MACAU'S APPROACH TO THE EMERGENCY ARBITRATOR

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I INTRODUCTION

Macau's new Arbitration Law (Law No 19/2019) option to include a specific regime governing the usage of an emergency arbitrator is one of its most original features. While Macau's Arbitration Law is heavily inspired by UNCITRAL's Model Law, it decided to innovate by including norms governing the appointment and jurisdiction of emergency arbitrators. This is largely unprecedented. While some arbitration laws deal with emergency arbitration to ensure the enforceability of the measures granted by emergency arbitrators,[1] further details on emergency arbitrators are typically lacking.[2] Usually, the regime applicable to emergency arbitration is found in institutional arbitration rules, with emergency arbitrators not being regarded as an alternative in ad hoc arbitration.

Despite the growing popularity of the emergency arbitrator as an option in institutional arbitrations,[3] its application in the context of ad hoc arbitrations raises a number of difficulties. Most notably, it is difficult to operate a workable emergency arbitrator system without the support of an arbitral

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1 For example, Hong Kong and Singapore's arbitration legislation empowers the local courts to enforce measures granted by emergency arbitrators. See Chiann Bao "Developing the Emergency Arbitrator Procedure: The Approach of the Hong Kong International Arbitration Center" in Diora Ziyaeva and others (eds) *Interim and Emergency Relief in International Arbitration - International Law Institute Series on International Law, Arbitration and Practice* (Juris Publishing Inc, 2015) 283.

2 Bolivia's arbitration law, as amended in 2015, represents perhaps the sole exception, offering details on the emergency arbitrator's powers and on the procedure to be followed by the emergency arbitrator. See Bolivian Conciliation and Arbitration Law No 708, arts 67-71.

3 See Monika Feigerlová "Emergency Measures of Protection in International Arbitration" (2018) 18 International and Comparative Law Review 155 at 156.

institution that undertakes the role of appointing authority and establishes a set of rules the emergency arbitrator can rely on as a framework. As speed is the fundamental element in emergency arbitration, an arbitral institution is the most straightforward option to obtain a timely appointment of an emergency arbitrator. The lack of express regulation in national laws further discourages attempts to use an emergency arbitrator outside an institutional arbitration framework.

The new Macau Arbitration Law offers an approach that allows, in theory, to circumvent these issues. It, however, does not offer a full-fledged regulation of the emergency arbitrator. As will be seen below, the lack of depth in the provisions offered raises some interpretation issues that are not easy to tackle. Against this background, this article evaluates the approach taken by the Macanese legislator. First, this article reviews the main common characteristics of the emergency arbitrator across institutional rules. Next, it presents some background on the new Macau Arbitration Law. Finally, it analyses the Macanese approach and offers a view on how such provisions can be interpreted to provide a workable emergency arbitration system in an ad hoc context and, more importantly, made compatible with existing institutional rules.

II THE EMERGENCY ARBITRATOR

An emergency arbitrator refers to a mechanism that provides urgent and immediate relief for situations where the arbitral tribunal has not yet been constituted. The earliest attempt to establish a mechanism with these characteristics dates back to the early 1990s when the ICC's Pre-Arbitral Referee Procedure was established.[4] While this earliest attempt was largely unsuccessful,[5] new approaches, starting with ICDR's 2006 "emergency arbitrator" proceedings, emerged. Importantly, ICDR's emergency arbitrator was established as an "opt-out" mechanism, ie the emergency arbitrator regime is applicable unless parties expressly agreed not to allow recourse to

4 See Kassi Tallent "Emergency Relief Pending Arbitration in the U.S. Context" in Diora Ziyaeva and others (eds) *Interim and Emergency Relief in International Arbitration - International Law Institute Series on International Law, Arbitration and Practice* (Juris Publishing Inc, 2015) 287.

5 Reportedly, the ICC Pre-Arbitral Referee Procedures only decided 14 cases in their first 24 years of existence. See Grant Hanessian and E Alexandra Dosman "Songs of Innocence and Experience: Ten Years of Emergency Arbitration" (2016) 27 The American Review of International Arbitration Journal 215 at 216.

the emergency arbitrator. This is an approach later followed by other leading arbitral institutions, allowing the emergency arbitrator to become a typical feature in international commercial arbitration.

At its core, the emergency arbitrator satisfies a simple procedural need: Until the formation of an arbitral tribunal, parties subject to an arbitration agreement are in a difficult position if they need urgent dispute resolution relief. This might comprise a broad range of needs, including avoiding dissipation of assets, destruction of evidence, disruption of a joint venture's operations, destruction of ongoing business and interference with customer relations.[6] As the formation of an arbitral tribunal can, in practice, take several weeks, parties need alternatives to avoid serious losses and to ensure the effectiveness of the final award. While, in theory, parties can rely on national courts to obtain interim relief, this gives rise to its own set of issues as not all national courts are able or willing to support arbitral proceedings.[7]

While details vary across arbitral institutions, emergency arbitration rules share the same main features. Arbitral institutions provide extremely streamlined processes, envisioning appointing the emergency arbitrator within three days.[8] While for the main arbitral proceedings, the selection of the arbitrator often involves parties participating in the selection of the panel, in an emergency arbitration, the selection of the arbitrator, due to its urgency, is made exclusively by the arbitral institution. In their appointment, arbitral institutions must guarantee that the emergency arbitrator is independent and impartial. Also, to guarantee timely relief, most arbitral institutions provide

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6 Gary Born *International Commercial Arbitration* (2nd ed, Wolters Kluwer Law & Business, 2014) 2426.

7 Also, some national laws limit the circumstances in which court-ordered provisional measures may be ordered in connection with a dispute that is subject to arbitration. For example, the English Arbitration Act establishes that an English court is granted the power to order provisional measures in aid of arbitration only in specified circumstances (for example only preservation of evidence or assets in cases of urgency); in all other circumstances, the court may grant provisional measures only with the "permission" of the tribunal or if the tribunal is unable to act. Gary Born, above n 6, at 2543.

8 See for example ICC Appendix V art 2(1): "The President shall appoint an emergency arbitrator within as short a time as possible, normally within two days from the Secretariat's receipt of the Application". See also LCIA Arbitration Rules (2014) 9(6) ("an Emergency Arbitrator shall be appointed by the LCIA Court within three days of the Registrar's receipt of the application") and SCC Arbitration Rules (2017) Appendix II 4(1) ("The Board shall seek to appoint an Emergency Arbitrator within 24 hours of receipt of the application").

tight deadlines for an emergency arbitrator to render their decisions, ranging from five to fifteen days.[9]

It should as well be noted that, in addition to their role of appointing the emergency arbitrator, some arbitral institutions play the role of gatekeeper, denying manifestly inadmissible applications.[10] This is the case of the ICC where the President of the Court of Arbitration determines, based on the information contained in the application presented by the requesting party, whether the Emergency Arbitrator Provisions apply.[11] This means in practice that the emergency arbitrator procedure will move forward only if the President of Court is satisfied that the parties established an arbitration agreement to which the emergency arbitrator rules are applicable. Other institutions, such as HKIAC, SIAC and the SCC, determine similar rules.[12]

After being constituted, the emergency arbitrator has broad powers to address a party request. While arbitration rules do not typically provide details on the powers of an emergency arbitrator, emergency arbitration's decisions have included measures: aiming to maintain the status quo and preservation of assets or property; restraining the sale of certain products allegedly in breach of contractual obligations; demanding the reinstatement or removal of individuals from board positions or employment, and enjoining the enforcement of bank guarantees.[13] In establishing their decisions, most, but not all, institutional rules determine that emergency arbitrators must hear all

9 See ICC Appendix V art 6(4): ("The Order shall be made no later than 15 days from the date on which the file was transmitted") and SCC Arbitration Rules (2017) Appendix II 8(1) ("Any emergency decision on interim measures shall be made no later than 5 days from the date the application was referred to the Emergency Arbitrator").

10 Hanessian and Dosman, above n 5, at 218.

11 See ICC Arbitration Rules (2017) Appendix V, art 1(5).

12 See SCC Arbitration Rules (2017) Appendix II, art 4(2) ("an Emergency Arbitrator shall not be appointed if the SCC manifestly lacks jurisdiction over the dispute"), HKIAC, Schedule 4, 4 ("If HKIAC determines that it should accept the Application"), SIAC, Schedule 1, 3 ("the President shall, if he determines that SIAC should accept the application for emergency interim relief, seek to appoint an Emergency Arbitrator").

13 See ICC Commission Report on Emergency Arbitrator Proceedings (2019) 29, available at <https://iccwbo.org> accessed on 23 June 2020.

parties before a decision can be taken, ie they do not allow ex parte decisions by the emergency arbitrator.[14]

As emergency arbitration proceedings have become more common, questions regarding the enforceability of emergency arbitration decisions remain.[15] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is silent on the enforceability of interim measures. Moreover, many national arbitration acts do not specifically address the issue and, when they do, most do not specifically address whether the enforceability of interim measures covers decisions made by emergency arbitrators. Therefore, while parties often voluntarily comply with emergency arbitrator decisions,[16] a lack of clarity regarding the enforceability of these decisions remains one of the limitations of the emergency arbitrator in many jurisdictions.

III MACAU'S NEW ARBITRATION LAW

Hong Kong and Singapore have been notable for being the first jurisdictions to expressly determine the enforceability of emergency arbitration decisions. As it will be explored below, Macau now goes even further by indicating a more detailed regime supervising emergency arbitration proceedings. In some ways, Macau is an unexpected place to find arbitral innovations. While sharing some similitudes with Hong Kong and Singapore, Macau did not become, as the other two Asian cities, an international arbitration hub. On the contrary, arbitration in Macau has remained largely underdeveloped. The city's arbitration institutions' dockets have registered very few cases and, therefore, the local legal community lacks, for the most part, experience with arbitration.

This has been a state of affairs the Special Region's government intends to change. It is in this context that Macau has passed its new Arbitration Law, representing a new attempt by the Macau Special Administrative Region to

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14 An exception, however, can be found in the Swiss Rules. See art 43(8) and art 26. See also Hanessian and Dosman, above n 5, at 223.

15 See more generally FG Santacroce "The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?" (2015) 31 Arbitration International 283 at 302.

16 See above n 15, at 289; A Ghaffari and E Walters "The Emergency Arbitrator: The Dawn of a New Age?" (2014) 30 Arbitration International 153 at 158.

increase the usage of arbitration and to establish the territory as an arbitration platform. Within Macau's legal community, there has long been a sense that the Special Region can play an important role as a hub linking the Chinese mainland and the Lusophone world, namely by offering dispute resolution services specifically targeted for such disputes.[17] Furthermore, the ambitious Guangdong-Hong Kong-Macau Greater Bay Area megapolis, a project which aims to further integrate the Pearl River region cities, has given rise to the belief that arbitration may become an important legal tool in the future.[18]

The new arbitration law substitutes two previous diplomas: Decree-Law 29/96/M (for domestic arbitrations) and Decree-Law 55/98/M (for international commercial arbitrations) still enacted under the Portuguese administration. While being partially outdated texts, Macau's arbitration laws were not the main cause for the lack of success of arbitration in the territory. Both texts featured heavily pro-arbitration options in line with contemporary understandings of the relationship between arbitral proceedings and national courts. The Decree-Law 55/98/M, aimed at attracting international disputes to Macau, was an almost textual translation of the 1985's UNCITRAL Model Law.[19] Still, no foreign disputes have ever arrived in the territory.

While there is an expectation that results will be different, the New Arbitration Law maintains largely the same approach. Most of its text is imported from UNCITRAL's Model Law, now incorporating the amendments adopted in 2006. Also showing its desire to be in line with international practice and its emulation of the Model Law, the Macanese text expressly establishes that the interpretation of its norms should take into consideration the UNCITRAL's Model Law and the need of promoting its uniform

17 See Fernando Dias Simões "Macau: A Seat for Sino-Lusophone Commercial Arbitration" (2012) 29 Journal of International Arbitration 375. Also, the government of Macau has made express mention to the goal of establishing Macau has a seat for disputes between Chinese and Portuguese-speaking parties. See Governo da Região Administrativa Especial de Macau, Gabinete do Chefe do Executivo, Nota Justificativa, Lei da Arbitragem (Proposta de Lei) 2, available at <https://www.al.gov.mo/> accessed 16 July 2020.

18 Arbitration features has one of the keys to "creating a globally competitive business environment" in the Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area, 46, available at <https://www.bayarea.gov.hk/> accessed 16 July 2020.

19 See Fernando Dias Simões *Commercial Arbitration Between China and the Portuguese-Speaking World* (Wolters Kluwer Law & Business, 2014) 103.

application.[20] In this sense, it is clear that the legislator intends to accelerate the convergence between Macau and international arbitral practice.[21]

Nevertheless, some differences from the UNCITRAL Model Law should still be noted. First, Macau's arbitration law, following the approach of many legislative texts in the territory, starts by indicating a set of general principles applicable to arbitration in the region. It therefore includes a description of most principles usually associated with arbitration, including parties' autonomy, the right to be heard, equality, confidentiality, informality and simplicity, celerity and efficiency, impartiality and independence and minimal state courts' intervention.[22] More importantly, the Macanese Law deals with several issues not specifically addressed in the UNCITRAL Model Law, including rules on determination of the arbitral tribunal's fees and costs, arbitrators' liability, and conciliation undertaken by the arbitral tribunal.[23]

IV MACAU'S ARBITRATION LAW EMERGENCY ARBITRATOR

The most original feature of the Macanese arbitration law relates, however, to its approach regarding the emergency arbitrator. While other jurisdictions, such as Hong Kong and Singapore, address the emergency arbitrator to clarify the enforceability of its decisions, Macau goes further in regulating these kinds of proceedings. Namely, it provides rules regarding the appointment and powers of the emergency arbitrator, as well as rules regarding the modification, suspension, termination and enforcement of emergency measures. With this goal, the Macanese Arbitration Law addresses the emergency arbitrator specifically in arts 16 to 19. It further determines the residual application of the rules on interim measures for issues not addressed in these articles (arts 36, 37 and 40 to 45).

A Appointment of the Emergency Arbitrator

The Macanese Arbitration Law starts by addressing the appointment of the emergency arbitrator. Article 16 establishes that the parties may, in the

20 See Macanese Arbitration Law, art 7(2).

21 See Gabinete do Chefe de Executive, Nota Justificativa – Lei da Arbitratgem (Proposta de Lei), 2 available at <https://www.al.gov.mo/> accessed 21 July 2020.

22 See Macanese Arbitration Law, art 5.

23 See Macanese Arbitration Law, arts 34, 35 and 55.

arbitration agreement or a subsequent agreement, agree on the possibility of recourse to emergency arbitration. The same article further determines that parties must establish the rules for its appointment and that failure to include such rules will render the agreement on the emergency arbitrator null and void. In the context of parties having opted for institutional arbitration, this article does not raise questions. By designating an arbitral institution that incorporates emergency arbitration into its rules, the parties are agreeing to an emergency arbitrator and establishing rules for its designation.

In the context of ad hoc arbitration, this rule creates more difficulties. From the working documents preceding the Macanese arbitration law, it is clear that the legislator intends to allow parties to agree on the emergency arbitrators' appointment rules.[24] In an ad hoc arbitration, parties can determine that an arbitral institution or another third party operates as an appointing authority, selecting an emergency arbitrator when requested by one of the parties. In practical terms, such an option will often be unadvisable, especially if it is unclear whether a third party would be willing and able to select an independent and impartial arbitrator in the short time frame necessary to make an emergency arbitrator operational.[25]

Further difficulties arise from the fact that the Macanese arbitration law does not establish a mechanism to challenge an emergency arbitrator if he/she fails to comply with independence and impartiality requirements. Emergency arbitrators are bound by the same obligations of independence and impartiality as an arbitral tribunal.[26] In the context of ad hoc arbitration, while parties could, in theory, agree on rules governing the challenge of an arbitrator, such level of detail in a parties' agreement is unlikely. In the lack of such detail, parties would be unable to challenge an emergency arbitrator.

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24 See Gabinete do Chefe de Executive, Nota Justificativa – Lei da Arbitratgem (Proposta de Lei) at 8 available at <https://www.al.gov.mo/> accessed 21 July 2020.

25 Some arbitral institutions offer services to act as appointing authorities. See, for example, 2018 Rules of ICC as Appointing Authority in UNCITRAL or Other Arbitration Proceedings and HKIAC's Rules as Appointing Authority (2019). These rules are, however, not designed to cover appointments of emergency arbitrators in ad hoc arbitrations.

26 See Hanessian and Dosman, above n 5, at 219; Santacroce, above n 15, at 293.

In itself, parties not establishing a process to challenge the emergency arbitrator do not seem sufficient to determine that the parties' agreement on an emergency arbitrator is null and void. In other contexts, it is possible to find rules that do not establish a system to challenge an arbitrator during the proceedings and reserve reactions of the parties to the aftermath of the arbitral decision.[27] Under the Macanese framework, in case the emergency arbitrator does not comply with independence and impartiality requirements and no rules are established in an ad hoc arbitration context, parties can either request the future arbitral tribunal to revoke the emergency arbitrator's measures or request the national court to refuse enforcement of the emergency decision.[28]

B Jurisdiction of the Emergency Arbitrator

Article 17(1) of the Macanese Arbitration Law establishes that, after being appointed, the emergency arbitrator has jurisdiction to make an urgent decision following a request by any of the parties and after hearing the opposing party. From this norm derives that the emergency arbitrator only has jurisdiction to make "urgent" decisions. This is in line with the language established in some institutional arbitration rules.[29] While the Macanese Arbitration Law does not clarify the meaning of "urgency", in international circles, there has been a tendency to understand that urgency in this context demands that the measure required cannot wait until the formation of the arbitral tribunal.[30]

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27 Most notably, the US Federal Arbitration Act does not foresee a challenge procedure. In ad hoc arbitral proceedings, lack of independence or impartiality can only be sanctioned by petitioning that the final award be vacated under s 10(a)(2) of the Act for "evident partiality or corruption in the arbitrators". Christopher Koch "Standards and Procedures for Disqualifying Arbitrators" (2003) 20 Journal of International Arbitration 325 at 339.

28 See respectively arts 18 and 45 of Macau's Arbitration Law.

29 See eg ICC Arbitration Rules (2017), art 29(1) ("A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal […]"); Swiss Rules, art 43 ("Unless the parties have agreed otherwise, a party requiring urgent interim measures pursuant to art 26 before the arbitral tribunal is constituted may submit to the Secretariat an application for emergency relief proceedings").

30 Edgardo Muñoz "How Urgent Shall an Emergency Be? – The Standards Required to Grant Urgent Relief by Emergency Arbitrators" in Marianne Roth and Michael Geistlinger (eds) *Yearbook on International Arbitration* Volume IV (Intersentia, 2015) 61; Santacroce, above n 15, at 285. See also ICC Arbitration Rules (2017), art 29(1).

Also importantly, the same article determines that the requested party must be heard before the decision by the emergency arbitrator, ie ex parte decisions are not permitted. Again, this norm has an imperative character and therefore supersedes the (few) arbitral institutional rules that allow ex parte decisions by an emergency arbitrator. In case a party considers an ex parte interim measure to be the best course of action, it will have to wait for the constitution of the arbitral tribunal, which has express powers to grant preliminary orders without notice to the other party.[31] Alternatively, the party can request the interim measure at a national court. In line with most other jurisdictions, the Macanese Civil Procedure Code allows the request of ex parte interim measures under the condition that the court is persuaded that prior notice of the requested party would seriously endanger the effectiveness of the measure requested.[32]

The jurisdiction of the emergency arbitrator is extinguished with its decision unless the arbitral tribunal is not yet constituted, in which case the emergency arbitrator maintains jurisdiction until the constitution of the arbitral tribunal. In art 17(2), the Macanese Arbitration Law establishes that the emergency arbitrator maintains its jurisdiction to decide a request made by a party even after the constitution of the arbitral tribunal if the request was initiated before that constitution. This norm has an imperative character and therefore supersedes rules from arbitral institutions that would determine the automatic extinction of the emergency arbitrator with the constitution of the arbitral tribunal.[33]

C Powers of the Emergency Arbitrator

Under Macanese Law, the emergency arbitrator, after constituted, will have the same powers as an arbitral tribunal to determine interim measures. This means that the emergency arbitrator may determine, in the same vein as the arbitral tribunal, any measures necessary to:

(i) maintain or restore the status quo pending the determination of the dispute;

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31 See Macanese Arbitration Law, arts 38 and 39.

32 See Macanese Civil Procedure Code, art 330(1).

33 See for example ICDR Rules, art 6(5); SIAC Rules, Schedule 1, art 10 and SCC Rules, Appendix II, art 1(1)

(ii) prevent a party, or refrain a party from taking action that is likely to cause imminent harm to the arbitral process itself;
(iii) preserve assets out of which a subsequent award may be satisfied; or
(iv) preserve evidence that may be relevant and material to the resolution of the dispute.[34]

The Macanese Arbitration Law, in line with the UNCITRAL Model Law, further establishes that to request an interim measure, a party shall satisfy the arbitral tribunal that two conditions are met. First, the party must show that harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is requested. Second, the party must show that there is a reasonable possibility that the requesting party will succeed on the merits of the claim. These norms also apply to the emergency arbitrator seated in Macau.[35] While in other jurisdictions, there is less clarity regarding the standards to be applied by emergency arbitrators, there is under Macanese Law an equivalence between the emergency arbitrator and the arbitral tribunal when deciding interim measures.[36]

D Modification, Suspension, Termination and Expiration of the Emergency Measure

Also, in regards to the modification, suspension and termination of the measures decided by an emergency arbitrator, the Macanese Arbitration Law applies a similar rule to the one applicable to interim measures decided by an arbitral tribunal.[37] In this sense, the emergency measure may be modified, suspended or terminated upon application of any party or, in exceptional circumstances and upon prior notice to the parties, by the arbitral tribunal or the emergency arbitrator's initiative. The decision to modify, suspend and terminate the emergency will belong to the emergency arbitrator until the

34 See Macanese Arbitration Law, art 36(2) applicable through art 20.

35 See Macanese Arbitration Law, art 37 applicable through art 20.

36 Making an argument that with respect to the likelihood that the applicant will succeed on the merits of its case, the standard may be lower in an application in front of an emergency arbitrator than in an application in front of an arbitral tribunal; See Muñoz, above n 30, at 60.

37 Compare Macanese Arbitration Law, arts 18 and 40.

arbitral tribunal is constituted. After its constitution, it will be upon the arbitral tribunal to review the decision made by the emergency arbitrator and modify, suspend or terminate the measure if appropriate.

Importantly, the Macanese Arbitration Law establishes that the emergency measure automatically expires if the requesting party does not initiate the proceedings towards the constitution of the arbitral tribunal within 30 days. These 30 days are counted from the date that the granting of the measure is communicated to the requesting party. While the Macanese Arbitration Law does not define what should be understood as "the initiation of the proceedings towards the constitution of the arbitral tribunal", it is clear that the simple fact that the arbitral tribunal is not constituted within 30 days does not entail expiration of the emergency measure. Rather, it seems sufficient for the requesting party to file a request for arbitration at the competent arbitral institution or serve the other party notice requiring them to appoint an arbitrator in the context of ad hoc arbitration.

A more complex question relates to how to articulate the expiration deadline prescribed in the Macanese Arbitration Law with different expiration dates established in arbitration institutional rules. The deadline established in the Macanese Arbitration Law has a mandatory nature. It, therefore, supersedes different expiration dates established in institutional arbitration rules. Some arbitral institutions do not, however, establish expiration dates of measures but rather establish the extinction of the emergency arbitration proceedings in case a request for arbitration is not filed within a certain time frame.[38] Since the expiration of the measure and the extinction of proceedings have a different nature, these rules are not superseded by the Macanese provision.

E Enforcement of Emergency Measures

The Macanese Arbitration Law adds Macau to the list of jurisdictions that determine the enforceability of emergency measures expressly. The Macanese Arbitration Law establishes the same rules for the enforcement of

38 ICC for example establishes that "The President shall terminate the emergency arbitrator proceedings if a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days of the Secretariat's receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary" and not an expiration date. See ICC Arbitration Rules (2017), Appendix V, art 1(6).

emergency measures and the interim measures determined by an arbitral tribunal.[39] These, in turn, are essentially the same provisions established in the UNCITRAL Model regarding the enforcement of interim measures.[40] The Macanese Arbitration Law, therefore, determines that an interim measure and, consequently, an emergency measure can be enforced upon application in the competent court (ie Tribunal Judicial de Base), irrespective of the country where the measure was issued.

Also, in line with the UNCITRAL Model Law, the Macanese Arbitration Law establishes a limited set of grounds that allow the court not to enforce an interim measure and, consequently, an emergency measure.[41] The Court of First Instance will refuse enforcement of an interim measure or emergency measure if the court finds that: i) refusal is warranted based on one of the grounds established in art 72(1) (which corresponds to Article V(1) of the New York Convention); ii) the security established by the emergency arbitrator was not complied with; iii) the measure was suspended, terminated or expired; iv) the measure is incompatible with the powers conferred upon the court; v) the subject-matter of the dispute is not capable of settlement by arbitration under Macanese Law, or vi) the enforcement of the measure would be contrary to public policy.

V CONCLUSION

Emergency arbitration was at one point an exciting procedural innovation within commercial arbitration. It is now a well-established procedure found in all major arbitral institutions, being increasingly used by parties. The transformation has been so quick that most legislations still do not address emergency arbitrators. Macau's decision to clarify in its legislation that emergency measures can be enforced in a court of law, something already established in the Hong Kong and Singapore arbitration acts, is a sensible step. Doubts regarding the enforceability of such measures is a needless point of uncertainty that users of commercial arbitration will benefit from seeing clarified in more jurisdictions.

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39 See Macanese Arbitration Law, arts 20, 44 and 45.

40 Compare UNCITRAL Model Law (With amendments as adopted in 2006), arts 17 H and 17 I and Macanese Arbitration Law, arts 44 and 45.

41 See Macanese Arbitration Law, art 45.

The usefulness of Macanese Arbitration Law's remaining approach to the emergency arbitrator is less clear. The Macanese legislator opens the door, in art 15, for parties to establish emergency arbitral proceedings in ad hoc proceedings. It, however, does not take the step to fully regulate how such proceedings would take place. Parties will, therefore, have to not only "opt-in" by expressly agreeing on the applicability of the emergency arbitrator to their ad hoc proceedings but will also have to define key aspects of how the proceedings will take place. Namely, they will have to agree on a procedure to select the emergency arbitrator. The lack of success of "opt-in" emergency arbitration systems allows anticipating that this option will likely not be widely used.

In regards to emergency arbitration within institutional proceedings, the Macanese Arbitration Law also establishes norms that might be, in some circumstances, difficult to reconcile with institutional rules. In particular, the norm that determines that the emergency arbitrator maintains jurisdiction even if in the meantime the arbitral tribunal is constituted might clash with the rules of those institutions that determine that "the emergency arbitrator shall have no further power to act after the arbitral tribunal is constituted".[42] Further, the norm that determines that emergency measures expire if the requesting party does not start the proceedings towards the constitution of the arbitral tribunal within 30 days should be borne in mind by those conducting arbitral proceedings in Macau as it is an unusual but relevant provision.

42 See for example ICDR Rules, art 6(5).