Arbitration Blog about that, which is here.

And finally, I've set out four areas where I think EA reforms could helpfully be used in the future. The first would be giving -- clarifying in institutional rules that interim-interim relief can be used by emergency arbitrators. And you know, one way of doing that would be to follow the approach in the SIAC arbitration rules.

The second would be to introduce ex parte relief for emergency arbitrators. And that could follow the approach in the New Zealand Arbitration Act. I've written an article which talks about that here.

Third, would be reducing the period for EAs to issue decisions. Currently, it's 14 days under most rules. The SCC approach is only five days. And it could well be that reducing that period would enable parties to get the relief they need more quickly whilst still enabling EAs to consider, you know, the parties' submissions and reach a fair outcome.

Finally, expanding the number of jurisdictions that have adopted national enforcement regimes for EA decisions. As we've seen, Hong Kong, New Zealand, and Singapore have already done that. And hopefully other jurisdictions will do so in the future.

And with that, I will wrap up the presentation. But thank you very much, and I will be happy to answer any questions you may have.

MODERATOR: Thank you. Thank you so much, Edward. Of course, I would open the forum by inviting the audience to ask questions by typing your questions in the Q&A box.

Well, perhaps while some audience may type in their questions, let me ask you this question, Edward:

Let's say if a party is not happy with an emergency arbitrator's decision? Any channels, any options, any reliefs this party may have in this respect?

MR TAYLOR: Yes. I mean, it would depend upon the particular arbitration rules. But I think there are three main options.

The first is if the emergency arbitrator has -- is still on foot. If the tribunal has not been constituted, the easiest option would be just to apply to the emergency arbitrator to vary or terminate the emergency arbitrator's decision. And I've seen that done in at least one case.

The second option is if the tribunal has been constituted, then the party can apply to the tribunal itself to vary or terminate the decision.

And the third issue, which is more complicated and likely to create, you know, some problems, would be to go to the national courts. It may be possible in some jurisdictions, for example, to challenge an EA decision before national courts. But then you go into a whole minefield about whether the EA decision is an award and capable of challenge.

And there's not much case law on that. I'm aware of two cases before the Bucharest Court of Appeal where an EA decision was enforced. And I'm aware of a decision before the Southern District of New York courts, where the New York courts refused to set aside a decision. But, really, there hasn't been a lot of cases around this, in most jurisdictions.

MODERATOR: Thank you so much, Edward. Well, as I said already, I invite all attendees. If you have any questions, type in the Q&A box, please.

Well, while we may wait for another question, let me

file one question for Edward to answer:

Well, what if an emergency arbitrator, he or she is minded to grant interim relief? Do you think that there may be some qualifications, conditions that may go along with this interim relief, such as a security or undertaking?

MR TAYLOR: Yes. Now, it's certainly something that emergency arbitrators can do under most institutional rules. For example, under the HKIAC rules, they allow arbitrators to -- they allow emergency arbitrators to condition the award of relief upon security or undertakings.

But from what I've read in the ICC task force report and other publications, it seems that emergency arbitrators rarely do actually condition their decisions upon the granting of security. And this might well be because the emergency arbitrators consider that tribunals will later on have the power to sanction a party for applying for an emergency arbitrator decision if it should not have done so.

And this is actually expressly recorded in the HKIAC rules, for example, under article 23.6, I believe.

MODERATOR: Thank you. Thank you so much, Edward. I can see one question posed by the audience. The question reads as follows:

"For parties who apply the EA, emergency arbitration,

instead of a court application, of course in terms of interim relief, what would be the typical driving factors? Perhaps parties would choose emergency arbitration over court applications?"

MR TAYLOR: Yes. I mean, in, I think, two of the cases I've been involved with, the main driving factor was the parties and assets were spread across multiple jurisdictions. And some of these jurisdictions were jurisdictions where it would have been easy to go to national courts to obtain interim relief. So having an emergency arbitrator that could issue one decision that would bind all the parties to the arbitration agreement across all of those jurisdictions was very helpful.

And the parties took the view that -- well, the applicant took the view that although it might be somewhat difficult to enforce the EA decision, that was a sort of compromise that they were willing to take in order to have that convenience of binding all of the parties across all of those jurisdictions, rather than having potentially to have to go to all of the -- all of the individual courts to obtain interim relief.

MODERATOR: Thank you so much, Edward. That must have been a very obvious driving force.

Well, thank you so much again, Edward. I can see the time, 7.01. So I trust -- I think all of our audience would put our hands together to appreciate your very insightful

presentation filled with your extensive, very comprehensive experience and knowledge. We really appreciate that. Well, thank you so much again. Thank you.

MR TAYLOR: Thank you very much. It was a real honour to be before you tonight. Thank you.

MODERATOR: Thank you, Edward. Okay, thank you.

[End of audio]