THE STATUS AND ENFORCEABILITY OF EMERGENCY ARBITRATION RELIEF IN KENYA

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A Research Project

Submitted in partial fulfilment for the requirements of the award of degree of Master of Laws of the University of Nairobi

2018
DECLARATION

I, WESONGA KADIMA EDMOND, do hereby declare that work contained herein is my original piece of intellectual output and it has not been submitted to any other university or learning institution by any person for academic purposes or any other purpose.

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Signature of the Supervisee                                  Date

This research paper has been submitted to the University for Examination with my approval

.......................................................................................... ........................................

Mr. L. O. Aloo                                              Date

Supervisor
DEDICATION

I dedicate this intellectual work to the 2nd, 3rd, 4th and 5th generations of the lineage of the late Mwalimu Clement Wesonga Akeet and Mama Valarie Chausiku Akeet and to all who dare to constantly seek to quench their unending intellectual thirst. You are the modern day heroes and heroines.
ACKNOWLEDGEMENT

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I further thank my family members for their material and psychological assistance they extended to me during my studies and writing of this research paper. I mirror the best in you all.

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<th>Full Form</th>
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<tr>
<td>AAA</td>
<td>American Arbitration Association</td>
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<tr>
<td>CA</td>
<td>The Court of Appeal of Kenya</td>
</tr>
<tr>
<td>CIArb</td>
<td>Chartered Institute of Arbitrators</td>
</tr>
<tr>
<td>CIETAC</td>
<td>China International Economic and Trade Arbitration Commission</td>
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<tr>
<td>eKLR</td>
<td>Electronic Kenya Law Report</td>
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<tr>
<td>HKIAC</td>
<td>Hong Kong International Arbitration Centre</td>
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<td>ICA</td>
<td>International Commercial Arbitration</td>
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<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
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<tr>
<td>ICDR</td>
<td>International Centre for Dispute Resolution</td>
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<td>KIAC</td>
<td>Kigali International Arbitration Centre</td>
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<tr>
<td>LCIA</td>
<td>London Court of International Arbitration</td>
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<tr>
<td>MARC</td>
<td>Mauritius Chamber of Commerce and Industry and Mediation Centre</td>
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<td>MCCI</td>
<td>Mauritius Chamber of Commerce and Industry</td>
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<td>NCIA</td>
<td>Nairobi Centre for International Arbitration</td>
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<tr>
<td>NYC</td>
<td>The New York Convention</td>
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<td>PARP</td>
<td>Pre-Arbitral Referee Procedure</td>
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<tr>
<td>PCA</td>
<td>Paris Court of Appeal</td>
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<tr>
<td>PCIA</td>
<td>Permanent Court of International Arbitration</td>
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<td>SCC</td>
<td>Stockholm Chamber of Commerce</td>
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<td>SIAC</td>
<td>Singapore International Arbitration Centre</td>
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<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>USA</td>
<td>United States of America</td>
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<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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5. The Arbitration Law China;
6. The Arbitration Ordinance, Cap 609 Hong Kong;
7. The Charter of the United Nations;
8. The Civil Procedure Code, Mauritius;
9. The Civil Procedure Law China;
11. The Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention);
12. The Convention on Recognition and Enforcement of Foreign Arbitral Awards Act Mauritius;
13. The Federal Arbitration Act United States of America;
15. The Foreign Judgment (Reciprocal Enforcement) Ordinance Cap 319 England;
16. The International Arbitration Act Singapore;
17. The International Arbitration Act, Mauritius;
18. The Judicature Act, Cap 8 Laws of Kenya;
19. The Nairobi Centre for International Arbitration Act, 2015 Kenya;
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2. Madras High Court Arbitration Centre (MHCAC) (Arbitration) Rules, 2014; and

3. MARC Arbitration Rules, 2018;


7. The CIArb Arbitration Rules, 2015;

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9. The International Centre for Dispute Resolution Arbitration Rules;


11. The London Court of International Arbitration (Arbitration) Rules, 2014;

12. The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015


14. The Singapore International Arbitration Centre Rules, 2016;
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5. Banco de Seguros del Estado v. Mutual Marine Office 344 F.3d 255 (2nd Cir. 2003);
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12. Groupe Antoine TABET République du Congo, No. 09-72439;
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15. Infocard Holdings Limited v Attorney General & 2 others (2014) eKLR;

21. Pacific Reinsurance Management Corporation v Ohio Reinsurance Corporation, 935 F.2d 1019 (9th Cir. 1991);

22. PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation [2015] SGCA 30, 27/05/2015;

23. Publicis Communication v True North Communications 206 F.3d 725 (7th Cir 2000);

24. Raffles Design International India Pvt. Ltd & Another v Educomp Professional Education Ltd & Others (MANU/DE/2754/2016);


26. Safari Plaza Limited v Total Kenya Limited (2018 eKLR);

27. Safaricom Limited v Oceanview Beach Hotel Limited & 2 Others (2010) eKLR;

28. Societe Nationale des Petroles du Congo and Republic of Congo v TEP Congo case at the Paris Court of Appeal in 2003;

29. Southern Seas Navigation Ltd. of Monrovia v. Petroleos Mexicanos of Mexico City 606 F. Supp. 692 (S.D.N.Y. 1985);


31. Sundaram Finance v NEPC (2004) 9 S.C.C. 619 (India);

32. Sutcliffe v. Thackrah [1974] A.C. 727, 737-38 (H.L.); and

33. Swift-Fortune Ltd v Magnifica Marine SA [2007] 1 SLR(R) 629;

34. The Roses case, [1938] I Dalloz 25;

35. University of Nairobi v N.K Brothers Limited (2009) eKLR;

36. Yahoo! Inc. v. Microsoft Corporation, United States District Court, Southern District of New York, 13 CV 7237, October 21, 2013;
ABSTRACT

The inclusion of the emergency arbitration by various arbitral institutions in their arbitration rules and its application is gaining momentum in the arbitration world. However, there is no unanimity on the status of emergency arbitration relief and its enforceability. Each country adopts different approach to the status and enforceability of the emergency arbitration relief.

In Kenya, the status of emergency arbitration relief is uncertain. There is little or no judicial jurisprudence over the subject. This paper discusses the nature, status and enforceability of emergency arbitration relief in Kenya. There is no legislative provision for emergency arbitration in Kenya. The status of the emergency arbitration relief is not certain and its enforcement is not provided for in the arbitration laws. It is difficult to enforce the emergency arbitration relief in Kenya through the New York Convention which deals with final and binding awards. The emergency arbitration relief does not attain the finality test under the New York Convention.

Literature from other jurisdiction further indicates lack of unanimity of the status and enforcement mechanism of the emergency arbitration. Each country adopts its own mechanism to the status and enforcement of emergency arbitration relief with some like Singapore and Hong Kong opting for direct enforcement under the statutes.
CHAPTER ONE

1. INTRODUCTION AND BACKGROUND

1.1. Introduction

International commercial arbitration is perceived as the most popular method of resolution of commercial disputes at international level.\(^1\) This perception is largely due to innumerable benefits that are inherent in its application which include neutrality of the forum, speed of resolution of dispute, confidentiality of substance and privacy of the proceedings among others.\(^2\) International commercial arbitration is growing significantly and new rules are often formulated to make this method of resolution of disputes more efficient and effective due to the dynamic nature of the dispute and growing technology.\(^3\) Arbitration as alternative dispute resolution method is sanctioned by the United Nations.\(^4\) There is recent development in international commercial arbitration regarding the emergency arbitration that is aimed at increased protection of the interests of the parties under urgent circumstances.\(^5\) The use of emergency arbitration is gaining momentum in international arbitration.\(^6\)

Emergency arbitration refers to an expedited arbitration dealing with an application for interim relief which cannot wait for the appointment of the arbitrator deal with the substantive dispute between the parties.\(^7\)

The purpose of emergency arbitration relief like interim measures of protection from court is, almost invariably as was stated in the case of Futureway Limited v National Oil Corporation

\(^3\) Supra note 1.
\(^5\) Maenpaa A K, ‘Emergency Arbitration Proceedings in International Commercial Arbitration,’ (LLB Thesis, Tallinn University of Technology, 2017), p 3. Accessed online on June 20, 2018 at:https://www.google.com/search?q=emergency+arbitration+proceedings+tallinn+2017&oe=utf-8&amp;gs_l=psy-ab.3...14242.19710.0.20545.12.12.0.0.0.0.216.1825.0j3i6j0i3j0l3j6i60k1.0.9ncll0Wb1A8..
of Kenya,\textsuperscript{8} to protect the evidence, assets, and information that might otherwise be altered or lost or otherwise rendered useless or of less value by one party to the detriment of the other, so as not to make the main arbitration proceedings meaningless, or to maintain the status quo ante between the parties.\textsuperscript{9} The underlying principle is to enhance unhampered arbitration so that no party’s rights should be prejudiced or affected due to the duration of adjudication.\textsuperscript{10}

Prior to inception of emergency arbitration, parties to arbitration applied and are still applying to national court for interim relief before the formation of arbitral tribunal.\textsuperscript{11} The Arbitration Act and the courts in Kenya recognise the parties’ rights to obtain relief from the High Court.\textsuperscript{12} Emergency arbitration is intended to reduce recourse to national courts and reduce the washing of dirty linen in courts\textsuperscript{13} in pursuance to the parties’ intentions to undertake private resolution of their disputes including interim relief for the protection of the subject matter of arbitration.\textsuperscript{14} Emergency arbitration is seen as one broader way of providing one stop forum for the parties to resolve their disputes without recourse to national courts and reduce intervention of national courts.\textsuperscript{15}

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The High Court may not readily avail to the applicant the relief in an expedited manner as courts may not either be sitting due to public holiday, weekend or some other reasons which may lead to dissipation of the subject matter of arbitration. In some instances, courts may direct the applicant to serve the application for interim measures of protection for inter partes hearing on another day fixed by the court. These and more others are the real challenges that face the process of obtaining interim relief from the High Court. Emergency arbitration provisions are intended to reduce these challenges.

Due to this innovation, major arbitration institutions have now incorporated emergency arbitration in their rules to allow parties to make emergency arbitration applications and obtain interim relief without necessarily resorting to national courts.\(^{16}\)

This innovative practice has also been imported to Kenya through institutional rules of arbitration in their effort to remain current and relevant to the emerging needs of their clients. These key arbitral institutional rules are the CIARB Arbitration Rules, 2015 and the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015.\(^{17}\)

However, the legal framework in Kenya does not definitively and exhaustively provide for the status of emergency arbitration relief and how it can be enforced. Due to this incomplete legal framework, the status and enforceability of the emergency arbitration relief is uncertain in Kenya just like it is in international commercial arbitration.\(^{18}\)

This research, therefore, seeks to elucidate the nature, status and enforceability of the emergency arbitration relief in Kenya. It also examines the true nature and form of emergency arbitrator and emergency Arbitration decision respectively in an attempt to interrogate the status and enforceability of emergency Arbitration relief.

1.2. Background to the Problem

Traditionally, parties to arbitration resort to High Court to obtain interim relief prior to or during arbitration. There is on the other hand persistent struggle for curtailing court involvement in arbitration to enhance independence and integrity of those proceedings and


\(^{17}\)These arbitral institutions are the leading arbitration institutions in Kenya in their establishment and this research uses them for illustration of the theoretical existence of the emergency arbitration without prejudice to other arbitral institutions in Kenya.

\(^{18}\)Supra note 14 p 757.
make them more appealing to the parties.\textsuperscript{19} The Arbitration Act reflects this struggle to reduce court intervention in arbitration.\textsuperscript{20} This principle of judicial non-interference in arbitral proceedings is vital for effective resolution of disputes through arbitration.\textsuperscript{21}

Historically, where a party initiated arbitration, that party, unless from national courts, was unable to obtain any relief until an arbitral tribunal was fully constituted.\textsuperscript{22} After the 2006 commencement of emergency arbitration proceedings in the America Arbitration Association’s International Centre for Dispute Resolution Rules, these provisions have been introduced in the institutional rules\textsuperscript{23} and some national statutes\textsuperscript{24} to afford parties opportunity to obtain emergency arbitration relief prior to the establishment of the arbitral tribunal.\textsuperscript{25}

In Kenya, the Arbitration Act provides for recourse to court by the parties to an arbitration agreement seeking interim measures of protection before or after the commencement of arbitral proceedings.\textsuperscript{26} However, the Arbitration Act does not have provisions for emergency Arbitration. The concept of emergency arbitration has been introduced in Kenya through the rules of two important arbitration institutions, the Chartered Institute of Arbitrators Arbitration Rules, 2015\textsuperscript{27} and the Nairobi Centre for International Commercial Arbitration (Arbitration) Rules, 2015.\textsuperscript{28}

The legal framework, while making provision for emergency arbitration in Kenya, does not provide for mechanism for enforcement of the emergency arbitration relief. There is uncertainty on the enforceability of emergency arbitration relief especially where no recognized enforcement mechanism either in national laws or international conventions establishing emergency arbitrations exist in Kenya.

\textsuperscript{20} Supra note 12 section 10.
\textsuperscript{23} Supra note 16, p 217.
\textsuperscript{24} See for instance the Singapore International Arbitration Act and the Hong Kong Arbitration Ordinance.
\textsuperscript{25} Supra note 5, p 3.
\textsuperscript{26} Supra note 12 section 7.
\textsuperscript{27} The Chartered Institute of Arbitrators Arbitration Rules, 2015, Article 26.
\textsuperscript{28} The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015, Article 28.
The enforcement of emergency arbitration relief may be more difficult where such relief does not have the status of interim relief granted by either the arbitrator or the High Court or final award as contemplated under the New York Convention. More plainly, enforcement may be difficult where national law provides that interim measures of protection may only be issued by national courts. The successful party may be unable to protect their interests through emergency arbitration relief in such circumstances. The enforceability of the emergency arbitration relief may ultimately be provided by the national law and the legal system where enforcement is sought in the absence of a uniform enforcement mechanism.

There is a discourse on the possible invocation of the New York Convention on enforcement of interim relief. The Convention is, however, applicable to final and binding awards dealing with the substantive issues in dispute. The Convention does not provide for enforcement of emergency arbitration perhaps due to its existence prior to this emerging jurisprudential issue of institutional innovation.

The concerns on the form of the decision of emergency arbitrator and its enforcement relate, in most cases, to three aspects. First, what is the status of the emergency arbitrator? That is, can emergency arbitrator be truly considered as arbitral tribunal? Secondly, what is the nature of the decision of the emergency arbitrator; and lastly, the impact of the form of the decision – as an award or an order – on its enforcement? Apparently, there is a global patchwork approach to the enforcement of emergency arbitration relief in different countries due to inherent limitations of the emergency arbitration and the uncertainty of the status and form of the emergency arbitration relief. In Kenya, the situation is not certain either.

32 Supra note 10, p 74-80.
34 Ibid.
These concerns are the foundational basis of this research which it seeks to address in an attempt to evaluate the status and enforceability of the emergency arbitration relief in Kenya.

1.3. Statement of the Problem

Emergency arbitration has become common in the last one decade with both national (largely theoretically enunciated in the new arbitration rules) and international recognition both in theory and practice. There is uncertainty, however, on the status of emergency arbitration relief, whether it is final award on the issue it relates to. Is it like interim relief granted by arbitrators, is it a partial award or sui generis in character? Due to uncertainty in its status and although emergency arbitration relief is now part of international commercial arbitration, there is apparent problem of enforceability in Kenya.

In Kenya, the emergency arbitration is a fairly new subject existing only in the new institutional arbitration rules of two important arbitral institutions. There has been no case in court for enforcement of the emergency arbitration relief and there is no mechanism for its enforcement in law. It is for this problem and the fact that Kenya is a constitutional country which vests judicial authority to the courts that it is of interest to see how the emergency arbitration plays in the Kenyan context.

1.4. Justification of the Study

The basis of this study is that although the utility of emergency arbitration is gaining traction in the international commercial arbitration and the recent institutional rules in Kenya have introduced it, there is uncertainty on its status and enforceability in Kenya where the principal arbitration law vests the jurisdiction of interim relief in court. The existence of this uncertainty on the status and enforceability of emergency arbitration relief, notwithstanding the existence of institutional rules of two important arbitral institutional in Kenya raises fundamental issues for consideration. The fact that emergency arbitration procedures exist in the two major arbitral institutional rules poses the need to study their practical utilization.

36 In Kenya for instance, see Article 27(1) of the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 and Article 26 of the CIarb Arbitration Rules, 2015. See also Appendix II of the Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules, 2017.
38 Supra note 12 section 7.
1.5. Research Questions

The primary question this paper seeks to answer is whether the emergency arbitration relief is enforceable in Kenya.

Other questions sought to be answered by this research are as follows:

a) What is the status and enforceability of emergency arbitration relief in Kenya?

b) What is the status and enforcement mechanisms of emergency arbitration relief in other jurisdictions whether Model Law or non – Model Law?

c) What conclusions and recommendations can be made about the status and enforceability of emergency arbitration relief?

1.6. Statement of Objective

The general objective of this research paper is to discuss the status and enforceability of emergency arbitration relief in Kenya. The following are the specific objectives which this paper seeks to achieve:

a) To understand out nature, status and enforceability of emergency arbitrator in Kenya;

b) To find out the status and enforceability of emergency arbitration relief in other jurisdictions;

c) To make conclusion and recommendations about the status and enforceability of emergency arbitration relief in Kenya.

1.7. Hypothesis

This paper proceeds on the hypothesis that emergency arbitration relief is alien in Kenyan law whose status is not known and not enforceable in Kenya. It is further premised on the hypothesis that practical jurisprudence on the subject in other jurisdictions is scanty on status and enforceability of the emergency arbitration relief. There is no unanimity on the legal mechanism for enforcement of emergency arbitration relief in different jurisdictions. Consequently, the emergency arbitration relief is of no utility in the field of international commercial arbitration in Kenya.
1.8. Research Methodology

This research used desktop method as a way of obtaining information. It relied on both primary and secondary sources of information which was accessed through library and online materials by use of internet.

The choice of the methodology was predicated on the fact that in Kenya the emergency arbitration is a fairly new subject and there has been no case on the emergency arbitration either in court or in arbitral tribunals in Kenya. The theoretical provisions for emergency arbitration state no more than the availability of the relief. The literature existing is largely from foreign countries and foreign arbitral tribunals hence use of desktop.

1.9. Research Design

This paper adopts a qualitative method of research focusing on interpretation of the existing institutional rules and analyzing judicial authorities on the subject matter. The purpose of adopting this approach is because the paper seeks to explain the utility of emergency arbitration procedures in the international commercial arbitration community and understand the shortcomings of this innovative procedure.

1.10. Theoretical Framework

The research is premised on four competing theoretical framework often pitying against each other; party autonomy, the jurisdictional theory, contractual theory and the hybrid theory.

1.10.1. Party Autonomy

This principle agitates for the parties to establish their relationship based on the contract in the manner they deem fit. In arbitration, it is the manner in which the parties choose applicable laws to regulate their contract.

Party autonomy is necessary for development of international commercial arbitration as a desirable means of dispute resolution mechanism. This principle underlies the recognition of foreign arbitral awards and their consequential enforcement with minimal exceptions.


42 Ibid.
Cross border disputes resolution through arbitration is only possible if the arbitrating parties are granted the freedom to control their own decision–making process which is the subject of this theory.  

This theory exists in many institutional rules and Model Law as well as national laws of various countries. The rationale for the principle is to determine the procedure for the arbitration as well as enforcement of the resultant decision of the arbitrators.  

The party autonomy has been heralded for its importance in arbitration thus it reflects the parties’ free choice to settle the disputes among them, it caters, precisely, their needs through choice of procedure, and the parties are at liberty to preclude intervention of the courts thereby avoiding washing their dirty linen in public. These parties’ needs should be protected throughout the arbitration process including at the interlocutory stages. 

This principle is key element in enforcement of an award. Its origin is linked to the common law freedom of contract which gained momentum in 19th century. Its application is that once the parties have freely chosen the law that law is binding upon the parties including the decision emanating from the application of the chosen law. 

It is, however, generally agreed that this principle is not absolute in its operation and it is subject to some limitations. These limitations include concept of equality that both parties to the arbitration agreement should be treated equally, rules of natural justice which apply to both parties, and the concept of public policy in that the principle should not be exercised in a manner that violates public policy. In Kenya, the court offered perhaps the best definition and parameters which can be used to determine whether an award offends public policy. It is also noted that rules of natural justice often referred to fair hearing in Kenya is entrenched

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43Ibid.  
46 Supra note 41, p 227.  
49 Supra note 41, pp 239 – 243.  
in the Constitution\textsuperscript{51} and may be a ground for setting aside or refusing to recognize an award.\textsuperscript{52}

At the centre of this theory is the independence of the international commercial arbitration institution which should use the law as agreed by the parties without consideration of the seat of arbitration.\textsuperscript{53} In the context of the emergency arbitration, the national courts within whose jurisdiction is sought to be enforced, such relief must be respected as reflecting the parties’ choice.

The principle of party autonomy is fundamental in arbitration and it is the basis of the Model Law which gives parties authority to control the conduct of the resolution of their disputes.\textsuperscript{54} In \textit{Safari Plaza Limited v Total Kenya Limited\textsuperscript{55}} the High Court stated that this principle is supreme and the national courts are precluded by from interfering with arbitration agreement and instead are required to promote the arbitration even if it is through granting and/or enforcement of interim measures of protection.

The court in the case of \textit{Karen Blixen Coffee Garden & Cottages Limited v Tamarind Management Limited\textsuperscript{56}} further stated that the Model Law requires courts in Kenya to uphold party autonomy which provides that where there is agreement of the parties on the mode of resolution of disputes, such mode should be upheld and even promoted by the court. The Court of Appeal affirmed the supremacy of the principle of party autonomy in \textit{Nyutu Agrovet Ltd v Airtel Networks Limited\textsuperscript{57}} to the effect that court’s intervention under the Arbitration Act is only supportive and not to supplant the choice of the parties.\textsuperscript{58}

The application of this principle to this research is its advocacy for independence of arbitral institutions which applies the law agreed on by the parties regardless of the legal framework of the seat of arbitration. Thus where parties have chosen emergency arbitration and have so

\begin{itemize}
\item \textsuperscript{51} The Constitution, 2010 Article 50 (2).
\item \textsuperscript{52} Arbitration Act section 35 (2) (iii) and 37(1)(iiii) respectively. See also the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 Article V(2)(b).
\item \textsuperscript{54} Githu Muigai (Ed), \textit{Arbitration Law and Practice in Kenya}, (Law Africa, 2011), p 4.
\item \textsuperscript{55} \textit{Safari Plaza Limited v Total Kenya Limited} (2018 eKLR at paragraph 14
\item \textsuperscript{56} \textit{Karen Blixen Coffe Garden & Cottages Limited v Tamarind Management Limited} (2017) eKLR at paragraph 13
\item \textsuperscript{57} \textit{Nyutu Agrovet Ltd v Airtel Networks Limited} (2015) eKLR
\item \textsuperscript{58} The Court of Appeal further stated that failure to recognize and uphold the principle of party autonomy by the courts, it would result to anarchy and isolation in the international sphere. See also the case of \textit{Channel Tunnel Group v Balfour Beatty Limited} (1993) 1 ALL ER 688 (f) & (g).
\end{itemize}
obtained emergency arbitration relief, that choice and the relief ought to be respected whenever it is sought to be enforced without undue consideration of jurisdictional law.

The party autonomy does not pay due regard to the territoriality principle and only admits refusal of enforcing the award, including emergency arbitration relief, on the grounds of public policy. Under this principle, therefore, decision of the emergency arbitrator should be enforced by law against the parties as it is a reflection of the parties’ choice. Thus on purposive interpretation of the Arbitration Act and the institutional arbitration rules in Kenya which respects agreement of the parties to resolve their disputes through arbitration; it is possible under this principle to make a case for enforcement of emergency arbitration relief. However, the parties’ choice may not be enforced against the third parties including decision resulting from such choice.

This theory fails to appreciate the fact that even parties’ wishes are subject to the laws of the country. They are not autonomous of the law of the country.

1.10.2. The Jurisdictional Theory

The jurisdictional theory invokes supervisory powers of a state where arbitration takes place over any agreement between the parties. This theory (also known as territoriality principle) is necessary in examining the state practice where arbitration takes place which is subservient to state’s law.

The theory holds that arbitration must be conducted by the law agreed by the parties, if any, in compatible with the law of the seat and those rules of law in force in the place of arbitration. It argues that the arbitrators are regarded as judges sitting in ordinary courts exercising delegated power and the awards given resemble judgements, and accordingly, they

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60 Supra note 60.
61 Supra note 54, p 258.
63 Ibid.
should be enforced in another jurisdiction same way as judgments.\(^\text{64}\) It makes no distinction between the arbitrator and the emergency arbitrators.

The argument further extends on the legality of the agreement to arbitrate and the arbitration proceedings which are determined by the laws of the jurisdiction.\(^\text{65}\) However, the legality of the arbitral award should be governed by both the lex arbitri and the law of the pace where the award is sought to be recognised and consequently enforced.\(^\text{66}\) The theory elevates the national law over any agreement by the parties on the law to be applied.

The application of the law of the seat of arbitration under this theory has legal backing in the Model Law’s explanatory notes which provide that parties may include into the arbitration agreement foreign law to govern the procedure on the basis that it is not contrary to the mandatory provisions of the Model Law.”\(^\text{67}\)

It is argued that the theory ensures that the state approves or disapproves the activities carried out within its territory by subjecting each activity to its laws.\(^\text{68}\) Consequently, any arbitration is subject to lex arbitri which includes the issues of legality of the arbitration agreement, the procedures, the power of arbitrator, arbitrability of the subject matter, the scope of submission and the recognition of arbitral awards, are to be dealt with by the mandatory rules and public policy of the lex fori.\(^\text{69}\) If the awards do not conform to these standards, they may not be enforced.\(^\text{70}\)

Thus under the theory, the arbitrator exercises delegated function by the state and renders awards with the same status as judgment issued by national courts, applying the national law or the law chosen by the parties.\(^\text{71}\) This theory offers explanation on how arbitral awards including emergency arbitration awards should be enforced. Thus emergency arbitration relief should be enforceable in the country of seat of arbitration before enforcing in a foreign country.

The theory provides that where an award has been made (including emergency arbitration relief), the same should be enforced as if it is the judgment of the court of the country it

\(^{64}\) Supra note 45, p 131.  
\(^{65}\) Supra note 54, p 258.  
\(^{66}\) Ibid.  
\(^{67}\) The Model Law Explanatory Note p 17.  
\(^{69}\) Supra note 54, p 259.  
\(^{70}\) Ibid.  
\(^{71}\) Ibid, p 261 - 262.
originated. Thus under this theory, the emergency arbitration awards shall be enforceable in another jurisdiction in the like manner as the final arbitral awards are enforced in the country of origin. However, under this theory, the emergency arbitration relief may not be enforced in the foreign court if lex arbitri of arbitration does not provide for emergency arbitration or where such relief is unenforceable on public policy grounds.

Applying the theory to emergency arbitration relief, the decision must be enforceable in the seat of arbitration as a judgment of the national court. Failure to conform to this requirement will open decision to scrutiny by the court in whose jurisdiction enforcement is sought in exercise of its supervisory powers and only enforce it under the national law.

This theory presumes that the court will assume jurisdiction even when it is expressly bereft of it as long as the decision of the emergency arbitrator is enforceable in the seat of arbitration. The theory fails to consider in case the national court is called upon to enforce the emergency arbitration relief, it only applies the national law without regard to the law of the seat of arbitration.

1.10.3. The Contractual Theory

The contractual theory departs from the jurisdictional theory and requires that arbitration be regulated by the wishes of the parties because arbitration itself is predicated on such agreement. Under this theory, there is no link between the arbitration and the law of the place of arbitration. It insists on the freedom of contract of the parties which should be respected. Under the theory, arbitration is contractually founded.

Kellor described aptly the contractual theory perspectives while conceding exceptions of public policy and arbitrability, insists that pacta sunt Servanda should prevail.

The relationship between the parties and the arbitrators, under this theory, is predicated on a arbitration agreement which is a contract. In this case, courts will often give prominence to the contract as enunciating the will of the parties. In Cereals S.A. v Tradax Export S.A., the court held that the relationship between the parties and the arbitrators is based on contract and that arbitrators get power under the agreement after acceptance of their appointment. The

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72 Ibid, p 257.
73 Ibid.
74 Ibid p 265.
76 Ibid, p 265.
court further observed that arbitration agreement is the cornerstone of arbitration which creates the premise upon which the arbitrators draw their mandate and which arbitration agreement is regulated by statutory provisions.\(^\text{78}\)

The arguments of this theory are sensible especially when looked from the fact that arbitration proceedings are initiated by the availability of a legal arbitration agreement which, by consent, is made by the parties. The emergency arbitration provisions are similarly contractual and parties may opt out.\(^\text{79}\) The emergency arbitration relief being a product of arbitration agreement must bind the parties and non compliance should be considered as breach of the contract.\(^\text{80}\)

Some proponents of this theory view arbitrators as agents of the parties appointed by the parties under a legally tenable agreement to arbitrate.\(^\text{81}\) They arbitrate on behalf of the same parties who appointed them as agents.\(^\text{82}\) Looking at it from this agency perspective, the question of enforceability of the emergency arbitration relief does not arise as the parties are expected to voluntarily comply with their contractual obligations.

This argument that arbitrators are agents of parties, however, falls short of agency relationship as currently known in law due to the fact that arbitrators resolve disputes between the parties and do not work for the best interest of the appointing principal, arbitrators are financially independent from the parties, arbitrators have different powers from those of agents, and finally they fail to explain the immunity of arbitrators.\(^\text{83}\)

Merlin who postulated the agency relationship between the arbitrators and the parties further argues that arbitration awards are contracts between the parties because they arise from the arbitration agreement.\(^\text{84}\) He further argues that it can be enforced in any national court as a

\(^{78}\)See also *K/S Norjarl A/S v. Hyundai Heavy Industries Co. Ltd.*, [1991] 3 All ER 211 (CA) (U.K.), when dealing with the issue of remuneration of the arbitrators the court said: “So far as the parties are concerned, their obligations under the trilateral contract include the liability to pay remuneration for the service of the arbitrators . . . The contractual obligation on Hyundai and Norjarl to pay such remuneration could not be altered without the consent of both.” See also id. at 531 (“Once the arbitrator has accepted an appointment, no term can be implied that entitled him to a commitment fee, and the arbitration agreement cannot be varied in that way without the consent of all parties.”)


\(^{80}\) Supra note 60.

\(^{81}\) Supra note 54, p 268.


\(^{84}\) Supra note 83, p 55.
contract between the parties because it emanates from private rather than public institution.\textsuperscript{85} This view influenced the French court which opined that enforcement of arbitral award could be easier than foreign judgment because “arbitral awards, which have, as their basis, an arbitration agreement, form one entity with it and share its contractual character.”\textsuperscript{86}

This view that arbitral award emanates directly from the arbitration agreement, unlike agency relationship, is not uncommon among many contractualists and have generally agreed that it has the contractual character and the award is laced with contract as the arbitrators’ authority is derived from the arbitration agreement.\textsuperscript{87}

In the same terms, the proponents hold that the law applicable by the arbitrators is that expressly chosen by the parties and \textit{lex fori} will only be applied to arbitration proceedings to fill the gaps in the agreement to arbitrate.\textsuperscript{88} Where there is no applicable substantive law either expressly or otherwise, the arbitrators will only use the conflict of laws rules of the arbitration forum to arrive at the proper law.\textsuperscript{89}

Under this theory, therefore, with regard to the subject matter of this research, emergency arbitration relief shall be enforced in national courts solely because it reflects the wishes of the parties. In enforcing the emergency arbitration relief, the courts will be giving effect to the freedom of contract which is a long recognised doctrine in law.

This theory fails to explain the enforceability of the awards and emergency arbitration relief against the parties who are not privy to the arbitration agreement. It also fails to interrogate recourse of any party in case non compliance with the award and the decision of the emergency arbitrator. Therein lies the paradox this research paper examines.

1.10.4. Hybrid Theory

This theory lies between the contractual and jurisdictional theory arguments.\textsuperscript{90} The hybrid of contractual and jurisdictional arguments exist in that the parties agree to submit their disputes to arbitration, they choose the arbitrators and the law governing the conduct of arbitration; on the other hand, the national regime applies in determining the powers of the arbitrators,

\textsuperscript{85}Ibid.
\textsuperscript{86}The \textit{Roses case}, [1938] I Dalloz 25. The court held that the awards can be enforced by the President of the Tribunal Civil. See also Samuel A, \textit{Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law}, 63, (1989), p 36.
\textsuperscript{87}Supra note 83, p 55.
\textsuperscript{88}Supra note 54, p 273.
\textsuperscript{89}Ibid p 274.
\textsuperscript{90}Ibid p 257.
legality of arbitration agreement and the enforceability of the resultant decision.\textsuperscript{91} This is essentially, the content of hybrid theory. Arbitration is therefore “a mixed juridical institution, sui generis, which has its origin in the parties’ agreement and draws its jurisdictional effects from the civil law.”\textsuperscript{92}

The hybrid theory views arbitration as a private tool which begins by parties’ arbitration agreement, private and confidential conduct of the arbitral proceedings including emergency arbitration and the resultant decision receives enforceability status by the national law.\textsuperscript{93}

Hybrid theory caters for the interests of both contractualists and jurisdictionalists, although not in complete terms. It is undeniable that arbitration will subsume the character of both theories. Arbitration thus has both aspects of contract because of its origin and jurisdictional character because of how decision is framed by the arbitrators and enforced.

The arbitrator’s power, according to the theory, is derived from the arbitration agreement but its extent is subject to the law of the forum and the law of enforcing country.\textsuperscript{94} However, the nature of award is in between a judgment and a contract of the parties.\textsuperscript{95}

This theory holds that in the absence of express agreement on applicable law by parties, the law of the seat will be applied to arbitration proceedings.\textsuperscript{96} The arbitrators will apply the conflict of law rules of \textit{lex fori} to determine the proper law.\textsuperscript{97}

Thus applying this theory, emergency arbitrator decision is predicated on the private agreement between the parties but its enforcement invokes the national law of the country in which enforcement is sought. Accordingly, enforcement of emergency arbitration relief should be provided in the national law for the court to enforce it. This theory leaves the latter stages of the awards and the emergency arbitration relief to the regime of national law.

This paper adopts this hybrid theory which views arbitration as a private tool and receives enforcement under national law thus ending with a public element. This is because arbitration is premised on the arbitration agreement which is private contractual agreement between the parties whose final outcome is enforced by national law beyond the parties’ contractual

\textsuperscript{91} Ibid p 274.
\textsuperscript{92} Ibid p 275.
\textsuperscript{93} Supra note 46, p 8.
\textsuperscript{94} Supra note 54, p 277.
\textsuperscript{96} Supra note 54, p 278.
\textsuperscript{97} Ibid.
relationship. Thus arbitration has both aspects of privacy and invocation of national law for its proper completion.

1.11. Delimitation

The paper focuses on emergency arbitration relief before establishment of the tribunal to arbitrate the dispute in international commercial arbitration. The primary concern is commercial arbitration as defined by Model Law. It examines the nature and status of emergency arbitration relief and emergency arbitrator in international commercial arbitration as compared to domestic arbitration as the parties can freely obtain and enforce interim relief from the High Court, if it is in Kenya. The paper does not discuss about the emergency arbitration in investment arbitrations. The paper is also concerned with the enforceability of emergency arbitration relief through existing legal framework in Kenya.

1.12. Limitation

The limitation of this paper is that the emergency arbitration procedures are fairly new in Kenya theoretically expressed in arbitral institutional rules. There is no practical case whether in court or arbitral tribunal dealing with status and enforcement of emergency arbitration relief or emergency arbitration generally. There is limited jurisprudence in Kenya on the subject and much information on the subject is borrowed from foreign countries.

1.13. Literature Review

Although there exists much wealth of the literature over the use and application of emergency arbitration processes in dispute resolution in the international arbitration, unanimity is yet to be reached on their true nature, status and enforceability in national courts across different jurisdictions. Even though the consequence of deploying emergency arbitration procedure falls within the permutations of the lex arbitri, the underlying principles in its application should not be dissimilar.

Throughout history, parties to arbitration had recourse only to courts for interim measures of protection where they needed to safeguard something that could not wait until the

98 The UNCITRAL Model Law on International Arbitration Article 1(1).
99 Supra note 16, p 237.
100 Supra note 9.
establishment of the arbitral tribunal or the final arbitral award.  

Resorting to court for interim measures of protection before establishment of the arbitral tribunal or during arbitration proceedings is provided for in the Arbitration Act.  

This historical recourse to courts for interim measures of protection, though not incompatible with objective of arbitration, has been largely due to some problems in arbitration regarding constitution of tribunal before any orders could be made thereby jeopardising the interests of the parties especially where the subject matter of arbitration or key evidence requires protection.  

This difficulty was expressed in the terms thus:

"Historically, the only option available to a party in this situation was to apply for interim relief in court. But that option has many drawbacks. For example, the relief sought may not be available; court proceedings may be public, lengthy, costly, and veer in unexpected directions; and a foreign party may fear that a national court will be biased in favor of its nationals."  

Interim measures have been traditionally resorted to when the parties seek protective measures through national courts.  

Many arbitration rules from leading arbitral institutions and some national legislation have recently introduced emergency arbitration proceedings as a forum for seeking interim measures of protection without resorting to courts.  

The concept of emergency arbitration is seen as a trend of continuously broadening the interim relief in international commercial arbitration.

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101 Supra note 14, p 751. See also note 13, p 78.  
103 The Arbitration Act, section 7. It provides that resorting to court for interim measures of protection is not incompatible with arbitration agreement between the parties.  
104 Supra note 14, p 751.  
106 Supra note 9.  
107 Supra note 16, p 216. Francis Gurry in his article “The Need for Speed”, presented at the 1997 Biennial International Federation of Commercial Arbitration Institutions Conference argues that the need for emergency arbitration relief is the physical manifestation of the existence of the dispute between the parties which arises before the commencement of arbitration proceedings and before establishment of the arbitral tribunal.  
Provisions of “opt-out” emergency arbitration first came to fore in 2006 in the International Centre for Dispute Resolution (ICDR) of American Arbitration Association (AAA) rules\textsuperscript{109} as a response to market demands as the international commercial arbitration was not properly equipped to offer interim measures of protection through arbitration.\textsuperscript{110}

Prior to 2006, the Court of Arbitration of ICC offered Pre-Arbitral Referee Procedure in 1990 rules which was basically optional and required the parties to expressly invoke their application.\textsuperscript{111} It appears the procedure did not offer party oriented solution and did not gain much popularity in arbitration circles. It was described as an excellent idea which did not live to its purpose and this engendered the inevitable reform in the field.\textsuperscript{112}

In mid 1990s, there was yet another attempt by the WIPO to provide for emergency arbitration relief under its intended rules to allow the parties to obtain ex parte emergency.\textsuperscript{113} The rules were not adopted thereby shuttering this innovative scheme from seeing the light of the day.\textsuperscript{114}

The American Arbitration Association in 1999 introduced rules for emergency measures which did not apply by default but were optional to the parties to apply them through opt-in

\textsuperscript{109} Supra note 16, p 217.
\textsuperscript{110} Supra note 14, p 751.
\textsuperscript{111} Supra note 16, p 216.
\textsuperscript{114} Ibid p 174. It is notable, however, that the WIPO Arbitration Rules, 2014 now provides for emergency arbitration relief at Article 49 with an option for a party to opt out. Under WIPO Arbitration Rules, 2014, the emergency arbitration relief may not be granted ex parte.
scheme. However, due to their optional nature, they did not gain ascendancy in their application in arbitration community.

The current usage of the phrase “emergency arbitration” was first devised by the American Arbitration Association’s International Centre for Dispute Resolution in 2006, and thereafter, other institutional rules gained appetite for the concept and have since included it in their respective rules.

It is worth noting that in the previous attempts to introduce emergency arbitration relief even the 2006 ICDR rules, there was no framework for enforcement of the emergency arbitration decision. This problem has persisted in majority of the institutional rules which have adopted emergency arbitration procedures. It would be surreal to suppose that enforcement of emergency arbitration decision would be under the New York Convention which applies to the final arbitral awards without interrogating its true application.

Based on the inspiration from other institutional rules and some countries on the emerging concept of emergency arbitration, two major arbitral institutions in Kenya have introduced emergency arbitration in their arbitration rules. This is institutional innovation in Kenya rather than constitutional or legislative undertaking.

There is a running debate on the nature, status and enforceability of the emergency arbitration relief. A more difficult debate exists on the utility and efficacy of emergency arbitration relief in international commercial arbitration particularly on its enforcement. It has been argued that given that there exists provision for enforcement of arbitral awards under the New York Convention, emergency arbitration may very well be the only real path a party has to obtain effective urgent relief and seek its enforcement through the New York Convention.

116 Supra note 16, p 217.
120 Supra note 14, p 761.
121 Supra note 11, p 6.
Enforceability of emergency arbitration relief has been largely extrapolated and some scholars postulate that such decisions constitute some form of finality as regards the issues they relate.\textsuperscript{122} Accordingly, they can be enforced under the New York Convention. This reasoning is largely US based and was applied in 2013 by US court in \textit{Yahoo! Inc. v. Microsoft Corporation}\textsuperscript{123} where Yahoo’s motion to vacate an emergency arbitrator relief was rejected. The court found that the relief awarded by the emergency arbitrator was, “in essence final” and therefore confirmed it for the purposes of recognition and enforcement. The court followed the established view with respect to interim measures of protection, reasoning that the possibility of having a final award on the merits does not prevent the emergency arbitrator from awarding final relief for the purposes of preserving the status quo of the subject of the dispute.

On the other hand, some authors express contrary views that arbitration law does not provide any route to enforcement of interim measures of protection including emergency arbitrator’s decision.\textsuperscript{124} This is true for interim measures of protection ordered by the arbitral tribunal, within the framework of the arbitration proceedings; and even more so for emergency interim measures protection, as they are ordered outside of the substantive arbitration proceedings, before the tribunal has been formed.\textsuperscript{125}

The New York Convention neither has a provision for recognition and enforcement of interim measures of protection, nor a definition of ‘arbitral award’ that would allow a precise definition of its scope. There is considerable debate on the possible application of the New York Convention on interim measures of protection,\textsuperscript{126} but the Convention is only considered applicable to final and binding awards dealing with the substantive issues in dispute.\textsuperscript{127}

Even in the United States of America where it is believed that there is consensus on the enforceability of emergency arbitration relief, there is another voice with contrary opinion. For instance, in \textit{Chinmax Medical Systems v. Alere San Diego},\textsuperscript{128} the court addressed a request to vacate a decision of an emergency arbitrator. The court refused to enforce the

\begin{footnotesize}
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\item \textsuperscript{122} Supra note 10, p 5.
\item \textsuperscript{123} \textit{Yahoo! Inc. v. Microsoft Corporation, United States District Court, Southern District of New York, 13 CV 7237, October 21, 2013.}
\item \textsuperscript{124} Supra note 31, p 939.
\item \textsuperscript{125} Ibid.
\item \textsuperscript{126} Supra note 32, p. 43–55.
\item \textsuperscript{127} Supra note 10, p 5.
\item \textsuperscript{128} \textit{Chinmax Medical Systems Inc., v. Alere San Diego, Inc., Southern District of California, Case No. 10cv2467 WQH (NLS, May 27, 2011).}
\end{itemize}
\end{footnotesize}
emergency arbitration decision because it was not final award within the meaning of New York Convention and that it could be set aside by the arbitral tribunal.

The continuing uncertainty on the enforcement of the emergency arbitration relief has led to some countries adopting different methods for the enforcement. While there is divergent judicial view in United States, Singapore and Hong Kong have undertaken legislative route to allow for enforcement of the emergency arbitration decision.129

Singapore enacted the Singapore International Arbitration (Amendment) Act, 2012 in which it broadened the definition of arbitral tribunal and an award to include the emergency arbitrator and interlocutory, interim and partial awards.130 This is principally to afford enforcement mechanism to the orders and decisions of the emergency arbitrator in a like manner as those issued by a constituted arbitral tribunal.131

In 2013, Hong Kong amended its law on arbitration which included the provision for the emergency arbitration relief and its enforcement in the like manner as an order of the court.132 This legislative fiat in both Singapore and Hong Kong is certainly a booster to enforcement of emergency arbitration relief in these jurisdictions.133

The United Nations Commission on International Trade Law (UNCITRAL) drafted the UNCITRAL Model Law on International Commercial Arbitration which was adopted by the General Assembly on 11th December, 1985 and amended on 4th December, 2006.134 The purpose of the Model Law is to guide countries in reforming their arbitration laws to reflect the modern features of international commercial arbitration.135 The countries which have acceded to the Model Law and modified their arbitration statutes and laws along it are generally referred to as Model Law countries. The Model Law, to which the Kenya Arbitration Act is modelled along, does not deal with the enforcement of the emergency arbitration reliefs.

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129 Supra note 16, p 231.
131 Supra note 16, p 231. Prior to the legislative amendment, the High Court in Singapore in PT Pukuafa Indah & Others v Newmont Indonesia Ltd (2012) SGHC 187 had held that it had no power to set aside an interlocutory order as it was not an award within the meaning of International Arbitration Act.
132 Hong Kong Arbitration (Amendment) Ordinance, 2013 Part 3A Section 22B. Accessed online on June 22, 2018 at: https://www.elegislation.gov.hk/hk/2013/7len.
133 Supra note 118, p 157 – 158. The authors suggest replication of legislative amendments by other jurisdiction to allow enforcement of emergency arbitration reliefs starting with the English Arbitration Act.
arbitration relief.\textsuperscript{136} While it provides that interim measures of protection of the arbitral tribunal are binding and enforceable through application to national court,\textsuperscript{137} its definition of the arbitral tribunal leaves open for debate on whether the emergency arbitrator is an arbitral tribunal for purpose of enforcement of the emergency arbitration relief.\textsuperscript{138}

In Kenya, arbitral awards are enforced through various legal frameworks which may include the Arbitration Act, the Foreign Judgments (Reciprocal Enforcement) Act or the New York Convention by dint of Article 2(5) of the Constitution.

The Foreign Judgments (Reciprocal Enforcement) Act recognises enforcement of awards.\textsuperscript{139} This is applicable if the award has, under the laws in force in the country where it was made, become enforceable in the same manner as a judgment given by a designated court in that country.\textsuperscript{140} The Act only applies where the original country is a commonwealth or has reciprocating duty, and the judgment requires the judgment debtor to make an interim payment of a sum of money to the judgment creditor, or where the judgment is final and conclusive between the parties thereto.\textsuperscript{141} Under this Act, a party is required to apply to court for enforcement of a judgment which includes an arbitral award.\textsuperscript{142}

The Arbitration Act provides for recognition and enforcement of arbitral awards as binding and enforced in accordance with the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.\textsuperscript{143}

It is noteworthy that the foregoing provisions relate to enforcement of the final arbitration award or an award which has become a judgment in the foreign country with reciprocal arrangement with Kenya. They do not address the emerging issue of emergency arbitration and emergency arbitration relief which may be set aside by the arbitral tribunal once constituted.


\textsuperscript{137}The UNCITRAL Model Law on International Commercial Arbitration Article 17H(1)

\textsuperscript{138}Supra note 135, p 289.

\textsuperscript{139}The Foreign Judgments (Reciprocal Enforcement) Act, Cap 43 section 3(1)(f).

\textsuperscript{140}Ibid.

\textsuperscript{141}Ibid section 3(2).

\textsuperscript{142}Ibid section 5(1).

\textsuperscript{143}The Arbitration Act section 36(2).
In Kenya, the parties ordinarily resort to court to seek for interim measures of protection before the tribunal is constituted or even during the arbitral proceedings. The Court of Appeal recognised this right in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others*. However, the court further stated that where the arbitral tribunal has the same power it cannot issue interim measures until it has itself been established. It follows from this reasoning that the interim relief issued before constitution of the arbitral tribunal by the emergency arbitration may not have full force of law as such can only be issued by either the court or the arbitral tribunal.

The definition of the arbitral tribunal under the Arbitration Act and the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 does not include the emergency arbitrator. Therefore, the orders from the emergency arbitrator cannot be said to be those of the arbitral tribunal.

The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 which constitute the only law on emergency arbitration present in Kenya does not provide for the enforcement of the emergency arbitration relief. It does not go beyond recognising parties’ right to apply for emergency arbitration unless they have expressly opted out. In fact, it is not clear the emergency arbitration relief is an order or an award as the same is used interchangeably in the rules.

An analysis of a raft of arbitration law and rules in Kenya leaves room for much to be discerned on whether the emergency arbitration relief is enforceable. Are the emergency arbitration relief an award to be enforced under the Arbitration Act or final award as regards the matters they relate to be enforced under the framework of the New York Convention? Are they in the nature of partial award the Arbitration Act or interim award or measures of protection?

In Kenya, it is a ground for setting aside arbitral award or annulment or refusal of recognition of award if the party against whom it is sought to be enforced was not given proper notice of appointment of arbitrator or of arbitral proceedings or was unable to sufficiently present its

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144bid section 7.
145[2010] eKLR.
146See the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 Rule 28.
147Ibid. See also Paragraph 13 to the Second Schedule to the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015.
Emergency arbitration relief is largely sought ex parte in order to be effective and may not afford notice or opportunity to the other party to present its case. The Court of Appeal also stated that in circumstances where the arbitral tribunal has the power to order for interim measures of protections, such powers are generally restricted to the parties involved in the arbitration itself and are not enforceable against the third parties. Thus aspersion is cast on whether the emergency arbitration relief can be enforced against third parties in Kenya.

It appears that the debate on enforceability of emergency arbitration relief is alive in Kenya like it is in the international arbitration community as there has been no decision of the court on the subject. The enforcement of the emergency arbitration relief is essential component in ensuring success of emergency arbitration processes and international arbitration community at large.

It is not clear whether emergency arbitration relief will be enforced through the existing legal provisions owing to the amorphous nature and status of the relief when contrasted against the existing legal framework.

1.14 Chapter Breakdown

1.14.1 Chapter One: Introduction

This chapter deals with general introduction to research. It covers background studies to the problem and statement of the problem. It also highlights the objectives of the research, methodology, hypothesis, theoretical framework, limitations and literature review.

1.14.2 Chapter Two: Nature, Status and Enforceability of Emergency Arbitration Relief in Kenya

This chapter examines the nature and status of emergency arbitration relief in Kenya. Is it equivalent to interim measures of protection by court or properly constituted arbitral tribunal or final or partial awards as regards the subject they relate? It further discusses the nature and status of emergency arbitrators in an attempt to understand the nature of decisions they make during emergency arbitraction. It also discusses the enforceability of emergency arbitration relief in Kenya.

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148 Arbitration Act sections 35(2)(iii) and 37(1)(iii).
149 Supra note 16, p 237.
150 Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR.
1.14.3. Three: Status and Enforceability of Emergency Arbitration Relief in Other Jurisdictions

This chapter addresses status and enforceability of the emergency arbitration relief in other leading pro-arbitration jurisdictions from both Model Law and non-Model Law jurisdictions including the United States of America, England, Singapore, China, France, Hong Kong, India and Mauritius.

1.14.4. Chapter Four: Findings, Conclusion and Recommendations

This chapter gives findings and general conclusion of the entire research paper. It gives conclusion on real nature and status of emergency arbitration relief in Kenya. It also returns the finding of whether emergency arbitration relief is enforceable in Kenya, and whether it serves any significant utility. It essentially seeks to prove or disprove the hypothesis of the research.

This part also proposes recommendations that the researcher makes and communicates to the readers of this research paper.
CHAPTER TWO

2. NATURE, STATUS AND ENFORCEABILITY OF EMERGENCY ARBITRATION RELIEF IN KENYA

2.1. Introduction

The previous chapter dealt with introduction to the topic under research highlighting the problem statement, research questions, objectives and methodology. It also dealt with the underlying theoretical underpinnings of the research and the existing literature review on the topic under research.

This chapter seeks to answer the following research question: what is the status and enforceability of the emergency arbitration relief in Kenya? The key objective of the chapter is to assess the nature, status and enforceability of the emergency arbitration relief. This chapter is premised on the hypothesis that the status of emergency arbitration in Kenya is uncertain and the emergency decision is unenforceable.

This chapter, therefore, examines the nature and status of emergency arbitration and relief in Kenya in answering the research question and the primary objective. It interrogates whether it is equivalent to interim measures by court or properly constituted arbitral tribunal or final or partial awards as regards the subject they relate. It further discusses the nature and status of emergency arbitrators in an attempt to identify the nature of the decision they make during emergency arbitration.\footnote{In \textit{Societe Nationale des Petroles du Congo and Republic of Congo v TEP Congo} case at the Paris Court of Appeal in 2003, the court began by examining the status of referee (now the emergency arbitrator) stating that if it went ahead and tried the status of the decision without first determining the status of the source of the decision, it would be an assumption that the referee was actually empowered to render an award. This was intended to determine whether the referee had the powers of arbitral tribunal.}

2.2. The Nature of the Emergency Arbitrator and Emergency Arbitration Relief

Examination of the legal nature of the decision of the emergency arbitrator is essential in determining its enforceability.\footnote{Supra note 13.}

Emergency arbitration in Kenya was introduced through institutional rules of arbitration of two major arbitration institutions – the Nairobi Centre for International Arbitration and the Chartered Institute of Arbitrators Kenya Branch. The Nairobi Centre for International Arbitration was established by the Nairobi Centre for International Arbitration Act, 2013 as
an independent institution\textsuperscript{153} for promotion of regional and international commercial arbitration and to provide for mechanism for resolution of disputes through alternative dispute resolution.\textsuperscript{154} The Nairobi Centre for International Arbitration in 2015 promulgated its arbitration rules which contain provisions for emergency arbitration.\textsuperscript{155}

Chartered Institute of Arbitrators Kenya Branch was established in 1984 whose legal lineage is linked to the Chartered Institute of Arbitrators founded in 1915 in London England.\textsuperscript{156} In 2015, the Chartered Institute of Arbitrators Kenya Branch introduced new rules of arbitration which contain provisions for emergency arbitration.\textsuperscript{157} This paper will consider these rules in detail in the ensuing parts.

There is no legal definition of emergency arbitration, emergency arbitrator or emergency arbitration relief or decision in the Kenyan legal framework providing for emergency arbitration or in the institutional arbitration rules.\textsuperscript{158} The courts and the arbitral tribunals are yet to get opportunity to interpret the meaning of emergency arbitration in Kenya. This omission is to be interrogated from the perspective of the nature of the emergency arbitrator and emergency arbitration relief in the Kenyan context.

However, some scholars have attempted to define emergency arbitration and emergency arbitrator in search for its nature. Under scholarly definition, emergency arbitration relief refers to temporary or provisional measures of protection issued by a person appointed on temporary basis for specific purpose as emergency arbitrator on application of one of the parties to the intended arbitration before the arbitral tribunal is established in accordance with the arbitration agreement.\textsuperscript{159} The emergency arbitrator, who is not appointed by the parties

\textsuperscript{153} See for more information at https://ncia.or.ke/.

\textsuperscript{154} The Nairobi Centre for International Arbitration Act, long title.

\textsuperscript{155} The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015

\textsuperscript{156} See for more information at https://www.ciarbkenya.org/about-us/.

\textsuperscript{157} The CIArb Arbitration Rules, 2015.

\textsuperscript{158} See detailed discussion on the legal framework for emergency arbitration in part 2.3 of this paper below.

\textsuperscript{159} Pandey A, “Tracing the Steps of Emergency Arbitration in India,” (2017), The World Journal of Juristic Polity, p 1. Accessed online on June 11, 2018 at: http://jurip.org/wp-content/uploads/2017/03/Adya-Pandey.pdf. See also the wording of the London Court of International Arbitration (Arbitration) Rules, 2014 Article 9.4 accessible online at: http://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx#Article%209B. On the purpose for which emergency arbitrator may be appointed to grant emergency arbitration relief, see note 9, p 8. Accessed online on November 23, 2016 at: https://gupea.ub.gu.se/bitstream/2077/24306/1/gupea_2077_24306_1.pdf. He postulates that the purpose is to protect assets or information that may be lost, altered or rendered useless through the activities of one party to the detriment of the other thereby impeding successful resolution of dispute through arbitration. However, there are different forms of interim measures under different names as correctly stated in Redfern A & Hunter M, Law and Practice of International Commercial Arbitration, 4th Edition, (London, Sweet & Maxwell, 2004), p 393.
themselves, makes decision on interim basis and grants the relief as may be sought by one of the parties prior to the establishment of the arbitral tribunal.  

Emergency arbitration is an expedited procedure meant to facilitate proper conduct of the arbitration without frustration by one or both of the parties that may exist if parties had recourse to national courts. It is a procedure in preservation of the utility of the final award to be rendered by the arbitral tribunal. Interim measures of protection by the court of the arbitral tribunal are also aimed at preserving the subject of arbitration as stated in *Infocard Holdings Limited v Attorney General & 2 others*. The distinguishing feature of emergency arbitration relief from the arbitral tribunal-ordered interim measures of protection is that the former is only available where the arbitral tribunal has not been constituted in accordance with arbitration agreement. This feature of emergency arbitration is provided for in the arbitration rules of the two major arbitration institutions in Kenya.

The emergency arbitration relief can be described as a protective system complementing the existing system of interim measures of protection under the arbitration laws and institutional rules. Emergency arbitration is thus supplementing and not supplanting the existing system of interim measures of protection from the arbitral tribunals or the national court.

Thus emergency arbitration relief is granted on urgent and temporary basis for specific purpose before the establishment of arbitral tribunal or transmission of the matter or file to

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1. Supra note 16, p 216. See also Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 Article 28 as read with Second Schedule to the Rules and the CIarb Arbitrations Rules, 2015 Article 26 as read with Appendix 1 to the Rules.


3. Supra note 9, p 26.

4. *Infocard Holdings Limited v Attorney General & 2 others (2014) eKLR*

5. The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 Article 28(1) and The CIarb Arbitration Rules, 2015 Article 26(1).

6. Supra note 9, p 7.

7. Ibid.

8. The Arbitration Act section 18 provides for the power of the arbitral tribunal which includes granting orders for interim measures of protection; The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 Article 27 and The CIarb Arbitration Rules, 2015 Article 26(3) also provide for the power of the arbitral tribunal to grant interim measures of protection at any time prior to making of the final award through which the dispute is finally disposed. The Arbitration Act section 10 read together with section 7 permit the High Court to grant interim measures of protection to a party in arbitration. The principles upon which this power is exercised were set out by the Court of Appeal in *Safaricom Limited v Oceanview Beach Hotel Limited & Others (2010) eKLR* discussed elsewhere in this paper. See also Githu Muigai (Ed), 2011, *Arbitration Law and Practice in Kenya*, Law Africa, p 78.
the arbitral tribunal. It is argued that the purpose of the emergency arbitrator or the arbitral tribunal in issuing emergency arbitration decisions or interim measures of protection respectively is to preserve the final awards from being rendered meaningless at the conclusion of arbitral proceedings. It is essentially a process of preserving a decision.

The emergency arbitration is increasingly becoming common largely due to market demands and in response to the fear of inherent shortcomings in the international commercial arbitration on the system of interim measures of protection from state courts. It is also intended to reduce recourse to national courts thereby further avoiding washing of ‘dirty linen’ in courts pursuant to the parties’ intentions to undertake private resolution of their disputes including interim measures of protection of the subject matter of arbitration. Thus emergency arbitration originated, not from real imminent cases but from innovative attempts by the institutional rules to further reduce court meddling in the subject matter of arbitration. It was also intended to provide one stop forum for the parties to resolve their disputes without recourse to national courts.

The historical development of emergency arbitration is linked to institutional innovations rather than conventional amendment, national legislative fiat or judicial interpretation. The legal ancestry to emergency arbitration relief can be traced from the ICC Pre-Arbitral Referee

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168 Supra note 161, p 2.
169 Infocard Holdings Limited v Attorney General & 2 others (2014) eKLR; See also note 9, p 25; The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 Article 28(1) and The CIArb Arbitration Rules, 2015 Article 26(1); supra note 54, p 47.
170 Supra note 9, p 26.
171 Supra note 16, p 215. See also Savola M, “Interim Measures and Emergency Arbitrator Proceedings,” (2016), Croatian Arbitration Yearbook e-Journal, 23, 73 – 97, p 73 – 74. Accessed online on June 20, 2018 at: http://www.hannessnellman.com/sites/default/files/savola_cay_23.pdf. The author discusses the problem that may be related to the court ordered interim measures which include undermining the purpose of the parties to choose arbitration over court for settlement of their disputes, the court may lack jurisdiction to grant the relief sought by the applicant, proceedings in the court may not fast, suspicion of impartiality of the court, language barrier, need to hire local counsel for representation, lack of appreciation of foreign law, where the relief sought concerns multiple jurisdictions may result to multiple applications with possibility of varying decisions based on the same set of facts among others.
172 Supra note 14, p 751. See also supra note 6. Further discussion on the point see Numa M J, The Nature and Role of Emergency Arbitrator, The Canvass Legal, 2018. Accessed online on June 23, 2018 at: https://canvasslegal.com/the-nature-and-role-of-emergency-arbitrator. Karl Falk on the other hand argues that emergency arbitration originated from the fact that some assets like in the field of intellectual property the subject of interim measures quite easily cross the border and national injunctive orders may not be enforced in foreign country thus the need for emergency arbitration relief. See supra note 9, p 8.
173 Supra note 16, p 215.
174 Supra note 15, p 90. James Catello in his article “The Emergency and its Arbitrator – Efficient or Illusion” also posits that emergency arbitration relief is a broader attempt to expand interim relief available in international commercial arbitration by allowing parties to utilise the emergency arbitrator rather than seeking such interim relief from the national court. More discussion see supra note 107, p 6.
175 Supra note 16, p 216.
This ICC Pre-Arbitral Referee procedure was voluntary to the parties by way of opting in and it is a mere semblance of the current emergency arbitration rules. This procedure did not exist in Kenya under any arbitration institution rules.

In Kenya, there existed no real situation that necessitated introduction of the emergency arbitration in the institutional rules as there is no single case reported involving emergency arbitration relief or which presented a situation for adoption of this innovative procedure. However, the delay in obtaining interim measures of protection from court may well be the reason for introducing the emergency arbitration provisions in Kenya.

The rules of arbitration of the Nairobi Centre for International Arbitration and the CIArb Kenya adopted the emergency arbitration procedure in order to be in line with the modern international practice which has been adopted by other major leading institutional arbitration rules. This was also intended to allow the party to seek for the relief at any day.

The increased acceptance by many institutional rules on the applicability of the emergency arbitration has made possible for those institutional rules to make it mandatory for the parties arbitrating under the rules unless they expressly opt out. However, those institutional rules are not exhaustive on the nature and status of the emergency arbitration and the emergency arbitration relief.

Some institutional rules do not provide for ex parte application of the emergency arbitration relief while others permit the application of such reliefs ex parte. The rationale in either


177 Major leading international arbitration institutions which adopted emergency arbitration procedure prior to the Kenyan arbitration institutions include the International Centre for Dispute Resolution (ICDR) in 2006, the International Chamber of Commerce (ICC) in 2012, the Stockholm Chamber of Commerce (SCC) in 2010, the London Court of International Arbitration (LCIA) in 2014, the Singapore International Arbitration Centre (SIAC) in 2010, the International Institute for Conflict Prevention and Resolution (CPR) in 2014, the China International Economic and Trade Arbitration Commission (CIETAC) in 2015 and the Hong Kong International Arbitration Centre (HKIAC) in 2013.


179 Ibid, p 218. See for instance the Stockholm Chamber of Commerce Arbitration Rules, 2017 Article 9 Appendix II, and London Court of International Arbitration (Arbitration) Rules, 2014 Article 9.5 require notice of emergency arbitration to be send to the other party and does not envisage the ex parte emergency arbitration relief.
case is not provided for in those institutional rules. The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 and the CIArb Arbitration Rules, 2015 require notice to be given to other parties to arbitration.\textsuperscript{180}

The emergency arbitration relief granted by the emergency arbitrator may be modified or set aside by the fully established arbitral tribunal which is not bound by such decision.\textsuperscript{181} The emergency arbitration relief is also binding on the parties on interim basis due to the fact that it may be varied, modified or even vacated by the arbitral tribunal once properly established in accordance with the arbitration agreement of the parties.\textsuperscript{182}

Emergency arbitration relief is granted upon satisfaction of laid down conditions in the institutional arbitration rules.\textsuperscript{183} These conditions are that the applicant must show that he or she has an arguable or prima facie case with reasonable possibility of success on the merits of the claim the subject of arbitration, and secondly, the applicant will suffer irreparable harm if the emergency arbitration relief are not granted which harm cannot be adequately compensated by award of damages.\textsuperscript{184}

These conditions are similar in nature and substance to those provided for under the Model Law for granting of interim measures of protection and preliminary order by the arbitral tribunal.\textsuperscript{185}

The true nature of the emergency arbitration is not easily discernible from the international institutional arbitration rules which have since adopted emergency arbitration procedure. However, there is a postulation by some scholars that the emergency arbitrator is an arbitral tribunal where the parties to the arbitration agreement have freely ceded their authority to

\begin{itemize}
\item \textsuperscript{180}The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 Second Schedule Rule 7 and CIArb Arbitration Rules, 2015 Appendix 1 Articles 1(1) and 2(4).
\item \textsuperscript{181}The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 Article 28(8) and The CIArb Arbitration Rules, 2015 Article 26(6). See also supra note 6; Supra note 23, p 2.
\item \textsuperscript{182}Supra note 36, p 17. See also supra note 160.
\item \textsuperscript{183}The CIArb Arbitration Rules, 2015 Article 26(4)
\item \textsuperscript{184}Supra note 161, p 2. See also supra note 159. These two conditions are provided for in the CIArb Arbitration Rules 2015 at Article 26(4) which must be satisfied before the interim measures in the nature of the emergency arbitration relief are issued. The Model Law under Article 17 also provides for these conditions for granting interim measures and preliminary orders with no direct application to emergency arbitration being stated therein. See also Savola M, “Interim Measures and Emergency Arbitrator Proceedings,” (2016), Croatian Arbitration Yearbook e-Journal, 23, 73 – 97, p 90. Accessed online on June 20, 2018 at: http://www.hannessellman.com/sites/default/files/savola_cay_23.pdf; supra note 15, p 96. Bernd adds under irreparable harm that such harm should substantially outweighs the harm against whom the relief is sought. In other words, it should be on a balance of probability.
\item \textsuperscript{185}The UNCITRAL Model Law Article 17A and 17B. This has been replicated in many institutional rules for instance, the CIArb Arbitration Rules, 2015 Article 26(4).
\end{itemize}
obtain emergency arbitration relief under the theoretical underpinning of party autonomy and freedom of contract.\textsuperscript{186} This postulation suffers a setback in that reference to the intentions of the parties should not be the only determining factor of the nature of the emergency arbitrator.\textsuperscript{187} In any event, the parties’ agreement to arbitrate their disputes does not necessarily include appointment of the emergency arbitrator unlike the arbitral tribunal which is either appointed by the parties or they devise mechanism for the appointment of the arbitral tribunal.

Jason Fry argues that the emergency arbitrator is an arbitral tribunal undertaking private judging in accordance with the parties’ arbitration agreement because the emergency arbitrator has similarities of duties, functions and features to the arbitral tribunal which include the independence, impartiality, fairness and judicial sanctions and powers.\textsuperscript{188} This argument however turns a blind eye to the fact that the emergency arbitrator is not appointed by the parties to the arbitration agreement but rather by the institution on application of one of the parties.\textsuperscript{189}

Fry’s argument further flies in the eyes of the twin tests for determining whether a body is exercising judicial power which requires such body to apply known law or legal principle in resolving the dispute and the resultant decision of the body must have a binding effect.\textsuperscript{190} Questions, therefore, arise regarding the test and the nature of emergency arbitrator. Is the emergency arbitrator resolving any dispute in any case? Is the decision or relief of universal binding effect?\textsuperscript{191}

Fry’s argument fails to answer these questions which make it more difficult in this context to hold emergency arbitrator as arbitral tribunal. It is argued by some scholars that emergency arbitrator does not, in actual sense, resolve any dispute but seeks to ensure that arbitration


\textsuperscript{187} Supra note 5, p 18.

\textsuperscript{188} Supra note 187, p 187.

\textsuperscript{189} Supra note 23, p 2. See also supra note 16, p 216.


\textsuperscript{191} Ibid.
proceeds unhampered at a later stage in accordance with the parties’ agreement to arbitrate.\textsuperscript{192} Thus it is again uncertain on the true nature of the emergency arbitrator across the board.

The argument for contractual basis of the emergency arbitrator may be contested in Kenya owing to contestation that has existed to emergency arbitration’s legal embryology from other jurisdictions. The Paris Court of Appeal considered the status of the Pre-Arbitral Referee under the old ICC rules which are the forerunners to the present emergency arbitration.\textsuperscript{193} In \textit{Societe Nationale des Petroles du Congo and Republic of Congo v TEP Congo}, after the decision of the referee on the interim measures of protection, the applicants sought to set aside that decision arguing that it was an award capable of being set aside. The Respondent on the other hand argued that the orders of the referee were not awards as they were not final and could not be set aside.

The court considered the jurisdictional nature of the emergency arbitration decision and held that the decision of the referee was not admissible as an award as it was rendered on the contractual basis of the parties’ agreement to arbitration and as such it could only have contractual binding.\textsuperscript{194}

The court concluded that the referee was not an arbitral tribunal and was incapable of rendering awards with finality.\textsuperscript{195} Thus the question of enforceability of the emergency arbitration relief may well rest not on whether the emergency arbitrator’s decision is held to be an award or an order, but rather on the emergency arbitrator’s mandate.\textsuperscript{196}

Borrowing from this decision of the court and the existing legal framework and institutional rules of arbitration, the nature of the emergency arbitration relief and emergency arbitration cannot be stated with certainty. There is no solid and convincing argument to accurately define the nature of the emergency arbitration relief and the emergency arbitrator.


\textsuperscript{193} \textit{Societe Nationale des Petroles du Congo and Republic of Congo v TEP Congo} case at the Paris Court of Appeal in 2003.

\textsuperscript{194} Supra note 106, p 32 – 36.

\textsuperscript{195} Supra note 9, p 23.

\textsuperscript{196} Ibid, p 24.
2.3. Status of Emergency Arbitration Relief and Emergency Arbitrator in Kenya

The Arbitration Act is silent on the growing concept of emergency arbitration and emergency arbitration relief. The concept is relatively new in the Kenyan arbitration law.\(^{197}\)

Penetration of emergency arbitration procedure in Kenya was under the aegis of two major institutional rules which are the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015\(^{198}\) and the CIArb Arbitration Rules, 2015 properly described in section 2.2 above.\(^{199}\) Notably, these are the newest arbitration rules in Kenya which embody international practice of emergency arbitration and from which the status of emergency arbitration relief and emergency arbitrator should be considered.\(^{200}\)

Analysis of the status of the emergency arbitration relief and the emergency arbitrator entails consideration of the form of emergency arbitration and whether the emergency arbitration relief can be considered as equivalent to or the same as interim measures of protection granted by the arbitral tribunal. By form this paper adopts the meaning in Oxford Dictionary as a particular way the decision of emergency arbitrator exists or appears or the intitulment of the decision.\(^{201}\) This analysis will elucidate the status of the emergency arbitration relief and emergency arbitrator.

2.3.1. Form of the Decision of Emergency Arbitrator

Interrogation of the intitulment of the decision of the emergency arbitrator is important in the debate on the status of the decision. It reveals the component of the decision that eventually determines its status, whether it be considered as an order, award or both or just a mere decision. The form of the emergency arbitration relief, either an award or an order, may well determine its enforceability.\(^{202}\)

The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 under Article 28 uses both words “order” and “award” interchangeably without being definitive on the status

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\(^{197}\) The UNCITRAL Model Law Article 17H deals with recognition and enforcement of interim measures of protection granted by the arbitral tribunal after its establishment but does not provide for emergency arbitration relief. The Kenya Arbitration Act was modeled along this international instrument.

\(^{198}\) The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 Article 28 as read together with the Second Schedule to the Rules.

\(^{199}\) CIArb Arbitration Rules, 2015 Article 26 as read together with Appendix I to the Rules.

\(^{200}\) This paper will discuss these institutional rules in detail in the next section.

\(^{201}\) See second definition of the word ‘form’ in the online English Oxford Dictionary accessible at https://en.oxforddictionaries.com/definition/form.

\(^{202}\) Supra Note 13, p 82.
of the decision that is rendered by the emergency arbitrator.\textsuperscript{203} It is not clear whether the decision should be regard as an order or award or both for purposes of enforcement either under the same rules or the Arbitration Act.

On the other hand, the CIArb Arbitration Rules, 2015 Article 26 and Appendix I provide for emergency arbitration relief but make no reference to its nature. It refers to emergency arbitration relief as interim measures of protection granted before the constitution of the arbitral tribunal.\textsuperscript{204} They are neither “orders” nor “awards” but just interim measures of protection granted by the emergency arbitrator. This makes the emergency arbitration relief even more complicated.

It is not certain in the context of Kenyan institutional rules whether the emergency arbitration relief is an order of the emergency arbitrator or an award or mere interim measures of protection couched as decisions. In this case, it is difficult to determine the form of decision of emergency arbitrator under the institutional rules applicable in Kenya. The form of the decision of the emergency arbitrator is critical in determining the enforcement mechanism of the decision as well as the power such decision yields in case of non compliance.\textsuperscript{205}

It is not clear whether lack of clarity and sometimes interchangeable use of “award” and “order” as a form of emergency arbitration relief is a legislative accident or deliberate deployment. Can it be seen that by using the words “order” or “award”, the rules give the emergency arbitrator some discretion to either give a reasoned order or a substantiated award? It is relevant for clarification of the nomenclature of the decision whose importance cannot be overemphasised.

The Arbitration Act on the other hand defines an arbitral award as any award of an arbitral tribunal and includes an interim arbitral award, and arbitral tribunal to mean a sole arbitrator or a panel of arbitrators.\textsuperscript{206} On the face of definition of award, it may be thought that it includes the decision of the emergency arbitrator which is made on interim basis. However, as discussed in the next section, emergency arbitrator is not an arbitral tribunal capable of granting interim awards. Further, Russell on arbitration defines an award as an embodiment

\begin{thebibliography}{99}
\bibitem{203} The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 Article 28(3) (5) (6) (7) & (8).
\bibitem{204} CIArb Arbitration Rules, 2015 Article 26.
\bibitem{205} Supra note 5, p 18.
\bibitem{206} The Arbitration Act section 3(1)
\end{thebibliography}
of a final determination or an issue or claim in the arbitration.\textsuperscript{207} Decision of the emergency arbitrator does not fit this meaning as discussed in the next section.

A distinction between an award and order is offered as the latter only addresses procedural issues where as the former concerned with substantive issues.\textsuperscript{208} Besides, an order does not meet the substantive requirements of an award which requires it to be issued by the arbitral tribunal on matters referred to it.\textsuperscript{209} The distinction is important not only for enforcement but also for any interference by the court which only exists on substantive issues and not procedural issues.\textsuperscript{210}

It therefore emerges that nomenclature of the decision of the emergency arbitrator is very vital in the understanding of the nature and status of the emergency arbitration relief and ultimately, its enforceability. The distinction between the award and order is necessary for the former gives recourse to the parties to invite court intervention according to the justice of the case.\textsuperscript{211} Given the fact that the enforcement mechanism in international commercial arbitration is achieved through the New York Convention\textsuperscript{212} which applies to awards and similar approach taken by the Kenyan Arbitration Act, it is relevant to determine the form of decision of the emergency arbitration for purposes of its enforcement in Kenya.\textsuperscript{213}

Kenya is not the only country where the form of emergency arbitration relief is quite uncertain. There are several other countries and institutional rules which do not precisely delineate the form of emergency arbitration as shall be addressed in chapter three.\textsuperscript{214} It may be argued that it is a global trend supposedly emanating from apparently weaknesses of this innovative procedure of emergency arbitration which this paper has pointed out in chapter 4.\textsuperscript{215}

\textsuperscript{208} Supra note 54, p 99.
\textsuperscript{209} Ibid, p 117
\textsuperscript{210} Ibid, p 101.
\textsuperscript{211} Ibid.
\textsuperscript{213} Supra note 177, p 30.
\textsuperscript{214} Specific countries and institutional rules of arbitration are discussed in detail in chapter three of this paper on the uncertainty relating to the nature and status of emergency arbitration.
\textsuperscript{215} See for instance the Arbitration Institute of Stockholm Chamber of Commerce Arbitration Rules, 2017 Article 8 Appendix II refers to emergency arbitration relief as a decision without categorization of either award or an order perhaps mainly due to the temporary nature of the decision which makes it hard to pass as anything else. Other institutional arbitration rules deploy other terms without clarity of the form including the two major arbitral institutions in Kenya. On the other hand, the ICC Arbitration Rules Article 29(2) limits the
There is no case from local courts to aid in the understanding of the form of the emergency arbitration relief and subsequently its nature due to newness of the concept in Kenya’s arbitration framework. The CIArb Arbitration Rules, 2015 and the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 which introduced emergency arbitration do not clarify the form of the decision either. Due to lack of clarity on the form of decision of the emergency arbitrator in Kenya’s jurisprudence and arbitration regime, it is inevitable to analyse the existing literature beyond the borders.

There is no unanimity on the form of the emergency arbitration relief or decisions. They differ from country to country and from one set of institutional rules to the other leaving a great uncertainty on the true form of the decision of the emergency arbitration relief.

For instance, the Stockholm Chamber of Commerce Rules like the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 provide that the emergency arbitration decision may be in the form of an award or order. There is no emergency arbitration in the Model Law but only provides for interim measures of protection issued by arbitral tribunal. On the other hand, the ICC rules provide that the form of emergency arbitration decision shall be an order. The ICC commission decided that the decisions of the emergency arbitrator to issue orders only. See others such as SIAC Rules Schedule 1 Article 8, the LCIA Rules Article 98.9.11

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217 Supra note 5, p 18. See also supra note 175, p 30; supra note 59; Supra note 13, p 81.

218 The SCC Rules Article 33(2). Other examples are the LCIA 2014 Rules. Article 9.8 which provides in part that the Emergency Arbitrator may make any order or award which the Arbitral Tribunal could make under the Arbitration Agreement., Article 6 (4) of the ICDR 2016 Rules states that way stating the emergency arbitrator shall have the power to order or award any interim or conservancy measures that the emergency arbitrator deems necessary.

219 UNCITRAL Model Law on International Commercial Arbitration Article 17(2)

220 ICC Rules, 2017 Article 28(2) as read together with Article 6 of the Appendix V to the Rules. The London Court of International Arbitration (Arbitration) Rules, 2014 Article 9.9 provides that the emergency arbitrator may make an order in some instances or award in other instances which award shall have the same effect as the final award of the arbitral tribunal. The America Arbitration Association’s International Centre for Dispute Resolution Arbitration Rules, 2014 Article provides that emergency arbitration relief may take the form of either an award or an order. The Rules of Arbitration of Kigali International Arbitration Centre, 2012 Article 34 provides that the emergency arbitrator’s decision shall take the form of an order. The Mauritius Chamber of Commerce and Industry MARC Arbitration Rules, 2018 Article 12 Appendix to the Rules provides that emergency arbitration decision may take the form of an award, order of just a decision. The Singapore International Arbitration Centre Arbitration Rules, 2016 Article 8 of Schedule 1 to the Rules provide that the emergency arbitrator shall have power to make an order or an award.
should not be awards.\textsuperscript{221} There are also situations where the emergency arbitrator has issued the decision in both forms – an award and order.\textsuperscript{222}

The difference in the form of decision issued by the emergency arbitrator has to be seen in terms of the legal force each has and the ability for it to be enforced.\textsuperscript{223} While an award is recognised and may be enforceable under the existing legal framework, an order is not unless the legislation so provides.\textsuperscript{224} Further, while awards are susceptible to challenge by either party to arbitration, orders cannot be challenged unless the final award has been rendered.\textsuperscript{225}

In Kenya, there is clear and elaborate procedure for enforcement of arbitral awards under the Arbitration Act, the Foreign Judgments (Reciprocal Enforcement) Act or the New York Convention by dint of Article 2(5) of the Constitution. Under these legal framework, a party desirous of enforcing an arbitral award makes an application to court for the court to adopt such an award and enforce it as if it is its judgment or decree. These are discussed in detail in section 2.4 of this paper. On the other hand, there is no corresponding legal framework in Kenya for enforcement of arbitral orders particularly those issued by emergency arbitrator prior to the establishment of the arbitral tribunal. Recourse may, however, be made to the Model Law\textsuperscript{226} which provides that interim measures of protection or orders issued by arbitral tribunal are enforced by making an application to a competent court for recognition and enforcement. Although there is no corresponding provision in the Arbitration Act on enforcement of interim measures of protection or orders of the arbitral tribunal, it may be argued that section 7(2) of the Arbitration Act may well serve the purpose which requires the High Court to treat as conclusive any finding of fact already made by the arbitral tribunal on interim orders. This, however, presupposes a party going to High Court seeking for orders already made by the arbitral tribunal and not necessarily enforcing interim orders of the arbitral tribunal.

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\textsuperscript{222} Supra note 20, p 2013 & 2019. See also supra note 10, p 197.
\textsuperscript{224} Supra note 5, p 18.
\textsuperscript{226} The UNCITRAL Model Law on International Commercial Arbitration Article 17H
\end{footnotes}
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Beyond Kenya, some scholars, however, argue that the form or nomenclature of the decision of the emergency arbitrator should not be considered in determining their enforceability. The argument is that the focus should be on the content and characteristic and not the form. However, it is argued that even if there were to be uniformity on the nomenclature or form of the decision of the emergency arbitrator, it will not dispose of the debate on the enforceability of the emergency arbitration relief.

For instance, in *Resort Condominiums International Inc. v Ray Bolwell & Resort Condominiums (Australasia) Pty. Ltd.*, the emergency arbitrator issued a decision couched as “interim arbitration order and award. The court found that even by calling the decision an award, it was not an award within the meaning of the New York Convention capable of enforcement by the court.

Emergency arbitration decisions, like interim measures of protection of the arbitral tribunal, lack the dignity of being styled awards as some voices in the arbitration community view them as mere orders falling outside the purview of the awards under the New York Convention. Thus certainty in the nomenclature of the emergency decision is relevant and cannot be wished away lightly. This is, at least, for the purpose of determining enforcement mechanisms of the emergency decision.

2.3.2. Equating Emergency Arbitration Relief to Interim Measures of Protection Granted by the Arbitral Tribunal Duly Constituted

In a further attempt to understand the true legal status of the emergency arbitration relief, this part examines whether the emergency arbitration relief is equivalent to the interim measures of protection issued by the arbitral tribunal after it has been established.

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227 Supra note 185, p 192.
228 Ibid. See also Supra note 9, p 26. Karl quoting a US case posits that the employment of the word award to emergency arbitration relief should not be given significant levitation in determining their enforceability but the content should be analyzed to see their finality.
229 Supra note 5, p 18.
231 Supra note 9, pp 9 and 24.
Emergency arbitration relief is granted by the emergency arbitrator appointed by the institution on temporary basis before the establishment of the arbitral tribunal and who shall not, unless the parties agree, be part of the arbitral tribunal to be established later. The Arbitration Act recognizes the power of the arbitral tribunal to grant interim measures of protection during arbitration proceedings for the protection of the subject matter of the dispute and can seek assistance of the High Court. The High Court under this provision has the same power as the arbitral tribunal to give orders as appropriate for the protection of the subject matter of the dispute.

This provision is labelled along the Model Law Article 17 which also provides for interim measures of protection by the arbitral tribunal. The Model Law defines interim measure of protection as any temporary measure issued by the arbitral tribunal in whatever form at any time before the rendition of the award by which the dispute is finally determined. In Kenya, the court has stated in Elizabeth Chebet Ochardson v China Sichuan Corporation for Tecno-Economic Corporation & Another that the aim of interim measures of protection is to protect the rights of the parties during pendency of arbitration so as to ensure that the subject matter of arbitration remains in the same state to guarantee future enforcement of the award or part of it.

The Model Law provides that interim measures of protection issued by an arbitral tribunal shall be recognized as binding by courts and enforced upon application to the competent court, irrespective of the country in which it was issued subject to the grounds of refusing to recognise an award. The court adopts them as though the order of the court. There is no corresponding provision in the Arbitration Act on enforcement of interim measures of protection or orders of the arbitral tribunal like that provided in the Model Law.

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233 The Arbitration Act section 18.
234 The Arbitration Act section 18.
236 Elizabeth Chebet Ochardson v China Sichuan Corporation for Tecno-Economic Corporation & Another (2013) eKLR
237 See further information in the subject in the case of Kastner v Jason (2004) EWCA 1599
For the purpose of determining the status of the relief from emergency arbitrator, for all purposes and intention, can it be equated to interim relief granted by the arbitral tribunal? The analogy may be drawn owing the meaning of interim measures of protection and their enforcement under the Model Law.\textsuperscript{239}

The Model Law gives the meaning of the interim measures of protection to include any relief granted by the arbitrator at any stage of arbitration before rendition of award and such measure is recognizable and enforceable. In equating the emergency arbitration relief to temporary orders of protection issued by the arbitral tribunal, a key question is whether the emergency arbitrator is in fact an arbitral tribunal.\textsuperscript{240}

The Arbitration Act has not adopted the section of the Model Law on interim measures under Article 17A – 17I. The Arbitration Act on interim measures of protection and that under the Model Law and the Arbitration Act are not common. While the Arbitration Act provides for interim measures by the arbitrator,\textsuperscript{241} it does not expressly provide for their enforcement.

It may be argued that section 7(2) of the Arbitration Act may well serve useful in enforcement of the interim measures by the tribunal which requires the High Court to treat as conclusive any finding of fact already determined by the arbitral tribunal on interim orders. This, however, presupposes that a party going to High Court seeking for orders already made by the arbitral tribunal and not necessarily enforcing interim orders of the arbitral tribunal as already explained above.

The language of the Model Law and the Arbitration Act fails to conclusively provide whether an arbitral tribunal includes emergency arbitrator.\textsuperscript{242} The definition of arbitral tribunal in both the Model Law and the Arbitration Act does not envisage emergency arbitrator and offer no meaningful assistance.\textsuperscript{243} Accordingly, and as discussed above in this chapter, under the Model Law, the Arbitration Act and the major institutional rules in Kenya which borrow


\textsuperscript{240} Ibid.

\textsuperscript{241} The Arbitration Act section 18


\textsuperscript{243} Ibid.
For instance the Nairobi Centre for International Arbitration provides in its rules gives the emergency arbitrator same power as the arbitral tribunal including power to rule on its jurisdiction and any objection. This means that the emergency arbitrator and the arbitral tribunal are different. Similarly, the CIarb Kenya in its rules provides that rules of impartiality and independence of arbitral tribunal shall apply to the emergency arbitrator signifying that the emergency arbitrator is different from arbitral tribunal.

It is for this reason also that the emergency arbitration relief cannot be equated to issues ruled upon by the arbitral tribunal which the High Court can take the ruling or decision or any finding of fact made in the course of the ruling as conclusive for the purposes of the application under the Arbitration Act.

The parallel comparison is also not possible due to the fact that both the Arbitration Act and the Model Law consider the arbitral tribunal as one that will determine the merits of the claim with finality. The emergency arbitrator does not deal with the merits of the claim. Thus what is meant by the “arbitral tribunal” in the Model Law and the Arbitration Act is not just any arbitral tribunal, but the arbitral tribunal that will conclusively and effectively determine the substance of the dispute.

The emergency arbitrator cannot be part of the arbitral tribunal that will hear and determine the dispute in its merit. If there is clear separation between the emergency arbitrator and the arbitral tribunal as such, it is inconceivable how the decision of the emergency arbitrator can be contrasted to the interim measures of protection issued by the arbitral tribunal.

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246 CIarb Arbitration Rules, 2015 Article 3(1) Appendix I.
247 Arbitration Act section 7(2) provides that where a party applies to the High Court for injunction or interim order and the arbitral tribunal has ruled on any relevant matter to the application, the High Court is called upon to find the conclusiveness of the ruling of the arbitral tribunal.
248 Supra note 240.
249 Supra note 193.
250 Supra note 240.
The emergency arbitration relief may be modified or set aside by the fully established arbitral tribunal which is not bound by such decision. In this premises, the emergency arbitration relief cannot be equated to the interim measures of protection by the arbitral tribunal as the former does not bind the arbitral tribunal as the latter does.

The emergency arbitration relief has its inherent inadequacies arising from failure to conform to the features enumerated above. In the circumstances, it is not possible to consider it as interim measures of protection granted by the tribunal for the purpose of enforcement. The two can be distinguished by a range of features.

However, even if emergency arbitration relief was to be fairly equal to the interim relief of granted by the arbitrator, it will not automatically receive recognition and enforcement. This is because the ordinary interim relief often faces problems of enforcement as it may not satisfy the requirements of finality under the New York Convention. This notwithstanding the provision of the Model Law which provides that the interim measures of protection shall be recognised and enforced in the same way as awards. Equating emergency arbitration relief to interim relief by arbitral tribunal will certainly faces this shortcoming in enforcement. Therefore without effective enforcement mechanism for interim relief ordered by the arbitrator, any theoretical comparison between the emergency arbitration relief and interim relief of the tribunal is meaningless debate that brings no enforcement mechanism for emergency arbitration relief.

It may be safer to state that the emergency arbitration relief can be properly described as a sui generis decision. This is due to the fact that it is unable to fit into interim measures by the arbitral tribunal or an award, of whatever nature.

2.4. Enforceability of the Emergency Arbitration Relief in Kenya

The previous section dealt with the status of the emergency arbitration relief analyzing whether it is an award or an order. It also dealt with the issue of whether emergency arbitration relief can be equated to interim measures of protection granted by the arbitral tribunal. This section examines the enforceability of the emergency arbitration relief in Kenya owing to the uncertainty of its status as discussed above.

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252 The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 Article 28(8); CIArb Arbitration Rules, 2015 Article 26(6). See also supra note 6; supra note 23, p 2.
253 Supra note 9, pp 9 and 24.
255 Supra note 9, pp 22.
The applicant for emergency arbitration relief is often desirous for the enforcement of the emergency arbitration relief against the party whom they are issued for obvious reasons.\textsuperscript{256} It is usually the ultimate goal for applying for emergency arbitration relief. Although majority of the institutional rules on emergency arbitration provide that emergency arbitration relief is binding upon the parties and parties voluntarily undertake to obey the decision of the emergency arbitrator, none of them provide for enforcement mechanism in case of lack of voluntary compliance.\textsuperscript{257} The CIArb Arbitration Rules, 2015 and the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 provide no more than voluntary compliance by the parties.

Whereas the songs of emergency arbitration and its supposed convenience in international commercial arbitration are soundly reverberating in our ears, there is an equal echo emanating from within on the problem involved in enforcement of emergency arbitration relief.\textsuperscript{258} The reverberations and echoes of the emergency arbitration when considered in Kenyan context are resoundingly clear more so in the present times than ever before.

It is a simplistic argument to posit that merely because the Arbitration Act permits enforcement of foreign arbitral awards as well as court-ordered interim measures of protection, enforcing a decision rendered by the emergency arbitrator is equally possible under the existing legal framework.

Recognition of an award refers to the formal acknowledgement of the validity of an award thereby providing mechanisms for its enforcement.\textsuperscript{259} Enforcement is the application of the legal mechanisms to secure compliance with the award by the party against whom it is made.\textsuperscript{260}

Recognition and enforcement of arbitral awards in Kenya is made through courts on application by the successful party.\textsuperscript{261} In Kenya, international arbitration award is enforceable under the New York Convention or any other convention to which Kenya is a party.\textsuperscript{262} Thus

\textsuperscript{256} Supra note 16, p 230.
\textsuperscript{258} Supra note 161, p 5.
\textsuperscript{260} Ibid, p 193.
\textsuperscript{261} Arbitration Act section 36(2). See Supra note 258, p192.
\textsuperscript{262} Arbitration Act section 36(2).
the court will draw its jurisdiction for enforcement of arbitral awards from the laws of arbitration in Kenya and the New York Convention which is the global principal instrument that governs the recognition and enforcement of awards.263 This paper will discuss enforcement mechanism under the New York Convention later under this section.

There are doubts on the enforceability of emergency arbitration relief owing to its features.264 It is more so in Kenya due to lack of express provisions for not only enforcing the decision of the emergency arbitrator but also enforcement of the interim orders of the arbitral tribunal. The arbitral awards generally are enforced through various legal frameworks which may include the Arbitration Act, the Foreign Judgments (Reciprocal Enforcement) Act or the New York Convention by dint of Article 2(5) of the Constitution. These are key enforcement legal framework for arbitral awards265 which are singularly discussed below.

The Arbitration Act provides that an international arbitration award shall be recognised as binding and enforced in accordance with the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.266 A party desirous of enforcing the award makes an application to the High Court for the court to adopt the award as its judgment or order and thereafter enforced as if it were he judgment or order of the court.267 The High Court may refuse to recognize and/or enforce the award if any of the grounds listed in the Arbitration Act is proved to exist.268 The Arbitration Act makes no reference to recognition and enforcement of emergency arbitration decision or interim orders generally.

The Foreign Judgments (Reciprocal Enforcement) Act recognises enforcement of awards.269 This is applicable if the award has, under the laws in force in the country where it was made,
become enforceable in the same manner as a judgment given by a designated court in that country. The Act only applies where the original country is a commonwealth or has reciprocating duty, and the judgment requires the judgment debtor to make an interim payment of a sum of money to the judgment creditor, or where the judgment is final and conclusive between the parties thereto.

Thus under the Foreign Judgments (Reciprocal Enforcement) Act, an arbitral award shall be enforceable in Kenya as it is a judgment of the court of the foreign country and if that judgment is enforceable in that foreign country. The foreign country must be a commonwealth country or have reciprocating duty under the Act.

Therefore for a party to successfully enforce arbitral awards under the Foreign Judgments (Reciprocal Enforcement) Act, that award must embody the judgment of the court of foreign which has reciprocal arrangement with Kenya. Applying this Act to emergency arbitration relief, the emergency arbitration relief must be enforceable in the foreign country of origin as the judgment of the court in order to receive recognition and enforcement in Kenya.

There are three important factors to be considered in order to determine whether the emergency arbitration relief will be enforceable under this Act. First, has the emergency arbitration relief been accepted by the court of the foreign country of origin as its judgment? It emerges that the emergency arbitration relief cannot be enforced under this Act unless it has been endorsed by the court of the country in which it originates as its judgment.

Thus it should be interrogated on whether an emergency arbitration relief can be properly described as judgment of the court within the meaning of the Act and whether such relief is dispositive of the rights and obligations of the parties to an arbitration agreement. Emergency arbitration relief is not an embodiment of final determination of the rights and obligations of the parties. The finality of the award is a precursor for the enforcement under this Act and a court may refuse it if it not a final award.

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270 Ibid.
271 Ibid section 3(2)
272 The Black’s Law Dictionary, 8th Edition defines judgment to mean a court’s final determination of the rights and obligations of the parties in a case.
273 The Foreign Judgments (Reciprocal Enforcement) Act, Cap 43 section 3(2)(b) which provides for conditions precedent for enforcement of an award.
The second issue for consideration is that the country of origin must have a reciprocal arrangement with Kenya before recognition and enforcement of the judgment of its courts. Unless these conditions are fulfilled, an award cannot be enforced under the Act.

The emergency arbitration relief falls short of an award capable of being enforced under the Foreign Judgments (Reciprocal Enforcement) Act. It is clear from the discussion on the form of emergency arbitration relief that it is not an award within the meaning of the Arbitration Act and the New York Convention. It is also not equivalent to interim measures within the meaning of the UNCITRAL Model Law and the Arbitration Act. Accordingly, it is not possible to find enforcement mechanism of emergency arbitration relief under the Foreign Judgments (Reciprocal Enforcement) Act.

The enforcement of emergency arbitration relief has to be considered in Kenya in the context of application of the New York Convention as the primary enforcement instrument. The New York Convention applies to arbitral awards arising out of the differences between the parties.

Under the New York Convention, a foreign arbitral award is enforceable in Kenya unless a party against who enforcement is sought can prove specific grounds set out in Article V for refusal to recognise and enforce the award. One such ground is where a party was not given notice of formation of arbitral tribunal or notice of arbitration proceedings to afford him opportunity to present his case.

The New York Convention applies to awards which have become binding on the parties. The emphasis of the New York Convention lies of the finality of the award rather than whether the award was issued by the arbitral tribunal or emergency arbitrator. The harbinger to the emergency arbitration, the ICC Pre-Arbitral Referee procedure lacked the

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274 See long citation of the Foreign Judgments (Reciprocal Enforcement) Act, Cap 43 and the principal object of the Act which provides that it is an Act of Parliament to make new provision in Kenya for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith.
275 The Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 Article I(1).
276 Supra note 268, p198.
278 Supra note 119, p 84.
dignity to qualify for enforcement under the New York Convention due to lack of finality of the decision embodied.\textsuperscript{279}

The finality of the award is an essential feature of the New York Convention to secure enforcement under it.\textsuperscript{280} Therefore where the award is not final, then it is not binding on the parties and a party may resist its enforcement on this ground.\textsuperscript{281} The emergency arbitration relief does not have binding effect due to its lack of finality as illustrated elsewhere in this paper.

The institutional rules provide that the emergency arbitration relief is temporary in nature and not binding on the arbitral tribunal that eventually resolves the dispute between the parties.\textsuperscript{282} This fact is incongruent with the “final and binding” phraseology employed by the New York Convention.\textsuperscript{283}

The emergency arbitration relief is interim in nature and cannot be enforced under the New York Convention because it does not meet the finality requirement set out in Article V(1)(e) of the Convention.\textsuperscript{284} Due to their temporary nature and capable of being modified by the arbitral tribunal,\textsuperscript{285} emergency arbitration relief are incapable of finding favour of enforcement under the New York Convention.\textsuperscript{286} The temporary nature of the emergency arbitration relief is undesirable feature impeding its enforcement under the New York Convention which largely embraces the concept of finality.\textsuperscript{287} In fact, it is argued that

\textsuperscript{279} Supra note 9, p 23. See also Societe Nationale des Petroles du Congo and Republic of Congo v TEP Congo case at the Paris Court of Appeal in 2003 in which the court after examination of the status of the referee concluded that the proceedings were inadmissible.

\textsuperscript{280} Supra note 36, p 18.

\textsuperscript{281} Ibid.

\textsuperscript{282} The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 Article 28(8); CIArb Arbitration Rules, 2015 Article 26(6).

\textsuperscript{283} Supra note 243 p 94.

\textsuperscript{284} Ibid, p 85. Karl in his article Karl Falk, Emergency Arbitration: An Examination of the Stockholm Chamber of Commerce Solution, (2010) p 25. Accessed online on November 23, 2016 at: https://gupea.ub.gu.se/bitstream/2077/24306/1/gupea_2077_24306_1.pdf, argues that the authority of the emergency arbitrator or the arbitral tribunal in issuing emergency decisions or interim measures respectively is to preserve the final awards from being rendered meaningless at the conclusion of arbitral proceedings.

\textsuperscript{285} Supra note 60.

\textsuperscript{286} Voser N, “Interim Relief in International Arbitration: The Tendency Towards a More Business-Oriented Approach,” (2007), Dispute Resolution International Journal, 1(2), p 184. See also supra note 9, p 23; Supra note 262. The authors in this article argue that due to its short period of effectiveness, emergency arbitration relief can hardly be described as final to be enforced under the New York Convention.

\textsuperscript{287} Supra note 9, p 24. Karl at page 23 argues that emergency arbitration relief has very little in the way of finality requirements under the New York Convention and as such, the New York Convention has equally little to offer in terms of their enforcement.
emergency arbitration relief and interim measures of protection by the arbitral tribunal are processes of preserving final decision in the award.\textsuperscript{288}

The previous sections of this chapter discussed the form of decision of emergency arbitration and found that the emergency arbitrator does not deal with the merits of the claim and the decision rendered by the emergency arbitrator is not an award.\textsuperscript{289} The emergency arbitration relief cannot be properly described as being dispositive of the differences between the parties in order to invoke the application of the New York Convention. The decision of the emergency arbitrator can hardly be described as an award within the New York Convention.\textsuperscript{290}

Formulation of emergency arbitration relief as awards in order to fall within the enforcement framework in Kenya does not offer any help for its enforcement. It is not how the parties to arbitration or the emergency arbitrator formulate the decision that helps in enforcement.\textsuperscript{291} It is the national law, in this case the Arbitration Act that determines whether the emergency arbitration relief can take the proper form of award to be enforced under the New York Convention.\textsuperscript{292} The New York Convention embodies the principles for enforcement of awards as opposed to orders to which it does not apply.\textsuperscript{293}

The institutional rules\textsuperscript{294} provide that the decision of the emergency arbitrator is binding upon the parties or the parties undertake to comply with such decision. This differs from the question of enforceability of such decision.\textsuperscript{295} It may be interpreted to mean that parties have contractual obligation to obey the decision of the emergency arbitrator failure to which it may attract claim for damages or order for specific performance.\textsuperscript{296} The rationale for this is that the arbitration agreement is a contract between the parties.

There is an argument, however, that the emergency arbitration relief should be capable of being enforced under the New York Convention as such orders, like any other interim

\textsuperscript{288} Ibid p 25.
\textsuperscript{289} Supra note 193.
\textsuperscript{290} Supra note 226, p 46.
\textsuperscript{291} Supra note 243, p 94.
\textsuperscript{294} See Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 Article 28(6) and the CIarb Arbitration Rules, 2015 Article 6(6) of Appendix I.
\textsuperscript{295} Supra note 243, p 94.
\textsuperscript{296} Ibid. See also supra note 226, p 51.
measures, is final in respect to the issue it relates.\textsuperscript{297} For instance, an emergency arbitrator decides on whether the applicant should be granted emergency arbitration relief applying the conditions that must be satisfied.\textsuperscript{298}

Under this theory, the decision of the emergency arbitrator therefore represents a firm and final determination of the issue and therefore embodies aspects of finality in the decision.\textsuperscript{299} In other words, the decision of the emergency arbitrator is final in view of the issues it addresses.\textsuperscript{300} Due to the finality of the issue the emergency arbitrator decided, the decision should be enforced under the New York Convention.\textsuperscript{301} The reasoning in this argument is that where the rules of arbitration chosen by parties embody mandatory and binding emergency arbitration, emergency arbitration relief is final in respect to provisional matter they dispose between the parties.\textsuperscript{302}

This argument, however, limbs in the face of the elementary features of emergency arbitration for two principal reasons. First, it fails to take into account that the emergency arbitrator does not resolve any dispute between the parties capable of producing a decision with finality. Secondly, it fails to appreciate the fact that the subsequent arbitral tribunal is not bound by the decision of emergency arbitrator and may modify or reject it altogether.\textsuperscript{303} The decision is therefore not final as it is susceptible to modification or nullification by the arbitral tribunal.\textsuperscript{304}

On the other hand, the Arbitration Act provides that where a party to arbitration is not given adequate notice of the appointment of the arbitral tribunal or the arbitral proceedings so as to afford the party sufficient opportunity to present its case, that party may apply to set aside an award.\textsuperscript{305} The court may also refuse to recognise and enforce the award if these rules of


\textsuperscript{298}bid.

\textsuperscript{299}bid.

\textsuperscript{300}Supra note 10, para 4-77. See also supra note 116, p 163.

\textsuperscript{301}Thus the party seeking enforcement under the New York Convention is only required to show the finality of the decision in order to be successful. See this discussion in Horodyski D & Kierska M supra note 175, p 34.


\textsuperscript{303} Supra note 119, p 85.

\textsuperscript{304}bid.

\textsuperscript{305}Arbitration Act section 35(2)(iii).
natural justice are not adhered to. Emergency arbitration proceedings are often commenced ex parte and the other party may not be aware of the proceedings. This may be a valid ground for setting aside of refusal to recognize and enforce the arbitral award.

The major leading institutional rules of arbitration provide for appointment of the emergency arbitrator within two days of receipt of the request who is required to issue a decision within fifteen days of appointment. This is due to the speed of emergency arbitration proceedings. This is short time periods and does not satisfy the provisions of the Arbitration Act and the Constitution on giving parties adequate time to prepare and present their cases. The resultant decision therefore becomes unenforceable under the foregoing provisions.

The notion of natural justice particularly the right to afford a party to a dispute opportunity to be heard has been entrenched in our judicial system and the constitutional dispensation. Where the party is able to show that it was not accorded opportunity to present its case, the court is likely to set aside the award.

2.5. Conclusion

The primary question this chapter sought to answer was what is the status and enforceability of emergency arbitration in Kenya? The chapter is premised on the hypothesis that emergency arbitration relief is not enforceable in Kenya due to uncertainty on its status. The objective it sought to find out is the status and enforcement mechanism of the emergency arbitration in Kenya

Looking at the available literature in Kenya and beyond its borders as analysed in the foregoing parts of this paper, the conclusion that readily emerges is that the emergency

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307 Supra note 260, p198.
311 Supra note 9, p 21.
312 Arbitration Act sections 35(2)(iii) and 37(1)(iii)
313 The Constitution, 2010 Article 50.
314 Supra note 9, p 21.
315 Ibid.
316 The Constitution, 2010 Article 50.
arbitration relief may not be enforced in Kenya under the existing legal framework due to its enumerated shortcomings as already discussed in this chapter. The decision of the emergency arbitrator lacks the dignity to find favour of enforcement in Kenya under the current legal regime. Besides, the status and the form of the decision of the emergency arbitrator are uncertain.

There is no emergency arbitration provision or indeed provision on interim measures of protection in the New York Convention and its enforcement mechanism. This is a possible indication of inapplicability of the Convention to recognition and enforcement of emergency arbitration relief which is widely seen as procedural orders.317 Procedural orders are not the subject of the New York Convention and are swiftly excluded.318 Therefore, the nature of the proceedings of the emergency arbitration and the resultant decision is derived from the contract of the parties and do not have the res judicata status of the award as it is not final decision.319

The debate on enforcement of emergency arbitration relief is genuinely showing an emerging weakness of the emergency arbitration procedure which is the newest player in international arbitration.320 This is a call for realignment of international conventions and domestic laws to accommodate this innovative emergency arbitration in its full cycle.

There exists global patchwork trend on the enforcement of emergency arbitration relief. There is no uniform enforcement regime either in common law on convention of the decision of the emergency arbitrator. In Kenya, the debate has not yet attracted judicial intervention or legislative mind. Analysis of the existing arbitration law in Kenya, however, indicates lack of enforcement mechanism for emergency arbitration relief.

Given the patchwork trend on enforcement of emergency arbitration relief and the silence of both the New York Convention and the UNCITRAL Model Law, enforcement of decision of

317 Supra note 224, p 11.
319 Supra note 9, p 21.
320 Supra note 119, p 81.
the emergency arbitrator remains to be addressed by the national legislation to set out what a country will recognise as an award and to enforce it under the New York Convention.\textsuperscript{321}

There is paucity of case law in Kenya on whether the emergency arbitrator is an arbitral tribunal capable of rendering awards which are enforceable. Kenya is yet to advert itself to this issue either through legislative recognition or judicial fiat.

Based on the conclusion this chapter has made on the status and enforceability of emergency arbitration relief in Kenya, it is appealing to consider the existing literature beyond the borders of Kenya. The next chapter will, therefore, discuss jurisprudence from some selected jurisdictions on the status and enforceability of emergency arbitration relief with the view of indentifying approaches taken by those countries to enforcement of emergency arbitration relief. It will also determine whether those approaches from different countries reveal a uniform approach to the enforcement of this emerging issue in international arbitration. The rationale for choosing those countries is explained under each country.

CHAPTER THREE

3. STATUS AND ENFORCEABILITY OF EMERGENCY ARBITRATION RELIEF IN OTHER JURISDICTIONS

3.1. Introduction

The previous chapter dealt with the nature and status of emergency arbitration and relief in Kenya. It interrogated whether emergency arbitration relief is equivalent to interim measures of protection granted by either court or properly constituted arbitral tribunal or final or partial awards as regards the subject they relate. It further discussed the nature and status of emergency arbitrators in an attempt to identify the nature of the decision they make during emergency arbitration. It also discussed the enforceability of emergency arbitration relief in Kenya.

This chapter examines the approaches taken on the enforcement of the emergency arbitration decision by other jurisdictions which have emergency arbitration provisions in their laws. This chapter will answer the following research question: what is the status and enforceability of emergency arbitration in other jurisdictions? The chapter is premised on the hypothesis that there is no unanimity on the status and enforceability of the emergency arbitration relief in the world.

The discussion relates to selected countries some of which are Model Law countries like Kenya while others are not. The selected countries are the United States of America, Singapore, India, China, Hong Kong, France, England and Mauritius. The choice of non Model Law countries is intended to see their approach and experience as the concept largely originated from the Model Law countries. In general terms, these chosen countries some of them have large economy, developed legal systems, are hosts to major international arbitration institutions or arbitration law is steadily growing.

The objective of this chapter is to find out the status and enforceability of emergency arbitration relief in other Model Law countries and countries which are non Model Law. Model Law countries are those that are party to the UNCITRAL Model Law on International Arbitration 1985 with Amendments as Adopted in 2006, majority of which have enacted their arbitration legislations based on the Model Law.322

The discussion begins with Model Law countries in which the concept of emergency arbitration procedure originated. Kenya is also a Model Law country and it is necessary to see the practice in Model Law countries first before considering the non Model Law countries.

3.2. The United States of America

This section analyses enforceability of emergency arbitration relief in United States of America (US). The choice of this country is predicated on the fact that emergency arbitration in its current legal structure emanated from the United States of America. Besides this, it is a Model Law country like Kenya and its jurisprudence may be borrowed. It is therefore intended to see how the progenitor of the emergency arbitration has embraced it. United States of America, however, has a comprehensive multi-faceted legal system which is not similar to Kenya’s legal system.

The “opt-out” emergency arbitration was introduced in 2006 by the International Centre for Dispute Resolution (ICDR) of American Arbitration Association (AAA) in the rules as a response to market demands as the international commercial arbitration was not properly equipped to offer interim measures before the establishment of arbitral tribunal. This was not immediately replicated in Kenya as the concept was introduced in 2015 through institutional arbitration rules.

The approach of the United States to emergency arbitration is seen from the broad perspective that it is pro arbitration like Kenya and it is careful not to undermine arbitration. This pro-arbitration by the United States court is aptly demonstrated in a landmark case of *Banco de Seguros del Estado v. Mutual Marine Office*. The court stated that it was not the role of the courts to undermine the authority of the arbitrator in issuing orders that secure meaningful final award. In Kenya, the Court of Appeal has reiterated the point in *Kenya Oil Company Limited & another v Kenya Pipeline Company*, by stating that

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323 See literature review in chapter one as discussed above.
325 Supra note 16, p 217.
326 Supra note 14, p 751.
327 Supra note 9, p 22 and 24. In Kenya, see the Arbitration Act sections 6, 10 and 32A as well as sections 35, 37 and 39.
329 *Kenya Oil Company Limited & another v Kenya Pipeline Company* [2014] eKLR; See also the *Anne Mumbi Henga v Victoria Njoki Gathara* [2009] eKLR where the Court f Appeal stated that there is no right for any court to intervene in the arbitral process except as provided for under the Arbitration Act.
parties’ autonomy should be upheld and courts should not interfere with it. In *University of Nairobi v N.K Brothers Limited*, the Court of Appeal stayed the proceedings in court and referred the parties to arbitration as they had indicated in the arbitration agreement.

The emergency arbitration provisions of the ICDR have been litigated in the United States unlike in Kenya. The main question has been the enforceability of the emergency arbitration decision under the Federal Arbitration Act and the New York Convention.

The courts in the United States pay no regard to the form of the decision of the emergency arbitrator in determining its enforceability. The attention of the court is directed to the substance of the decision and not the stylistic names accorded to such decisions. In this regard, emergency arbitration decisions are considered final as regards the issue they relate to in respect to the parties. Accordingly, they are enforceable under the New York Convention and the Federal Arbitration Act notwithstanding that these legal instruments are applicable to final awards. This has not been tested in Kenya by the courts and it is not possible to state whether courts will adopt finality approach like in US to find enforcement mechanism under the New York Convention to which Kenya is a party.

In enforcement of emergency arbitration relief debate in US, intitulement is of secondary significance. This is yet to be ascertained or tested in Kenya. It is therefore the duty of the court to look at the substance and effect of the emergency arbitration decision in judging its finality rather than paying attention to formalistic technicalities of nomenclature. This approach has been adopted in several other cases.

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330 *University of Nairobi v N.K Brothers Limited* (2009) eKLR.
331 Supra note 16, p 232.
332 Ibid.
333 Ibid.
334 Ibid.
335 *Publicis Communication v True North Communications* 206 F.3d 725 (7th Cir 2000)
336 Supra note 16, p 232.
337 Supra note 177, p 31.
338 *Publicis Communication v True North Communications* 206 F.3d 730 (7th Cir 2000). Mere nomenclature of the decision does not make it enforceable under any regime of enforcement of international arbitral awards. See also *Resort Condominiums International Inc. v. Ray Bolwell & Resort Condominius (Australasia) Pty. Ltd*, Supreme Court of Queensland, 29/10/1993, reported in Yearbook Commercial Arbitration vol. XX – 1995, p. 628–650. The emergency arbitrator called his decision “interim arbitratin order and award” in order to enhance its enforceability. The court pointed out that the naming of the decision does not confer it with status for enforcement under the New York Convention,
339 *Pacific Reinsurance Management Corporation v Ohio Reinsurance Corporation*, 935 F.2d 1019 (9th Cir. 1991).
340 *Southern Seas Navigation Ltd. of Monrovia v. Petroleos Mexicanos of Mexico City* 606 F. Supp. 692 (S.D.N.Y. 1985); *Arrowhead Global Solutions, Inc v Datapath Inc* 166 Fed Apps 39 (4th Cir 2006); and *Banco de Seguros del Estado v. Mutual Marine Office* 344 F.3d 255 (2d Cir. 2003). The reason running through these cases is that
A further illustration of the flexibility of the US courts regarding the emergency arbitration relief is found in yet another landmark case of *Draeger Safety Diagnostics Inc. v New Horizons Interlock.*[^340] In this case, the court issued an order granting a petition for confirming and enforcing the emergency arbitration relief ordering the return of customer data, records and equipment. The emergency arbitrator had issued interim award for emergency arbitration relief which the court confirmed and enforced. The court reasoned that where the arbitrator applies the contract and acts within his scope, the resultant decision must be confirmed as the courts have narrowest standards of judicial review in arbitration awards.[^341] Therefore, in court’s view, an interim award of emergency arbitration relief that finally and definitively disposes of an issue which it addresses may be confirmed by the court.

In *Yahoo! Inc. v. Microsoft Corporation,*[^342] the emergency arbitrator issued emergency arbitration relief compelling Yahoo to undertake specific activities within the contract. Yahoo brought a motion in court to vacate the decision of the emergency arbitrator granting relief. The court while acknowledging that the emergency arbitration relief was an award rejected Yahoo’s motion and found that the decision was enforceable under the law.

Even though there appears to be acceptance of the enforceability of the emergency arbitration relief in US, it is not without dissentient voices within the judicial circles. In *Chinmax Medical Systems v. Alere San Diego,*[^343] the court was called to vacate a decision of an emergency arbitrator. The court refused to vacate the emergency arbitration decision because, in court’s view, the emergency decision was not final award within the meaning of New York Convention capable of being vacated by the court. The court found that the decision of the arbitral tribunals including emergency arbitrators must have power to issue temporary equitable relief to preserve the decision and the courts must have power to confirm and enforce such relief as final in order for these equitable remedies to have teeth. See also *Sperry International Trade v. Government of Israel,* 532 F. Supp. 901 (S.D.N.Y. 1982), where the court found that emergency arbitration relief is final as regards the issue it addresses for purposes of enforcement and enforceable under the New York Convention and the Federal Arbitration Act.


[^341]: In court’s view, an interim award of emergency arbitration relief that finally and definitively disposes of an issue which it addresses may be confirmed by the court.

[^342]: Yahoo! Inc. v. Microsoft Corporation, United States District Court, Southern District of New York, 13 CV 7237, October 21, 2013.

emergency arbitrator was temporary in nature and subject to review by the arbitral tribunal once appointed. The court also found that the decision was subject to modification or it could be set aside by the arbitral tribunal as it deemed fit. The net effect of the court’s refusal to vacate the decision is that emergency arbitration decision was left undisturbed.  

The Chinmax decision seems to indicate divergent view of the court on the enforceability of the emergency arbitration relief. However, this court is alone on this path as the debate is settled and the jurisprudence is stable on the pragmatic approach taken by the US courts generally.

In Kenya, the courts are yet to rule on the enforceability of the emergency arbitration relief. However, given that where an award has not yet become binding on the parties is a ground of refusing to recognize and/or enforce it, there are doubts as to whether the pragmatic US approach will be borrowed to Kenya. In Kenya, the decision of the emergency arbitrator is a procedural decision in preservation of the subject matter of arbitration and does not constitute finality of the issues to in order to be binding upon the parties.

This pragmatic approach by the US courts to the emergency arbitration relief is further stressed through severability. The emergency arbitration relief is severed from the merits of the arbitration and requires to be enforced in order to have meaningful arbitration proceedings and final award.

The rationale for upholding interim measures of protection including the emergency arbitration relief by the US courts is to ensure effective and efficient resolution of disputes without frustrations by one of the parties. In effect, this promotes resolution of disputes through arbitration and reduces court interventions.

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344 Supra note 16, p 233.
345 See for instance Pacific Reinsurance Management Corporation v Ohio Reinsurance Corporation, 935 F.2d 1019 (9th Cir. 1991). Southern Seas Navigation Ltd. of Monrovia v. Petroleos Mexicanos of Mexico City606 F. Supp. 692 (S.D.N.Y. 1985); Arrowhead Global Solutions, Inc v Datapath Inc 166 Fed Apps 39 (4th Cir 2006); and Banco de Seguros del Estado v. Mutual Marine Office 344 F.3d 255 (2d Cir. 2003). The reason running through these cases is that arbitral tribunals including emergency arbitrators must have power to issue temporary equitable relief to preserve the decision and the courts must have power to confirm and enforce such relief as final in order for these equitable remedies to have teeth. See also Sperry International Trade v. Government of Israel, 532 F. Supp. 901 (S.D.N.Y. 1982), where the court found that emergency arbitration relief is final as regards the issue it addresses for purposes of enforcement and enforceable under the New York Convention and the Federal Arbitration Act.
346 Supra note 177, p 32.
The emergency arbitration relief is enforceable in the United States regardless of the nomenclature. Once there is finality of the issue emergency decision addresses for it to be enforceable under the New York Convention and the Federal Arbitration Act, such decision will be enforced by the courts. This approach by the United States can be properly described as an indirect enforcement of emergency arbitration relief.\textsuperscript{349}

This pragmatic approach adopted by the United States courts may not settle the dust on enforceability of the emergency arbitration relief in Kenya in view of the categorization of awards under the Arbitration Act. In \textit{PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation},\textsuperscript{350} the Singapore Court of Appeal indentified three types of awards that may be made prior to final determination of the dispute.\textsuperscript{351} These include partial award which disposes of a part but not all claims brought by the parties with finality; an interim award, which finally decides a preliminary issue, relevant to the disposition of that claim, such as choice of law, liability, interpretation of a particular provision; and a provisional award, which protects the party from damage during the pendency of the arbitration, like the preservation of assets or evidence, but does not finally dispose of either a preliminary issue or a claim.\textsuperscript{352}

Emergency arbitration relief falls in the third category and it is hardly an award with finality to fall within the ambit of the New York Convention. The US indirect enforcement may not apply in Kenya due to this categorization and the Arbitration Act. However, an unequivocal conclusion on this issue at this stage may not be possible as the issue has not yet been addressed by courts. Thus enforcement of emergency arbitration relief in US is possible through authoritative interpretation of the existing legal framework by the courts. The courts is US have provided some guidance which is yet to happen in Kenya.

3.3. The Singapore Approach

This part discusses the enforceability of emergency arbitration relief in Singapore. Singapore is a vibrant hub for international commercial arbitration and it is a home of one of the leading international arbitral institutions, the Singapore International Arbitration Centre (SIAC).

\textsuperscript{349}Supra note 238. This constitutes enforcement by analogy which works like this: the finality of the arbitral awards regards the merit of the dispute while finality of the emergency arbitration relief regards the interim measures. It is therefore finality that is the subject to analogy and where any or both cases exist, they must be enforceable under the New York Convention.

\textsuperscript{350}\textit{PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation} [2015] SGCA 30, 27/05/2015.

\textsuperscript{351}Kenya seems to follow this categorization in view of Arbitration Act section 3 on definition of arbitral award, section 31(6) regarding partial awards and sections 32A and 36 regarding the final award and its effect.

\textsuperscript{352}Supra note 177, p 32.
Besides, Singapore is a monist and Model Law country as far as arbitration law is concerned having enacted arbitration law that applies to both domestic and international arbitration. Singapore is a country on the trend of finding a firm position in international arbitration. It is based on the foregoing that it is desirable to analyse the enforceability of emergency arbitration in Singapore.

Singapore first included emergency arbitration in the Singapore International Arbitration Centre Arbitration Rules in 2010. The rules require giving of notice to the other party subject to emergency arbitration to avoid surprises. Thus emergency arbitration relief is not available to the party ex parte.

From the historical perspective, Singapore sent reverberations across the arbitration community by its judgment in the case of Swift-Fortune Ltd v Magnifica Marine SA. In this case and unlike in Kenya, the Court of Appeal stated that it did not have jurisdiction to grant interim relief in aid of foreign arbitration and was only empowered to issue interim relief in respect to Singapore conducted arbitration. This pro-Singapore arbitration judgment of the Court of Appeal initiated the legislative amendment in 2009 to the Singapore International Arbitration Act which enhanced the jurisdiction of the court to aid foreign arbitration. In Kenya generally, the court has power to grant interim measures of protection to a party to arbitration regardless of the place of arbitration there exists a valid arbitration agreement and the subject matter is within its jurisdiction.

A legal problem in the arbitration in Singapore is usually and urgently addressed through legislative amendments, sometimes before court intervention. The question of enforceability

354 Singapore has an international arbitration Act, the Singapore International Arbitration Act which has given it an internationally acceptable legislative framework for international commercial arbitration.
356 Supra note 322, p 16.
357 The Singapore International Arbitration Centre Arbitration Rules, 2016 Article 1 Schedule I. See also supra note 322, p 17.
358 Supra note 320, p 16.
360 Supra note 356, p 6.
361 Ibid.
362 See generally the case of Safaricom Limited v Oceanview Beach Hotel Limited & 2 Others (2010) eKLR on conditions under which a court grants interim measures of protection pending arbitration or intended arbitration.
of the emergency arbitration relief in Singapore is boldly addressed through legislative command.\textsuperscript{363}

However, the inclusion of the emergency arbitration provisions in the Singapore International Arbitration Act was not as a result of existing problem but was intended to provide legislative support to the emergency arbitration provisions in the SIAC Arbitration Rules and maintain a world class legislative framework for arbitration.\textsuperscript{364} Like in international arbitration community and in Kenya, there was no imminent problem in the system of interim measures of protection that called for legislative amendments to support emergency arbitration in Singapore.

Unlike the US, Singapore opted for parliamentary approach to resolve the impasse. The 2012 amendments introduced to the Singapore International Arbitration Act amended the definition of the arbitral tribunal and arbitral award to accommodate the emergency arbitrator and emergency arbitration relief respectively.\textsuperscript{365} These amendments were in response to uncertainty on the status and form of emergency arbitrator and emergency decision in the SIAC Arbitration Rules.\textsuperscript{366} The net effect of these amendments is to ensure enforcement of the emergency arbitration relief in the same way as final awards of the arbitral tribunal.\textsuperscript{367}

It follows that the uncertainty of the status and enforceability of the emergency arbitration relief in Singapore has been cleared through the legislative amendments. The orders, directions and decisions of the arbitral tribunal including the emergency arbitrator are now enforceable in Singapore in the same way as court decisions.\textsuperscript{368} In Kenya, this approach has not been adopted. As discussed in chapter two above, even if Kenya amended its Arbitration Act, it will still not be possible to enforce the emergency arbitration relief because of lack of

\begin{footnotes}
363 Supra note 356, p 7.
365 Supra note 15, p 100.
367 Supra note 356, p 9.
368 Supra note 5, p 21.
\end{footnotes}
finality and merely being procedural in nature for preservation of the subject matter of arbitration.

The enforcement of the emergency arbitration relief in a like manner as the decision of the court is made possible due to the fact that there are no ex parte orders by the emergency arbitrator. In this case, a party cannot apply to set aside or refuse to recognise an award on the grounds that it was not given notice or sufficient opportunity to present its case.

Due to bold legislative step in Singapore, little is left for controversy and discussion on the status and enforceability of the emergency arbitration relief. Emergency arbitration relief as awards are enforceable under express provisions of the legislation without any difficulty.369 This fact alone may be considered by the business community as an attracting feature of the Singapore arbitration regime.

3.4. Experience from India

This part discusses the status and enforceability of emergency arbitration relief in India. The choice of this country is predicated on the fact that India is one of the largest economies and attracts many businesses. India has key arbitral institutions which have incorporated emergency arbitration provisions in their institutional rules.370 India is also a Model Law country371 and the Kenya Courts continuously borrow jurisprudence from India in other spheres other than arbitration. Besides, India seems to adopt a dichotomy on the approach to enforcement between the foreign seated emergency arbitrator decisions and the domestic one which is not the case in Kenya. It is for these reasons that analysis of emergency arbitration procedures in India is deemed necessary.

In India, just like Kenya, courts generally have powers to grant interim measures before the constitution of the arbitral tribunal.372 In India, once the arbitral tribunal is formed, parties are

369See for instance in Raffles Design International India Pvt. Ltd & Another v Educomp Professional Education Ltd & Others (MANU/DE/2754/2016) where an emergency arbitrator in Singapore under the SIAC Arbitration Rules issued an emergency arbitration relief which was enforced by the Singapore court. It was, however, not enforceable under the India law in India for the reasons highlighted in part 3.4.

370See for instance Mumbai Centre for International Arbitration (Rules), 2016 section 3; Madras High Court Arbitration Centre (MHCAC) Rules, 2014 Part IV and section 20; Court of Arbitration of International Chamber of Commerce – India Arbitration Rules Article 29; Delhi International Arbitration Centre Arbitration Rules section 18A.


expected to seek such orders from the arbitral tribunal. In Kenya, however, parties may still seek interim measures of protection from court notwithstanding the existence of the arbitral tribunal, but where the tribunal has already ruled on that issue, the High Court adopts the ruling of the tribunal.

Unlike Singapore, India does not have a direct legislative enforcement mechanism for emergency arbitration relief much like Kenya. The Law Commission considered the inclusion of the enforcement mechanism in the recent amendments in the Arbitration and Conciliation Act but was ultimately not included in the Act. This leaves it with the dilemma Kenya and some other jurisdictions are facing on the status and enforceability of the emergency arbitration relief.

The looming legal problem of enforcement of emergency arbitration relief is amplified in India in view of the Delhi High Court in Raffles Design International India Pvt. Ltd & Another v Educomp Professional Education Ltd & Others. In this case, the court stated that the emergency arbitration relief from foreign seated arbitral tribunal or emergency arbitrator are not enforceable in India under section 9 of the Arbitration and Conciliation Act, 1996 as amended which provision empowers to the court to grant interim measures of protection.

The court, however, indicated that the option that was available to such a party was to file a suit and seek interim provisions under section 9 independent from the emergency arbitration relief. Initially India had adopted an approach to the effect that the Indian courts could not grant interim measures to aid arbitration conducted in a foreign country. This is not the

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374 The Arbitration Act section 7(2).

375 Supra noe 372. See also Supra note 159, p 3. The Law Commission of India in its 246th Report, proposed amendment of the meaning “arbitral tribunal” under section 2(1)(d) of the Act to accommodate emergency arbitration (similar to the position in Singapore) but this did not see the light of the day.


377 The Court relied on Article 17H of the UNCITRAL Model Law on International Commercial Arbitration on recognition and enforcement of interim measures granted by the arbitral tribunal to be binding. There is no provision on enforcement of foreign seated emergency arbitration relief in the Indian Act. The court stated that in the absence of a similar provision for foreign seated arbitrations, emergency arbitration relief cannot be enforced under the Act and the only method available for enforcing the same would be to file a suit.

position in Kenya where the courts are generally supportive of arbitration regardless of the seat of arbitration.\textsuperscript{379}

It flows from the foregoing that emergency arbitration relief is not enforceable in India regardless of the nomenclature ascribed to the decision.\textsuperscript{380} A party desirous of obtaining interim relief may just apply for it directly to court independent of existence of emergency arbitration relief from any jurisdiction.

In \textit{HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd & Others},\textsuperscript{381} the applicant had sought and obtained emergency arbitration relief in Singapore under SIAC Rules of arbitration. Instead of enforcing the emergency arbitration in India, the applicant moved the Bombay High Court under section 9 of the Arbitration and Conciliation Act for similar orders. The court found and held that since the party had moved an application under section 9 of the Act and was not seeking to enforce the emergency arbitration decision passed, the same could be granted by the Court.\textsuperscript{382} This illustrates the unfinished business of legislative amendments in India to respond to emerging needs of the arbitration community. However, it may be argued that this is an indirect enforceability of the emergency arbitration decision in India as a party obtains similar orders from the court for enforcement.\textsuperscript{383} In Kenya and as discussed in chapter three, the status of the emergency arbitrator is unsettled and the court may not readily adopt the decision of the emergency arbitrator under the Arbitration Act.

In India, the emergency arbitration relief from foreign seated emergency arbitrator are not enforceable regardless of the form of the decision as the Indian law only provides for enforcement of final arbitral awards.\textsuperscript{384} The \textit{Raffles case} highlights the position in India and the difficulty associated with enforcement of the emergency arbitration relief.\textsuperscript{385} The problem of enforceability of the emergency arbitration relief still persists in India even after the much

\textsuperscript{379} Supra note 260, pp 160 – 164.
\textsuperscript{380} Supra note 374.
\textsuperscript{381} HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd & Others (MANU/MH/0050/2014).
\textsuperscript{382} Supra note 379.
\textsuperscript{383} Supra note 16, p 232.
\textsuperscript{384} Ibid.
appreciated amendments to the Arbitration and Conciliation Act in 2015. For domestic arbitration like in Kenya, parties ordinarily apply to court for interim measures of protection.

Emergency arbitration relief may still not be enforceable in India even if they were to be equated to interim measures granted by the arbitral tribunal under section 17 of the Act. The Supreme Court of India has sent ripples in the water tank on the enforceability of the arbitral tribunal ordered interim measures in its interpretation of the Act. In *M.D Army Welfare Housing v Sumangal Services Pvt. Ltd.*, the Supreme Court while dealing with the enforcement of the interim measures of the arbitral tribunal stated that the arbitrator had no power under section 17 of the Act to enforce its orders and could not get judicial enforcement from courts, as such, the arbitrator powers under the section were a nullity. In Kenya, there is no clarity on enforcement of the orders of the arbitral tribunal and it is anticipated that a party applies to court for the orders to be enforced as if they were granted by the court. This is not the position with emergency arbitration relief as the definition of the arbitral tribunal under Arbitration Act does not include emergency arbitrator.

Thus equating emergency arbitration relief in India to interim measures ordered by the arbitral tribunal will face this difficulty in enforcement that is largely engineered by the Supreme Court through interpretation of the Act. It is also a limitation to the equation as section 17 interim measures presuppose existence of the arbitral tribunal. However, a liberal interpretation of the section may be a panacea and give teeth to the interim measures of protection in order to promote arbitration. This problem faced in India in equating the

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387 The Indian Arbitration and Conciliation Act, 1996 section 17.

388 *M.D. Army Welfare Housing v. Sumangal Services Pvt. Ltd.*, A.I.R. 2004 S.C. 1344 (India). See also the decision of the Supreme Court of India in *Sundaram Finance v NEPC* (2004) 9 S.C.C. 619 (India) in which it stated that though section 17 of the Act gives the arbitral tribunal power to make orders for interim measures, the same cannot be enforced thus remaining to be a toothless dog.


390 Ibid. See the interpretation advanced by the High Court of Delhi in *Sri Krishan v Anand* (2009) 3 Arb. L.R. 447 (Del) (India), in which the court considered the legislative intent behind the section and stated that the legislative intent of section 17 is to make the arbitral tribunal a complete forum for adjudicating the parties’ dispute as well as making interim measures capable of being enforcement. Giving it a different interpretation will make the section otiose and redundant.
emergency arbitration relief to interim measures of protection by the arbitral tribunal equally exists in Kenya.\textsuperscript{392}

3.5. The Chinese Perspective

This part discusses the status and enforceability of emergency arbitration relief in China which is also a Model Law country.\textsuperscript{393} China is steadily developing in terms of judicial jurisprudence and attraction of investors. The institutional arbitration in China is gaining ascendancy. Besides this, China, unlike Kenya, seems to adopt a bipartisan approach to enforcement between the foreign seated arbitrator decisions and the domestic one as discussed in detail below. It is for these reasons that jurisprudence from China is deemed necessary.

Enforcement of foreign awards in China is achieved through the Civil Procedure Law, the Arbitration Law and the Interpretation of the Supreme People’s Court on the Application of the Civil Procedure Law which largely incorporates the provisions of the New York Convention.\textsuperscript{394}

The concept of emergency arbitration in China, just like in Kenya, was introduced through institutional rules just like Kenya as a procedural innovative.\textsuperscript{395} In 2015, the China International Economic and Trade Arbitration Commission (CIETAC) amended its arbitration rules and included the emergency arbitration provisions in Article 23 Appendix III.\textsuperscript{396} However, these rules of emergency arbitration appear to apply to CIETAC arbitrations administered outside the mainland China.\textsuperscript{397}

In the mainland China, only courts are mandated to grant interim measures of protection.\textsuperscript{398} The arbitral tribunals in having their seat in China do not have power to grant interim measures of protection including emergency arbitration relief notwithstanding the applicable

\textsuperscript{392} See more discussion in chapter two above.
\textsuperscript{396} The China International Economic and Trade Arbitration Commission Arbitration Rules, 2015.
\textsuperscript{397} Supra note 396.
institutional rules. The mandatory rules do not allow parties to seek interim measures including emergency arbitration outside courts. In Kenya, the courts as well as the arbitral tribunal have power to grant interim measures of protection.

Due to the fact that the arbitral tribunals and the emergency arbitrators do not have power to grant interim measures and the emergency arbitration relief in China, it is doubtful whether the emergency arbitration relief from foreign country will be enforceable. The Arbitration Law does not contain provisions of emergency arbitration or enforcement of the decisions of emergency arbitration much like in Kenya. Accordingly, enforcement of emergency arbitration relief is not possible under the Chinese law.

Even though Chinese institutional arbitration rules contain provisions for emergency arbitration, they provide that such orders only have binding effect on the parties and it is generally understood that courts will not enforce them in China. The rules containing the emergency arbitration provisions both in Kenya and China do not provide for enforcement of the decision in case where there is no voluntary compliance.

3.6. Experience from Hong Kong

This section discusses the status and enforceability of the emergency arbitration relief in Hong Kong, which is a Chinese island. The choice of this island is predicated on the fact that it adopts a direct route to the enforcement of emergency arbitration relief notwithstanding the mainland China has different legal provisions on emergency arbitration as already discussed.

Like many other jurisdictions including Kenya, emergency arbitration provisions first found their way to Hong Kong through institutional arbitration rules. Under the rules, the

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400 Supra note 399. See also the Civil Procedure Law Article 272 and the Arbitration Law Articles 28, 46 and 68.
401 The Arbitration Act sections 7 and 18.
402 Supra note 399.
emergency arbitration relief will have the same effect as interim measures of protection and they are binding upon the parties.406 This is not the position in Kenya and adopting it will raise questions of finality of the decision.

Hong Kong, like Singapore adopts direct approach to enforcement of emergency arbitration relief through legislation. In 2013, Hong Kong amended the Hong Kong Arbitration Ordinance to provide mechanism for enforcement of emergency arbitration relief.407

The Hong Kong Arbitration Ordinance as amended in 2013 provides that decision of the emergency arbitrator made in Hong Kong or elsewhere is enforceable in the same manner as an order of the court.408 In this regard, emergency arbitration relief is directly enforceable in Hong Kong.

The emergency arbitrator is defined to mean emergency arbitrator appointed under the arbitration rules chosen by the parties to arbitration agreement.409 This definition does not adequately state the status of emergency arbitrator. On the other hand, arbitral tribunal means a sole arbitrator or a panel of arbitrators, and includes an umpire.410 This definition does not also elaborate on the status of emergency arbitrator and leaves it open to court to interpret it.

The approach taken by Hong Kong does not conclusively deal with the uncertainty surrounding the emergency arbitration relief. It fails to address the nature and status of the emergency arbitrator and the decision of the emergency arbitrator. It is interesting to see how this approach accords itself with the New York Convention especially if the two legal instruments are pitied against one another.

3.7. Approach Adopted by Mauritius

This section discusses the enforceability of emergency arbitration relief in Mauritius. Mauritius arbitration law is gaining ascendancy not only in Africa but also in the entire

406Ibid, the Hong Kong International Arbitration Centre Administered Arbitration Rules, 2013 Article 16 Schedule 4
408The Arbitration Ordinance, Cap 609 section 228(1), Part 3A accessible online at: https://www.elegislation.gov.hk/hk/cap609?p0=1&p1=1.
409Ibid section 22A, Part 3A.
410Ibid section 2(1)


The applicable statutory arbitration law in Mauritius, like in Kenya, does not have provisions for emergency arbitration.\footnote{These include the International Arbitration Act, 2008 as amended in 2013, the Civil Procedure Code, the Convention on Recognition and Enforcement of Foreign Arbitral Awards Act (the New York Convention Act), the Supreme Court (International Arbitration Claims) Rules, 2013 and the Mauritius International Arbitration Centre (Arbitration) Rules.} The concept of emergency arbitration and its legal provisions have been imported to Mauritian arbitration rules through institutional rules which became effective in May 2018.\footnote{The Mauritian Chamber of Commerce and Industry Arbitration and Mediation Centre (MARC) Arbitration Rules, 2018 Appendix 4.} The phenomenon is relatively new in Mauritius existing only through institutional arbitration rules like in some other jurisdictions such as Kenya.

It is appreciated that interim measures of protection in support of arbitration may be sought from the Supreme Court or any foreign court which is not incompatible with the arbitration
agreement.\textsuperscript{417} This provision tacitly indicates that the interim measures granted by a foreign national court are enforceable in Mauritius in so far as they support arbitration by the parties.\textsuperscript{418} It is not known whether emergency arbitration relief can be given status of interim measures from the foreign court capable of enforcement.

The arbitral tribunal is empowered to grant interim measures of protection\textsuperscript{419} which are considered as awards and recognised and enforced through Supreme Court.\textsuperscript{420} However, the definition of arbitral tribunal does not contemplate emergency arbitrator as it is only limited to sole arbitrator or panel of arbitrators.\textsuperscript{421} As such, it is not possible to consider emergency arbitrator as an arbitral tribunal within the meaning of the International Arbitration Act and to view the decision of the emergency arbitrator as an award.

Enforcement of the emergency arbitration relief through analogy as largely done by the US courts is thrown into legal adulteration by virtue of the provisions of the Act which domesticates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.\textsuperscript{422} The Act adopts the meaning of the arbitral awards under the New York convention\textsuperscript{423} with the net effect that it insists on the finality of the award. In this context, it is difficult to exude confidence that indirect enforcement is available. This position is similar in Kenya which also adopts the same approach.

As pointed out, the emergency arbitration provisions do not exist in the national arbitration law of Mauritius just like in Kenya. In this case, the International Arbitration Act provides that where the issue is not expressly covered by the Model Law, it shall be dealt with in accordance with the general principles on which Model Law is based.\textsuperscript{424} There is no case under the Model Law dealing with enforceability of the emergency arbitration relief based on general principles upon which the Model Law is based.

\textsuperscript{417}The International Arbitration Act, 2008 as amended in 2013 section 6(1) and 23 accessible online at: http://www.miac.mu/download/international-arbitration-act-2008.pdf; see also the Supreme Court (International Arbitration Claims) Rules, 2013 Rule 14.
\textsuperscript{418}Supra note 413 p 9.
\textsuperscript{420}Ibid section 22.
\textsuperscript{421}Ibid section 2(1).
\textsuperscript{422}The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act, 2001 accessible online at: https://supremecourt.govmu.org/HighlightDoc/QA4181405112017113642.pdf.
\textsuperscript{423}Ibid section 2.
The Mauritian context is not far much dissimilar to the Kenyan predicament on the status and enforceability of emergency arbitration relief. In both countries, the concept is relatively new and only exists through institutional rules.

3.8. The French Perspective

This section discusses the status and enforceability of the emergency arbitration relief in France. Choice of this country is predicated on the fact that France is on the leading path in domestic as well as international commercial arbitration. France is a home to leading international arbitral institution – the International Chamber of Commerce and its International Court of Arbitration. The ICC is an old arbitral institution and its court one of the leading international courts for resolution of disputes through arbitration. Besides, before the introduction of the emergency arbitration rules, the ICC had a Pre-Arbitral Referee rules which is heralded as the father of the current emergency arbitration. France is non Model Law Country and it is necessary to compare the French approach to enforceability of the emergency arbitration relief. It for these reasons that these research analyses jurisprudence on the status and enforceability of the emergency arbitration relief in France.

The concern for emergency arbitration, though its application having gained international as well as institutional reputation, is the status of the emergency arbitrator and enforceability of the decisions made by the emergency arbitrator. This concern is not uncommon in France and there is a continuing debate.

In France, there is equally uncertainty on the status of the emergency arbitrator and the enforceability of the decision of the emergency arbitrator like in Kenya. The concept of the emergency arbitration was introduced in France through arbitral institution rules like in

428 Supra note 14, pp 751, 756 & 762.
Kenya and as such the French arbitration law and the Code of Civil procedure do not have provisions for emergency arbitration.\(^{429}\)

Unlike in China, in France, the law does not prohibit the emergency arbitrator or even the arbitral tribunal to issue emergency arbitration relief or interim measures.\(^{430}\) This is the position also in Kenya. However, the emergency arbitrator does not have power to issue conservatory attachments and judicial securities.\(^{431}\)

Like the arbitral tribunal – ordered interim measures, enforcement of the emergency arbitration decisions is laced with uncertainty in France especially due to ambivalence in their nature.\(^{432}\) The enforceability of the emergency arbitration relief in France is disputed and uncertain and it is quite unlikely that the enforcement mechanism is that provided under the New York Convention which insists on the award and its finality.\(^{433}\) This is the scenario Kenya is facing and the only difference is that there has been no intervention of the court either to affirm non-enforcement of the emergency arbitration relief or provide any guidance about it.

Prior to the emergency arbitration, under the pre-referee arbitral rules, the Paris Court of Appeal in *Societe Nationale des Petroles du Congo and Republic of Congo v TEP Congo*\(^{434}\) considered the status of the pre-arbitral referee appointed under the ICC rules. In this case, the Respondent sought and obtained an order for provisional measures of protection from referee. The Applicant moved the court to annul the order arguing that it was capable of being annulled as it amounted to an award with the meaning of the law. The Court of Appeal before looking at the legal nature of the order analysed the nature of the referee and concluded that the referee was not an arbitrator and could not render awards capable of being set aside. The court reasoned that in proceeding to analyze the nature of the decision without

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\(^{429}\) Supra note 14, p 757.

\(^{430}\) Ibid, p 757.

\(^{431}\) The French New Code of civil Procedure Article 1468.


\(^{433}\) Supra note 14, p 763.

considering the nature and mandate of the referee would be to assume that referee is in fact mandated to make orders or award capable of enforcement under arbitration laws.\textsuperscript{435} Applying the decision of the court to the emergency arbitration, the emergency arbitrator may not make decision capable of enforcement under French law due to uncertainty of his/her status.\textsuperscript{436} The decision is only binding upon the parties on contractual basis and non-compliance is considered as breaches of the contract between the parties as opposed to contempt.\textsuperscript{437} The decision of the emergency arbitrator does not meet the requirements under the French law for it to be characterized as an award capable of enforcement under the arbitration laws.\textsuperscript{438} Under French law, an award is a decision of the arbitral tribunal that finally resolves the dispute between the parties on the merit or terminates arbitral proceedings.\textsuperscript{439} Under this definition, an award must therefore be final, rendered by arbitrator or arbitrators, settle the issue between the parties either in whole in part, and must be capable of bringing to end arbitral proceedings.\textsuperscript{440} Emergency decision is incapable of resolving disputes or terminating arbitral proceedings and it is usually provisional in nature\textsuperscript{441} hence not enforceable under the French law.\textsuperscript{442} This approach on the finality of awards is adopted in Kenyan judicial jurisprudence as discussed in detail in chapter two above.

From the definition of award under the French law and the above analysis, emergency arbitration relief do not have judicial enforcement mechanisms under the French law and it is


\textsuperscript{436} Supra note 14, p 764.

\textsuperscript{437} Ibid, p 763.

\textsuperscript{438} Ibid, p 769.


\textsuperscript{440} Supra note 137, p 292.

\textsuperscript{441} Ibid.

\textsuperscript{442} Supra note 14, p 771.
left to the parties to voluntarily comply.\textsuperscript{443} Judicial intervention for enforcement of the emergency arbitration relief is yet to be innovated under French law.

Even though France is a non-Model Law country, the approach it takes with regard to interim orders and the arbitral awards is substantially the same as that adopted by Kenya. Both in France and Kenya, the emergency arbitrator is not an arbitral tribunal within the meaning of the Act. In both countries, the orders granted by the emergency arbitrator cannot properly be considered as arbitral awards capable of being enforced under the New York Convention. Accordingly, recognition and enforcement of decision of the emergency arbitrator may be refused in Kenya like in France due to the similarity of the grounds enumerated above.

\textbf{3.9. The English Approach}

This part discusses the enforceability of emergency arbitration relief in England. England is non Model Law country\textsuperscript{444} and it is a home to major international arbitral institutions including Chartered Institute of Arbitrators and London Court of International Arbitration. The concept of emergency arbitration in its current legal structure emanated from a Model Law country and it is of interest to analyze its status and enforceability in a country that is not a party to Model law. Furthermore, in Kenya, where the statute does not provide for a remedy, the fall back plan is usually common law, most of which is English.\textsuperscript{445} The Kenyan legal system was heavily borrowed from England and sometimes we apply the English law in Kenya.\textsuperscript{446} It is for these reasons that this research deems it necessary to consider jurisprudence on the topic from England.

England is a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 and therefore the Convention applies to the enforcement of foreign arbitral awards in England.\textsuperscript{447} The enforcement mechanism of arbitral awards is also available under the Arbitration Act, 1996.\textsuperscript{448} Where the New York Convention does not apply by reason of the seat of arbitration was in a country which is not a signatory, the award may

\textsuperscript{443} Supra note 14, p 778.
\textsuperscript{445} The Judicature Act section 3.
\textsuperscript{446} See sources of law under the Judicature Act Cap 8 Laws of Kenya section 3.
still be enforced through the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927, the Foreign Judgment (Reciprocal Enforcement) Ordinance Cap 319, and the common law principles.

The Arbitration Act does not have any provision for emergency arbitration like in Kenya which heavily borrowed provisions from it as the concept is largely institutional rather than legislative in England. The court has power to grant interim measures before establishment of the arbitral tribunal where the applicant demonstrates the urgency of the matter. This is also the position in Kenya and the courts have adopted principles upon which to grant such orders.

In *Gerald Metals SA v. Timis & Others*, the English court boldly indicated its willingness to support use of the emergency arbitration by parties to the arbitration agreement. In the case, the court held that it does not have power under section 44 of the Arbitration Act where there is time for a party to obtain urgency relief from either the expedited tribunal or the emergency arbitrator. Thus the jurisdiction of the court under the Act is limited to interim measures which cannot be obtained from the expedited tribunal or emergency arbitrator, hence emergency arbitration is exclusive. The case is important as it tries to locate the

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450 Ibid section 66.
454 See the case of *Safaricom Limited v Oceanview Beach Hotel Limited & 2 Others* (2010) eKLR discussed in chapter one and two above.
availability and application of the emergency arbitration provisions in the Arbitration Act.\footnote{458} This is not the same thing as enforcement of the decision of the emergency arbitrator.

The English courts are readily available for enforcement of the interim measures granted by the arbitral tribunal in order to promote access to justice through arbitration.\footnote{459} However, the arbitration law does not expressly provide for enforcement of the emergency arbitration. It is therefore left to the court to determine whether the emergency arbitration relief in whatever form is enforceable.\footnote{460} It is appreciated that the Arbitration Act provides for the power of the court to require any party to comply with any order of the arbitral tribunal.\footnote{461} This provision is not in the Kenyan Act but generally courts support arbitration.\footnote{462}

There is no reported case law from England for enforceability of the emergency arbitration relief and it is not possible to give a conclusive approach adopted by England on the status and enforceability of the emergency arbitration relief. However, given the pro – emergency arbitration approach adopted in the case of \textit{Gerald Metals SA v. Timis & Others},\footnote{463} it may be concluded that the English law will treat the emergency arbitration relief in the same way it treats other interim measures from arbitral tribunal or court. This conclusion is not a reflection of the English law as the courts are yet to pronounce themselves on the subject.

In Kenya however, the courts have jurisdiction even where an arbitral tribunal has been established to grant interim measures of protection. There is no similar provision to section 44 of the English Arbitration Act. The only condition is that where arbitral tribunal has ruled on an issue before the court, that decision shall be taken as conclusive between the parties and the High Court cannot substitute that ruling by its decision.\footnote{464}

3.10. Conclusion

This chapter has considered the jurisprudence on the status and enforceability of emergency arbitration from selected jurisdictions. The main research question sought to be answered by this chapter is what is the status and enforcement mechanisms of emergency arbitration relief


\footnote{459} Supra note 177, p 35.

\footnote{460} Supra note 36, p 19. See also supra note 135, p 287.

\footnote{461} The Arbitration Act, 1996 section 42 accessible online at: \url{http://www.legislation.gov.uk/ukpga/1996/23/data.pdf}. The Arbitration Act does not define arbitral tribunal and it not possible to determine whether emergency arbitrator is an arbitral tribunal within the use of the Act.

\footnote{462} Supra note 260, pp 160 – 164.

\footnote{463} \textit{Gerald Metals SA v. Timis & Others} [2016] EWHC 2327 (Ch).

\footnote{464} See the Arbitration Act section 7(2).
in other jurisdictions? The paper proceeded on hypothesis that there is no unanimity on the status and enforceability of emergency arbitration relief across various jurisdictions and as such, there is no uniform legal methodology for enforcement of emergency arbitration relief. The objective of the chapter was to find out whether there is uniform mechanism for enforcement of emergency arbitration relief.

From the discussion, it clear that each country has its own approach to the status, recognition and enforceability of emergency arbitration relief. It is the national law of each country that determines what to be recognised and enforced under emergency arbitration. There is no unanimity on the status and the enforcement mechanism to the emergency arbitration relief. What is not uncommon, however, is that emergency arbitration is gaining prevalence through institutional rules and some national legislation.

The next chapter of this research tabulates the findings of the research and makes overall conclusion of the status and enforceability of emergency arbitration relief in Kenya and also as seen from other countries which this chapter has discussed. It also makes recommendations that may be considered to secure enforceability of the emergency arbitration relief in Kenya.
CHAPTER FOUR

4. FINDINGS, CONCLUSION AND RECOMMENDATIONS

4.1. Introduction

The previous chapter dealt with analysis of the status and enforceability of emergency arbitration relief in other jurisdictions. It analysed jurisprudence from the United States of America, Singapore, India, China, Hong Kong, France, England and Mauritius and the approach taken by each country.

This chapter deals with overall conclusion of the research having tested the hypothesis and considered each of the research questions within the context of statement of problem. The section also deals with the recommendations the paper puts forward to its readers in an attempt to provide solution to the problem identified in the statement of problem.

This chapter is, therefore, dedicated to the question as to what are the findings and the overall conclusion on the status and enforceability of emergency arbitration relief in Kenya. What are the recommendations that may be proposed to enhance utility and enforceability of the emergency arbitration in Kenya?

4.2. Findings and Conclusion

This section provides for the findings and the overall conclusion on the research topic, the status and enforceability of emergency arbitration in Kenya. The overall hypothesis upon which this research was premised was that emergency arbitration relief is alien in Kenya whose status is not known and not enforceable in Kenya.465

The overall conclusion that commends itself from the discussion above is that the status of emergency arbitration in Kenya is uncertain. The nature and form of emergency arbitration relief is not provided for in the arbitration laws. Emergency arbitration relief is not an arbitral award within the meaning of the New York Convention. The emergency arbitration relief is not similar to the interim measures of protection granted by properly established arbitral tribunal.

Accordingly, the emergency arbitration relief is not enforceable in Kenya due to uncertainty that surrounds its legal status and the findings above. The concept of emergency arbitration and the resultant relief is largely arbitration institutional innovations rather than conventional

465See Part 1.5 of this paper above.
amendment, national legislative fiat or judicial craftsmanship of interpretation of the law. This fact has contributed to the uncertainty surrounding the status and enforceability of the emergency arbitration relief not only in Kenya but also in other countries which have not taken bold legislative amendments.

There is no definition of emergency arbitrator or emergency arbitration relief either in national legislation or major arbitration institutional rules which have introduced the concept in Kenyan arbitration atmosphere. Definition of arbitral tribunal in the Arbitration Act does not include emergency arbitrator. The meaning of arbitral tribunal as employed by the Arbitration Act and the Model Law means the arbitral tribunal that will conclusively determine the substance of the dispute. This lack of definition is a progenitor of the uncertainty on the nature and status of emergency arbitration relief in Kenya.

It is also clear from the analysis in chapter two that there is no unanimity on the form of the emergency arbitration relief, whether it should be called an order or award for the purpose of determining its enforceability in Kenya.

Emergency arbitration decisions do not have the dignity of being awards within the arbitration community as they are mere orders of temporary nature falling outside the purview of the New York Convention. Such decisions cannot be sought to be enforced under the New York Convention in Kenya. The New York Convention insists on the finality of the award yet the emergency arbitration relief does not meet the finality requirement set out in Article V(1)(e) of the Convention. The finality of the award is a determinative character of the application of the New York Convention to secure enforcement of awards

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466 Supra note 16, p 216.
467 The Arbitration Act, section 3(1). It defines arbitral tribunal to mean a sole arbitrator or a panel or arbitrators.
468 Supra note 240.
469 Supra note 9, p 9 and 24.
470 Supra note 243, p 85. Karl in his article Karl Falk, Emergency Arbitration: An Examination of the Stockholm Chamber of Commerce Solution, (2010) p 25. Accessed online on November 23, 2016 at: https://gupea.ub.gu.se/bitstream/2077/24306/1/gupea_2077_24306_1.pdf, argues that the authority of the emergency arbitrator or the arbitral tribunal in issuing emergency decisions or interim measures respectively is to preserve the final awards from being rendered meaningless at the conclusion of arbitral proceedings. The emergency arbitration relief is temporary in nature which may be varied by the properly constituted arbitral tribunal or set aside or disregarded wholly.
under it.\textsuperscript{471} This essential feature of the New York Convention is also emulated in the Arbitration Act.\textsuperscript{472}

However, the nomenclature of the form of the decision of emergency arbitration relief will not be a panacea to lack of enforceability of emergency arbitration in Kenya, especially in light of the Constitution.\textsuperscript{473} The court will be inclined to look at the substance of the decision to determine its enforceability. It is the Arbitration Act that determines whether the emergency arbitration relief can take the proper form of award to be enforced under the New York Convention.\textsuperscript{474} As already discussed, emergency arbitration relief in its form or substance does not have any favour of enforcement under the Arbitration Act, the New York Convention or any other law in Kenya.

Further, the emergency arbitration relief cannot be equated to the interim measures of protection ordered by the arbitral tribunal. This comparison is not possible due to the fact that the Model Law and the Arbitration Act considers the arbitral tribunal as one that will determine the merits of the claim with finality.\textsuperscript{475} The emergency arbitrator does not deal with the merits of the claim but deals with only procedural issues.\textsuperscript{476} Even if emergency arbitration relief was to be considered as the interim measures of protection issued by the arbitral tribunal, it will not automatically receive recognition and enforcement because the ordinary interim measures of protection often face problems of enforcement as they too do not satisfy the demands and requirements of finality under the New York Convention.\textsuperscript{477}

Jurisprudence from different jurisdictions indicates that status accorded to the emergency arbitrator and mechanism adopted for the enforcement of the emergency arbitration relief is determined by the national legislation or interpretation of the existing law by national court. The approach is not uniform across the board. Some countries like the United States of America have adopted indirect enforcement by analogizing emergency arbitration relief to awards finally disposing of the issue it covers. Through this analogy, they find enforcement under the New York Convention. Some jurisdictions like Singapore and Hong Kong have

\textsuperscript{471} Supra note 36, p 18.
\textsuperscript{472} The Arbitration Act, section 37(1)(vi). It provides that recognition and enforcement of an award regardless of the state in which it was made may be refused if the award has not yet become binding on the parties. An award is not yet binding upon the parties if it not final as regards the issue in dispute it is addressed to.
\textsuperscript{473} The Constitution of Kenya, 2010 Article 159 (2) enjoins the courts to look at the substance over form.
\textsuperscript{474} Supra note 293, p 540.
\textsuperscript{475} Supra note 240.
\textsuperscript{476} Supra note 193.
\textsuperscript{477} Supra note 9, pp 9 and 24.
taken legislative route and amended the law to recognize and enforce the emergency arbitration relief. Thus enforceability of emergency arbitration relief varies from jurisdiction to another.  

Due to the global patchwork trend on enforcement of emergency arbitration relief as discussed, the silence of both the New York Convention and the UNCITRAL Model Law, enforcement of decision of the emergency arbitrator remains to be addressed by the national legislation, the Arbitration Act, to set out what Kenya will recognise as an award and to enforce it under the New York Convention. The concept of emergency arbitration is unknown to the Arbitration Act. Kenya is yet to address this issue either through legislative recognition or judicial interpretation.

As it stands now, emergency arbitration relief is not enforceable in Kenya as there are no mechanisms for such enforcement. Given lack of case law on the subject, it is uncertain whether emergency arbitration relief is recognised and enforceable in Kenya. The only available option for emergency arbitration relief is voluntary compliance by the parties based on contractual underpinnings of the arbitration agreement. This is not guaranteed because disputes between the parties often arise due to lack of voluntary performance of the terms of contract.

Accordingly, emergency arbitration in its present rigour and structure has little or nothing to offer in Kenya. For domestic arbitration, emergency arbitration has nothing to offer and consequently, has no utility at all. Recourse to national court for interim measures of protection before the establishment of the arbitral tribunal remains the best option for the parties to arbitral proceedings. It is more so in situations where interim measures of protection are required without notice to the other party and in situations where such measures are to be enforced against third parties who are not parties to arbitration agreement. Emergency arbitration may result to multiplicity of the proceedings as the successful party of the emergency arbitration relief will still approach national court to have the orders recognized and given enforcement status.

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478 Supra note 258, p 2.
479 Supra note 322, p 17.
480 Supra note 226, p 64.
481 Supra note 16, p 237.
482 Ibid.
It is clear that enactment of the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 and the CIArb Arbitration Rules, 2015 with inclusion of the provisions of the emergency arbitration in Kenya was intended to portray to the international arbitration community that these rules are current with the changing arbitration environment and to appear to be at par with growing arbitration law. It was not a solution to any existing or potential problem in the system of the interim measures of protection before the establishment of the arbitral tribunal. It is an idea whose time is yet to come.

4.3. Recommendations

This section deals with proposals that may be considered to address the uncertainty on the status and enforceability of the emergency arbitration relief in Kenya. Kenya requires proposals that are best suited to its circumstances owing to its legislative ingenuity and the conventions that provide for setting aside an award of refusing to recognise an award based on lack of opportunity to prepare own case and tenets of fair hearing. Therefore, proposal that emergency arbitration relief should be considered as awards for the purpose of enforcement may not be helpful either.

Given the rising tide on the inclusion of the emergency arbitration provisions in institutional rules and its subsequent application, emergency arbitration seems to be here to stay. The sooner we formulate mechanisms and approach to its effective use and enforceability of the emergency arbitration relief the best for Kenya and the entire international arbitration community.

The starting point may be to the international arbitration community in an attempt to provide a uniform system relating to the status and enforceability of emergency arbitration relief. This paper makes a case for an international convention for recognition and enforcement of interim measures of protection from the emergency arbitrator. This can be done through either amendment to the New York Convention to include system of emergency arbitration

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483 The constitutional underpinning of the concept of fair fearing is very key especially if viewed from the human rights perspective. Article 50 of the Constitution enunciates this right to fair hearing which, pursuant to Article 25(d), cannot be limited in whatever manner. Emergency arbitration, in order to be effective and achieve its purpose, may require to be undertaken ex parte especially where orders sought are in the nature of Anton Pillar orders. Ex parte emergency arbitration relief may be caught by the right to fair hearing and fail to be enforced against a party who pleads lack of hearing on its part. This constitutional levitation of the right to fair hearing plays critical role in formulation of some of the recommendations that may be considered to enhance the effectiveness of the system of emergency arbitration and achieve its enforcement mechanism in Kenya.

484 Supra note 177, p 34.

485 Supra note 16, p 217.
relief or promulgation of a separate instrument. Necessary amendments may also be made to
the UNCITRAL Model Law on International Commercial Arbitration to recognise and
provide enforcement mechanism to emergency arbitration for the countries that have adopted
it.

It is discussed in chapter two of this paper that status accorded to the emergency arbitrator
and mechanism adopted for the enforcement of the emergency arbitration relief is determined
by the national legislation or interpretation of the existing law by national court. This paper
therefore recommends for legislative amendment to the Arbitration Act to make provisions
for emergency arbitration and the enforcement mechanism for the emergency arbitration
relief. Emergency arbitration relief under the proposed amendments should be regarded as sui
generis in nature and not equated to awards to interim measures of protection by arbitral
tribunal. Sui generis mechanism for enforcement should be crafted. In doing this, the
provisions for setting aside an award or refusing to recognize an award shall not apply to the
emergency arbitration relief. This, however, may properly be achieved without contradiction
of law after amending the New York Convention which Kenya applies so dearly in the
recognition and enforcement of foreign arbitral awards.

In order to achieve desirable legislative amendment that will enhance effectiveness of
emergency arbitration and its relief, this paper proposes that the Office of the Attorney
General in consultation with arbitration institutions in Kenya and other stakeholders review
the Arbitration Act with the purposes of providing clear enforcement mechanisms for
emergency arbitration relief. This paper proposes an approach close to that provided for
enforcement of interim measures of protection under Article 17H of the UNCITRAL Model
Law. Benchmarking may also be made to Singapore, Rwanda and Hong Kong which have
legislative mechanisms for enforcement of emergency arbitration relief.

To further overcome challenges to the enforcement of emergency arbitration relief on the
grounds of lack of fair hearing, the proposed legislative amendments should not permit the ex
parte emergency arbitration relief. No emergency arbitrator should be permitted to make ex
parte orders of interim measures of protection.

These proposed legislative amendments may have budgetary implications resulting from
benchmarking and the need for public participation. The Office of the Attorney General in
collaboration with the national government should ensure availability of the necessary
resources.
These proposals are intended to enhance the effectiveness of the emergency arbitration provisions and secure the enforcement of the emergency arbitration relief. It is hope that the proposals will clarify the status of the emergency arbitration and secure the enforcement of the emergency arbitration relief in order to make Kenya a competitive hub for international commercial arbitration.

This paper further proposes that upon providing a clear framework in the laws for enforcement of the emergency arbitration relief, a clear review should be made to ensure that enforcement is easier and direct by the users of emergency arbitration provisions. To this end, there is need to consider how emergency arbitration relief, which may be obtained ex parte due to urgency of the matter, interacts with the constitutional right to fair hearing which cannot be limited. The paper also proposes, as another research area, whether the emergency arbitration relief granted under a regime that has enforcement mechanism can be enforced in Kenya under the current arbitration laws. There is further need to determine whether emergency arbitration provisions are effective for domestic arbitrations.

This paper sought to answer three research questions to wit: what is the status and enforceability of emergency arbitration relief in Kenya? What is the status and enforceability of emergency arbitration relief in other jurisdictions? What are the findings, conclusion and recommendations that can be made? In answering these questions, this paper intended to achieve three objectives: to understand the nature, status and enforceability of emergency arbitration relief in Kenya; to find out the status and enforceability of emergency arbitration relief in other countries; and to make findings, conclusion and recommendations to cure the current problem.

This paper has achieved its objectives and answered the research questions by finding that the status of emergency arbitration relief in Kenya is uncertain and it may not be easily enforced in Kenya. It further found that there is no unanimity in the international arbitration community on the status of emergency arbitration relief and each country adopts its own approach to recognition and enforcement of emergency arbitration relief. This paper has therefore proposed amendments that may be made to the laws to ensure certainty of the status of emergency arbitration relief thereby making its enforcement much easier.
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