

The Role of Emergency Arbitrator in Commercial Arbitration (Comparative Study)

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Abstract

This study dealt with the arbitrator of emergency in commercial arbitration and this development is the most innovative in the rules of commercial arbitration of the International Chamber of Commerce in Paris in 1912, where a new trend was adopted with regard to interim and urgent measures before the final form of the arbitral tribunal. The International Chamber of Commerce has already adopted the rules of this system before the Arbitration Institute of the Stockholm Chamber of Commerce.

The emergence of new systems in commercial arbitration needs to be examined in order to understand, interpret and check its suitability to the needs of the parties to the dispute in the framework of commercial arbitration. Among the most important new systems are the rules of emergency arbitrator, which have been taken by many commercial arbitration centers because of the advantages of one or both parties when it needs urgent and incidental measures that cannot wait until the formation of the arbitral tribunal. Therefore, the appointment of an emergency arbitrator may be requested for such measures. Many of the centers have organized such rules as Stockholm Rules of Arbitration in Sweden and ICC in Paris and others.

The study concluded with a set of results, the most important of which was that the emergency arbitrator is one of the modern rules that serve commercial arbitration, which began by relying on Western legal systems not Arab laws.

Keywords: emergency arbitrator, commercial arbitration

1. Introduction

The system of commercial arbitration in the settlement of disputes between traders or in the commercial environment in general is constantly evolving and the perpetrator of this system finds changes and developments in arbitral laws, rules and international arbitration agreements by the commercial arbitration centers. In the arbitration system, we are required to stand up and discuss the most important new provisions and additions in the field of commercial arbitration. Among the most important developments in this method is the so-called "emergency arbitrator system". The rules of the emergency arbitrator are new rules in commercial arbitration appeared recently and have a special purpose where they were adopted by many arbitration rules and regulations of institutional arbitration¹ (Matloub, 2017).

1.1 The Problem of the Study

The problem of the study is that the arbitration agreement produces two effects: the first effect is positive. It is the jurisdiction of the arbitral tribunal to adjudicate the subject matter of the dispute. The second is negative, namely, to deprive jurisdiction of the jurisdiction of the State in consideration of the subject of the dispute agreed to arbitration. If the impact is negative, it includes temporary disputes or so-called temporary and conservative measures required by the nature of disputes agreed upon to arbitrate. The so-called emergency arbitrator, who has multiple powers, appears in issuing urgent injunctions before forming an arbitral tribunal.

1.2 Objectives of the Study

This study aims to

¹ Matloub, M. (2017) Role of Arbitrator in Commercial Arbitration, Tikrit University Journal of Legal and Political Sciences Volume 5 / Year 5 Issue 7

- Statement of the arbitrator of emergency in commercial arbitration.
- The importance of Arbitrator Rules in Commercial Arbitration.
- The powers of the emergency arbitrator and the position of the arbitral rules of the arbitrator.

2. Methodology of the Study

This study was handled through the comparative method through arbitration laws, especially the Jordanian Arbitration Law and the Egyptian Arbitration Law, and some arbitration rules such as the rules of the International Arbitration Center of Singapore.

2.1 Search Plan

Two topics will be discussed:

The first topic: The essence of the arbitrator of emergency in commercial arbitration.

The second topic: the powers of the emergency arbitrator and the position of the arbitration rules from the emergency arbitrator.

2.2 The Essence of the Arbitrator of Emergency in Commercial Arbitration

The development of the personality of the arbitrator, and the emergence of modern names against him led to the need to understand these new terminology and legal centers, and these concepts will be clarified through the definition and conditions of the emergency arbitrator and the importance of rules in the framework of commercial arbitration through two requirements:

2.2.1 Definition of the Emergency Governor and His Conditions

2.2.1.1 Definition of the Emergency Arbitrator

The legislator and the various arbitration rules have not defined the emergency arbitrator, and therefore we can define him as: the natural person chosen at the request of one of the parties and assigned a set of competencies and powers granted to him for the purpose of facing urgent circumstances before the arbitral tribunal is formed as the final, this system was introduced in 2010 by the Arbitration Institute of the Stockholm Chamber of Commerce.

There is a difference between the emergency arbitrator and the ordinary arbitrator. The emergency judge is the natural person to whom one or both of the parties to the conflict resort to urgent emergency measures, without prejudice to the origin of the dispute or the nature of the contested right. In other words, an emergency arbitrator does not rule out the existing dispute, but its primary purpose is to close the vacuum between the period of conflict and until the final form of the arbitral tribunal is established. The ordinary arbitrator is the natural person chosen according to the type of commercial arbitration to which the parties resort (free or organized arbitration) and its main function is to resolve the dispute between the litigants by virtue of a final arbitration of the dispute.

The emergency court may resemble a judge of urgent matters in the Civil Procedure Law, although there are differences between them. Urgent judiciary is defined as a period of time aimed at temporary judicial protection that does not affect the origin of the right but in order to prevent the real threat to it, in respect of the apparent rights and to protect the interests of the conflicting parties².

The Jordanian Civil Procedure Law³ dealt with the expeditious judiciary in Articles 33 (30) of the Jordanian Arbitration Law, which does not refer to granting the arbitral tribunal the power to take urgent and temporary measures. Article 31 of the Jordanian Civil Procedure Law granted the president of the court or to the person in charge of examining the urgent requests, which he fears will be overdue without prejudice to the origin of the right⁴.

Article (9) of the Commercial Arbitration Model Law 1985 allows for the possibility of resorting to a regular court to take any time procedure despite the existence of an arbitration agreement. Article 24/1 of the Egyptian Arbitration Law allowed the arbitral tribunal to take any temporary and necessary measures.

Therefore, we find that recourse to an emergency arbitrator can be done in various types of disputes between the parties, including disputes of investment contracts, when there is justification for recourse to the urgent need and

² Abbas Aboudi, Explanation of the provisions of the Code of Civil Procedure, Comparative Study, Dar al-Kitab for Printing and Publishing, University of Mosul, 2000, p. 326.

³ Jordanian Civil Procedure Law No. 24 of 1988 and its amendments

⁴ Article (31) of the Jordanian Civil Procedure Law provides that "1 - the judge of urgent matters is the head of the court of first instance, or the person acting in his place or the commissioner for that of her judges and the magistrate in cases that fall within his jurisdiction"

urgency and time needed by one of the parties.

2.2.1.2 Conditions of the Emergency Arbitrator

The emergency arbitrator has a number of conditions, and by measuring the conditions of the ordinary arbitrator, it must be present:

1) To be a natural person: It is intended to be a person, not a moral person.⁵

Because in commercial arbitration we note that the role of arbitral institutions is organizational and there are natural persons represented by the legal person (i.e., the center or the arbitration institution) serve as arbitrators registered with these centers and are chosen under special rules prepared for this purpose.

Article 1451 of the French Code of Procedure of 1981 provides that the arbitrator shall be a natural person. The majority of the national arbitration legislation is void of this requirement, although it may be inferred from the other conditions of the arbitrator.

2) An emergency arbitrator shall be fully qualified: the arbitrator may not be a minor, denied or deprived of his civil rights by reason of his conviction for a felony or misdemeanor of honor or for the declaration of bankruptcy unless he is rehabilitated.

In this regard, Article (16/1) of the Egyptian Arbitration Law and Article (15/1) provide for such condition⁶.

3) The arbitrator shall not be an arbitrator of the emergency and shall be subject to the conditions of prohibition applicable to certain persons to serve as arbitrators such as judges, for example, unless he obtains the approval of the Supreme Judicial Council before the judge exercises the task of arbitration even without a wage even if the dispute is not subject to the judiciary⁷.

The arbitrator is not required to be of any gender or nationality. In this context, the comparative laws in Article (16/2) of the Egyptian Arbitration Law and Article 14 (b) of the Jordanian Arbitration Law provide.

As for the experience of the emergency arbitrator, we consider the need for expertise in the management of arbitral proceedings, especially the urgent and temporary, as well as the independence of the emergency arbitrator when taking temporary and urgent measures in accordance with the general rule of the arbitrator's independence, and that such arbitrator shall remain independent and impartial between the parties when such emergency measures are taken.

2.2.2 The Importance of the Rules of the Arbitrator of Emergency in Commercial Arbitration

The existence of arbitral rules in general, to deal with many disputes between the litigants at the commercial level - domestically and internationally - is of great importance in that these rules will govern any dispute referred to arbitration through the arbitration agreement⁸.

Therefore, the development of specialized rules for the emergency arbitrator is of great importance, especially in large international trade disputes⁹.

The legal importance of the rules of an arbitrator in the context of commercial arbitration is essentially to fill the vacuum between the period of the dispute and until the formation of the arbitral tribunal, which may take considerable time and the need of one of the parties for urgent and emergency measures to be requested through the emergency arbitrator, and rules that are legislated by many arbitration systems¹⁰. The judiciary does not have a role in the issue of temporary and emergency measures here when one or both of the parties to the dispute choose to resort to the rules of the emergency arbitrator, wishing to move away from the courts and its long and complicated procedures that don't not fit at all with the speed of commercial arbitration in resolving commercial disputes.

⁵ Mohamed Ali Bin Mekdad, *International Commercial Arbitration Law*, Dar Al Yazuri Publishing, Amman, Jordan, 2011, p. 125.

⁶ Article (16/1) of the Egyptian Arbitration Law No. (27) for the year 1994, as well as Article (15/1) of the Jordanian Arbitration Law No. (31) of 2001

⁷ Mahmoud Samir Al-Sharqawi, *International Commercial Arbitration*, Dar Al-Nahda Al-Arabiya, Cairo, 2011, p. 203

⁸ Mahmoud Samir Al-Sharqawi, *op. Cit.*, P. 62, and Nabil Abdel Rahman Hayawi, *Principles of Arbitration*, Al-Atat Book Industry, Cairo, 2007, p. 61

⁹ Fawzi Mohammed Sami, *International Commercial Arbitration*, Dar Al-Thaqafa for Publishing and Distribution, Amman, Jordan, 1994, p. 100 and beyond, Hosny Al-Masri, *International Commercial Arbitration*, Legal Book House, Egypt, Without a Year Printed, pp. 37 et seq

¹⁰ Class Rainer Stefan sanden scc Introduce new rules allowing Emergency Arbitrator, 14, May, 2009, p 1 on website: <http://www.dlapiper.com/global/newsinsights>

2.3 The Powers of the Emergency Arbitrator and the Position of the Arbitration Rules from the Emergency Arbitrator

Here, the main powers and powers of an emergency arbitrator will be clarified when selected for emergency and time-consuming measures.

According to the following two requirements:

The first requirement: the powers of the arbitrator of emergency in commercial arbitration.

The second requirement: the position of the arbitration rules from the emergency arbitrator.

2.3.1 The Powers of the Arbitrator of Emergency in Commercial Arbitration

The arbitration agreement gives a negative effect after its conclusion is that the jurisdiction of the State has no jurisdiction in considering the dispute agreed upon by arbitration¹¹.

However, the jurisprudence and legislations differed as to the authority to take these measures. Jurisprudence went to three directions:

- 1) Gives the right to the authority of the national judiciary to take them only and the arbitral tribunal cannot take any such action because it does not have the power to enforce in this regard.
- 2) Gives jurisdiction to the arbitrator in accordance with the arbitration agreement.
- 3) Gives joint jurisdiction between the judiciary and the arbitral tribunal.¹²

As to the position of the legislations, it is noted that the text of Article 31 of the Jordanian Code of Civil Procedure gave jurisdiction to the Court of First Instance in dealing with urgent matters which are feared to be overdue, provided that the origin of the right is not infringed. There is no power here for the arbitrator to take such temporary and expeditious measures in Jordanian law.

We believe that the Jordanian legislator should avoid the deficiencies in the provisions of the arbitration law and pass legislation on arbitration in civil and commercial law, taking into account the most important developments and modern principles in commercial arbitration and benefiting from the experiences of the major countries in general and the Arab countries in particular.

This power granted to the emergency arbitrator in this area has the power to be binding in the face of the parties to the dispute. As for the arbitral tribunal after its formation, it is not obliged to do so, as it has the right to amend these procedures in addition to deletion or cancellation in full and as it sees fit from its point of view.

Temporary and provisional measures are intended as: a set of temporary or emergency measures or procedures that are ordered by the Court of Arbitration or by any arbitral tribunal or other international commercial arbitration bodies or centers in respect of a dispute before it and intended to preserve the rights of either party to the dispute or to maintain the status or the execution of the final judgment until the final settlement of the dispute or final settlement of the dispute.¹³

In order to be able to carry out the task entrusted to him and to have a great deal of weight in the process of issuing interim measures in a manner that binds the parties and does not lead to the loss of his efforts uselessly.

2.3.2 The Position of Commercial Arbitration Rules from the Emergency Arbitrator

Through our knowledge of many of the laws of the Arab arbitration we did not find a legal treatment of the rules of emergency arbitrator in the sense explained above, but we have found that it dealt with the issue of temporary measures taken by the arbitral tribunal after being formed in accordance with the general rules of commercial arbitration, the most important rules and arbitration centers that adopted the emergency arbitrator system in commercial arbitration.

Accordingly, we will divide this requirement into three branches as follows:

- Rules of the Arbitration Institute of the Stockholm Chamber of Commerce of Sweden (SCC).
- Rules of the International Chamber of Commerce in Paris (ICC).

¹¹ Hafiza Saed Haddad, The extent of the jurisdiction of the national judiciary to take temporary and precautionary measures in the international disputes that have been agreed on arbitration, University Thought House, Egypt, 1996, p. 10

¹² Hafizah saed Haddad, op. Cit., P. 17

¹³ Abdul Aziz Mahkimer Abdul Hadi, The Problem of Interim Measures in International Commercial Arbitration, Research Presented to the 16th Annual Conference, "International Commercial Arbitration - The Most Important Alternative Solution for Commercial Dispute Resolution", Abu Dhabi, UAE University, Faculty of Law, 2008, p. 744.

- Rules of the International Arbitration Center of Singapore (SIAC).

2.3.2.1 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce of Sweden (SCC).¹⁴

The Institute was established in 1971 and adopted new rules in commercial arbitration. It entered into force on January 1, 2010. The Institute took these rules through an emergency arbitrator system through the approval of the Stockholm Chamber of Commerce in 9/12/2009, to be effective with the new arbitration rules.¹⁵

The Institute consists of a board of directors and a general secretariat¹⁶, the Institute's arbitration rules for 2010 include a set of rules for the emergency arbitrator in annex II to the Rules, including ten arbitral legal articles.

Article (1) of Annex II of the Rules gave the right to any party to the dispute to request the appointment of an emergency arbitrator until the case is referred to the arbitral tribunal.¹⁷

After receipt of the request of the General Secretariat of the Institute to request the appointment of the arbitrator we send a notice to the other party¹⁸, and the emergency arbitrator is selected by the Board of Directors of the Institute¹⁹, within 24 hours from the date of receipt of the request.

After the application is handed over to the Emergency Court, it shall assume its role in the dispute and shall have several basic and legal powers to take such interim measures as it deems appropriate.

An emergency arbitrator shall issue the expedited decision after the applications have been considered and all documents examined by him within a period not exceeding five days from the date of referral of the request to the emergency arbitrator.²⁰

The existence of this system comes to fill the void in the period between the inception of the dispute and the beginning of the arbitral tribunal after it is formed to consider the applications of the parties, which may extend to three or four months according to the statistics of the Stockholm Arbitration Institute, in which the parties to the dispute can only resort to the ordinary courts on temporary procedures. And the urgent reservation, and therefore the system came binding urgent emergency decisions issued by the emergency arbitrator, however, this binding effect ends at the final judgment of the arbitral tribunal, or if the arbitrator so decides, or if the arbitration has not commenced within 30 days from the date of the decision, or if the case has not been transferred to the Commission Arbitration within 90 days from the date of the decision.

It should be noted that the arbitral tribunal after its formation is not bound by any decision issued by the emergency arbitrator, in respect of temporary and emergency measures.

Therefore, this system achieves a complete departure from the procedures and powers of the judicial courts, in which the opponents of arbitration fear to refer to it, although this system will burden the litigants with new expenses and fees added to the fees of the arbitral tribunal which issues its final judgment in the dispute

2.3.2.2 Rules of the International Chamber of Commerce in Paris (ICC).

The International Chamber of Commerce in Paris is one of the most important and largest institutional arbitration centers in the world. It has special rules in arbitration. These rules dealt with the Emergency Arbitrator System with special rules and in Annex V, which consists of eight legal articles, and cannot wait for the composition of the arbitral tribunal to take place, to apply for such measures to suspend the rules of the emergency arbitrator in accordance with Annex V to the Rules.²¹

Article (1) of these Rules gave the party wishing to appoint an emergency arbitrator the right to submit a request

¹⁴ Arbitration Institute the Stockholm Chamber of Commerce

The details of its rules are as follows: <http://www.sccinstitute.com>

¹⁵ Apply for Emergency Arbitrator after new year, 10, Dec, 2009, P 1, on website: <http://www.sccinstitute.com/2009-2.aspx>

¹⁶ Article (1) of the Rules The Arbitration Institute of the Stockholm Chamber of Commerce of Sweden (SCC).

¹⁷ Article (18) of the Arbitration Rules of the Institute states: "When the arbitral tribunal is appointed and the expenses provider is paid, the secretariat shall refer the case to the arbitral tribunal."

¹⁸ Article (3) of the Annex

¹⁹ The Council shall consist of a President, three Vice-Chairpersons and an additional twelve members comprising Swedish and foreign nationalities

²⁰ The Emergency Arbitrator Project provided for the consideration of the dispute and the examination of the documents and applications submitted within 24 hours only. Therefore, it was criticized because of the short period of time specified and changed to five days. For further details see:

Fatima Zahra Slaoui, Emergency Arbitrator - The Proposed new Procedure of the SCC rules, 22, June, 2009, P 1 on website <http://www.kluwerarbitrationblog.com/blog/author/Fatima-Zahraaslaoui/>

²¹ Article (29) of the Arbitration Rules of the International Chamber of Commerce in Paris in 2012

for measures to the General Secretariat of the Chamber. The request shall be submitted before the Secretariat sends the arbitration file to the arbitral tribunal for its acceptance.

The arbitrator shall be appointed by the President of the International Tribunal for Arbitration of the Chamber within two days from the date of receipt of the request by the Secretariat.²²

Article (5) of Annex V stipulates that an emergency arbitrator shall set a timetable for the shortest time to impose his decision in the form of an order not later than 15 days from the date of sending the file to him under Article 2/3 of this annex, the President of the International Court of Arbitration may extend the term by reasoned request from the Emergency Arbitrator.²³

Upon issuance of the order, he shall send a copy thereof to the parties and to the General Secretariat in any effective and expeditious manner.

Finally, article (8) of the same annex of the chamber rules gave a general authority for the president to take a decision that he deems appropriate regarding the conduct of all emergency procedures when the annex is exempted from a special text. It is noted that the rules of both the International Chamber of Commerce in Paris and the rules of the Stockholm Institute set one arbitrator, not more, the reason in our opinion is that this arbitrator is assigned a specific task to take temporary and urgent measures without the purpose of resolving the dispute between the two parties to the arbitration, even such measures and procedures taken by an emergency arbitrator are not binding after the arbitral tribunal has been formed and functioning, so that only one arbitrator is able to complete the task for which he has been chosen.

2.3.2.3 Rules of the International Arbitration Center of Singapore (SIAC).²⁴

These rules were issued on July 1, 2010 in its fourth edition, in Annex 1 of the Rules and dealt with the Emergency Arbitrator at several points. Paragraph (1) of the Annex states that if an emergency measure is requested by a party to the dispute, Notify the Registrar²⁵, and the rest of the parties or by any other means.

After submitting the notification, the Center President shall announce his / her opinion on the first acceptance of the application for the purpose of appointing the Emergency Arbitrator within one working day from the date of receipt of the application and payment of the expenses required for this purpose.²⁶

The arbitrator shall have multiple powers in which he has the powers vested in the court and has the authority to decide on his jurisdiction and to resolve any disputes arising out of the application of the annex, and paragraph (6) of the Annex to the Emergency Court authorizes the issuing of any temporary order or decision in writing with reasons. It is natural that an emergency arbitrator does not have any power after the arbitration panel is formed in respect of the matter previously issued. The arbitral tribunal may amend, change or even cancel any decision or temporary order issued by the emergency arbitrator, This decision shall have the status of compulsory since its issuance to the parties , and the costs and expenses of the arbitrator shall be subject to the authority of the arbitral tribunal in determining its final award. It should be noted that these rules did not explicitly state the duration of the emergency order or decision. We believe that the period of two months referred to in paragraph (5) of Annex (1) of the Rules in which the emergency measure is issued is very long compared to what was set by the Rules of the International Chamber of Commerce in Paris and the Stockholm Arbitration Institute, as already stated.

In spite of the fact that there are many arbitration centers in the Arab countries such as the Cairo International Center for International Commercial Arbitration in Egypt and other centers, they did not provide for the emergency arbitrator and urgent and timely procedures before the final formation of the arbitral tribunal, and, after having formed its full body, the arbitral tribunal may take interim and urgent measures at the request of one or both parties.²⁷

3. Results

1) This study shows that the emergency arbitrator is one of the modern rules that serve commercial arbitration, which began with reliance on Western legal systems not the Arab laws.

²² Article (2/1) of the abovementioned number (5) of the Chamber Rules for the year 2012

²³ Article (6/1, 4) of Annex (5) of the Chamber Rules for the year 2012

²⁴ SIAC is the abbreviation of the Singapore International Arbitration Center.

²⁵ Registrar of Singapore Arbitration Center for Arbitration in Article 1/3 of the Rules

²⁶ Paragraph (2) of the Annex

²⁷ Article (26) of the Cairo Regional Center for International Commercial Arbitration in Egypt for the year 2010

- 2) The development of commercial arbitration rules from time to time leads to tangible results in the speed of dispute resolution.
- 3) The nature of the emergency arbitrator is special, with the primary objective of taking the interim and emergency measures and procedures needed by the parties to the dispute prior to the formation of the arbitral tribunal.
- 4) Under the international arbitration rules that have been created and adopted on these rules for the Emergency Court, this arbitrator has been granted several powers by which he can take such urgent emergency actions as the adversaries require and grant the obligation to take orders pending the formation of the arbitral tribunal.
- 5) Emphasizing the use of advanced technologies in the management of remote sessions and taking urgent and emergency measures, which facilitate the achievement of the objectives of selecting an arbitrator in commercial arbitration.
- 6) It is clear that the parties to the conflict choose one natural person as an emergency arbitrator for the purpose of taking provisional and emergency measures needed by both parties and to prejudice the subject matter of the dispute.

4. Recommendations

- 1) In view of the successive developments in the commercial arbitration system, we call upon the Jordanian legislator to issue a special law to arbitrate civil and commercial articles, benefit from the experiences of the countries of the world and arbitration centers and deal with developments in the commercial arbitration system.
- 2) We recommend that the Jordanian legislator adopt the rules of emergency arbitrator by issuing a special regulation or instructions from the Judicial Council, which helps the parties that resort to arbitration in resorting to it when it needs temporary and quick procedures away from the judiciary authority, especially since there are many major investment projects in Jordan, Contract to resort to arbitration in the event of any dispute between the parties.

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