DISPUTE RESOLUTION INTERNATIONAL

The Journal of the Dispute Resolution Section of
the International Bar Association

Dispute Resolution International

Vol 13 No 1 pp 1–102 **May 2019**

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Pushing the Envelope: Emergency Arbitration Ex Parte

Douglas D Reichert*

This article is about principles, practices and pitfalls in respect to *preliminary* interim measures, that is, temporary decisions in the nature of ex parte preliminary orders taken before hearing the affected party (and sometimes without notice). In other words, these temporary decisions are a special type of interim measure that is front-loaded within the beginning portion of a regular process for assessing requests for interim measures.

Preliminary interim measures are not commonly encountered in international arbitration. Some have asserted, as a matter of policy, that the arbitration space is no place for ex parte procedures.[1] Others have observed, as a practical matter, that some expensive arbitration proceedings could be pointless without them, or, as a legal matter and all things considered, that well-known features of national civil procedure codes are just as relevant to international arbitration procedures as they are to litigation before national

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1 See, eg, Hans van Houtte, 'Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration' (2004) 20 Arbitration International 85 (discussing also the 11 October 2002 Declaration of the Club of Arbitrators of Milan); Yves Derains, 'The View Against Arbitral Ex Parte Interim Relief' (2003) 58 *Dispute Resolution Journal* 61; and Yves Derains, 'L'arbitre et l'octroi de mesures provisoires ex parte' (2003) Gazette du Palais, Cahiers de l'arbitrage, No 2003/2, 1st part 14.

courts.[2] Quarrel or not, ex parte preliminary orders do exist.[3] And as reviewed in the third part of this article, the past year flushed out a few new specimens, of sorts. These examples include emergency orders issued in relation to: (1) a United States domestic dispute between President Donald J Trump and Stephanie Clifford (aka 'Stormy Daniels'); (2) an investment treaty arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Rules (1976) administered by the Permanent Court of Arbitration (*Igor Boyko v Ukraine*); and (3) a treaty dispute before the International Court of Justice (ICJ) between the Islamic Republic of Iran and the US over economic sanctions.

The second part of this article discusses basic principles and relationships between emergency arbitration, interim measures and ex parte procedures.

But to set the scene with the first part of this article, the popularised expression 'pushing the envelope'[4] supplies a suitable metaphor for the topic of emergency arbitration ex parte.[5] This imagery can be understood either positively or negatively, depending on attitude or point of view: 'pushing the envelope' can be viewed positively as 'attempting to extend the current limits of performance' or else it can be viewed negatively as 'going beyond commonly accepted boundaries'.

Pushing the envelope

The 'envelope' part is said to come from mathematics,[6] but the more relevant source for the popular idiom comes from early aeronautics.[7] Carried into

2 See, eg, James E Castello 'Arbitral Ex Parte Interim Relief – A View In Favour' (2003) 58 Dispute Resolution Journal 60; and Gabrielle Kaufmann-Kohler, 'Mesures ex parte et injonctions préliminaires' (2007) Les Mesures Provisoires dans l'Arbitrage Commercial International: Evolutions et Innovations, Litec 91.

3 Eg, the Swiss Chambers report that ex parte requests were made in over 40 per cent of the applications for emergency relief during the first four years of experience with emergency relief under the Swiss Rules: '*Ex parte* measures were requested in three [of seven] cases… The request was denied in two cases and partially granted in one case. In the one case where *ex parte* measures were granted, the Emergency Arbitrator issued a Preliminary Order, which it subsequently confirmed in an Interim Award…' See 'Emergency Relief under the Swiss Rules (Art. 43): An overview after 4 years of practice' www.swissarbitration.org/files/620/untitled%20folder/Emergency%20Proceedings%20under%20the%20Swiss%20Rules%20(2017).pdf accessed 4 March 2019.

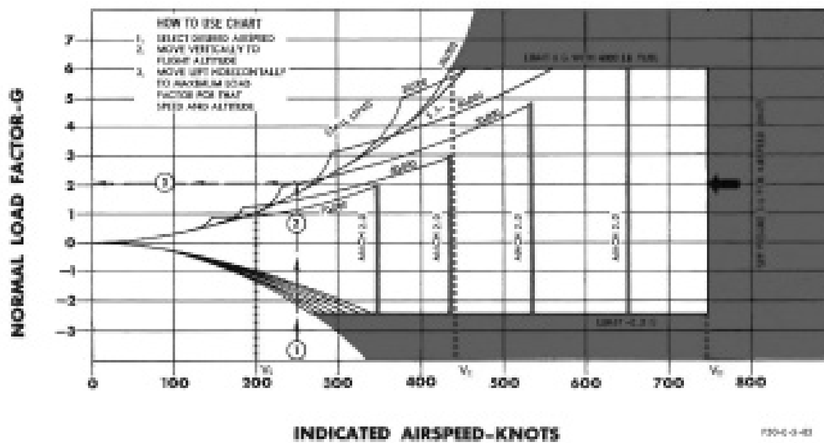
4 'To push the boundaries of what is possible', *Collins English Dictionary* (13th edn, HarperCollins 2018).

5 '…if you get outside the envelope, you're in trouble', Tom Wolfe as quoted in William Safire 'ON LANGUAGE; Pushing the Envelope' *The New York Times* (New York, 15 May 1988).

6 Envelope: 'a curve or surface that is tangential to every curve or surface in a family', *The Concise Oxford Dictionary of Mathematics* (4th edn, Oxford University Press 2009).

7 As an aeronautical term, 'envelope' refers to 'the gas or air container of a balloon or airship', *Oxford English Dictionary Supplement*, citing usage in the August 1901 edition of Scientific American.

the field of mechanical aeronautics during the 1940s, 'the flight envelope'[8] became technical jargon for the flight performance parameters of a given aircraft in terms of critical factors, such as thrust, load, speed and altitude. For the fun of a graphic, the flight envelope (n-v diagram) for the F-104A Starfighter looks like this:



The point of graphing the flight envelope is that pilots need to be mindful that the flying part ends if the aircraft ventures outside its performance parameters. That's when the gravitational force takes over, plain and simple. Think already of the fate of Icarus for not heeding altitude parameters for strap-on pinions assembled from feathers and wax.[9]

In modern times, designers of experimental military aircraft greatly expanded the physical limits for mechanical flight with winged rockets capable of flying much faster and much higher than the propeller-powered Zeros, Spitfires, Hellcats, MiGs and Messerschmitts of the Second World War. And the exuberant spirit that felled Icarus juiced the bravura of test pilots tasked, often fatally, with proving drawing board

8 W Tye, '*Factors of Safety – Or of Habit?*' (1944) The Journal of the Royal Aeronautical Society 48(407) 487–494 at 488 ('The "flight envelope" covers all probable conditions of symmetrical manoeuvring flight').

9 According to ancient Greek heroic tales, Daedalus admonished his son to fly neither too low nor too high, lest the sea's dampness clog the feathers or the sun's heat melt the wax… (see, eg, Publius Ovidius Naso (Ovid), Metamorphoses, (circa 8 CE) Book VIII, Lines 203–205 ('… *Instruit et natum: medio que ut limite curras, Icare, ait moneo. Ne, si demissior ibis, unda gravet pennas; si celsior, ignis adurat. Inter utrumque vola…*' – … My son, I caution you to keep the middle way, for if your pinions dip too low the waters may impede your flight; and if they soar too high the sun may scorch them. Fly midway…') (translation: Brookes More, 1922)).

design parameters while 'pushing the envelope', a character trait noted by Tom Wolfe in *The Right Stuff*.[10]

For the less exalted arbitrator tasked with piloting proceedings within the rules and bounds of a notional 'arbitration envelope', might mixing 'ex parte' with 'emergency arbitration' risk what results from 'flying too close to the sun'? If not, why not?

Emergency arbitration ex parte

There are interim measures and there are preliminary orders

At its 2017 Session in Hyderabad, the Institute of International Law – after several years of research and reflection – adopted a resolution on provisional measures. The Hyderabad Resolution affirms that '[i]t is a general principle of law that international and national courts and tribunals may grant interim relief to maintain the status quo pending determination of disputes or to preserve the ability to grant final effective relief' (paragraph 1). With particular relevance to the present topic, the Hyderabad Resolution also affirms that 'in cases of special urgency an order may be made without hearing the respondent (ex parte), but the respondent is entitled to be notified promptly and to object to the order' (paragraph 3). Perhaps the most notable element of the Hyderabad Resolution is that the distinguished Institute considered and resolved in respect to provisional measures that the law and practice of national courts are sufficiently uniform so as to give rise to a general principle of law within the meaning of Article 38(1)(c) of the Statute of the ICJ (preambular paragraphs).

The Institute's Hyderabad Resolution thus provides a succinct restatement, in general terms, of the basic parameters for ex parte preliminary orders. In so doing, the resolution confirms the touchstone of the due process rights of the affected party even when, due to special urgency, rights to an opportunity to be heard upon notice can be deferred until a second, regular process phase of proceedings on a request for interim measures.

In this, the Institute's Hyderabad Resolution is consonant with Principles 6–8 on Provisional and Protective Measures in International Litigation adopted in 1996 by the International Law Association,[11] Principles 1.4, 5.8

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10 Tom Wolfe, *The Right Stuff* (Farrar, Straus and Giroux 1979) ('One of the phrases that kept running through the conversation was "pushing the envelope". The "envelope" was a flight-test term referring to the limits of a particular aircraft's performance, how tight a turn it could make at such-and-such a speed, and so on. "Pushing the outside," probing the outer limits, of the envelope seemed to be the great challenge and satisfaction of flight test.') And thanks to the popularity of Wolfe's book and the resulting Hollywood film, the aviator phrase was launched into popular usage.

11 International Law Association, Report of the Sixty-Seventh Conference (Helsinki), p 202.

and 8.2 of the American Law Institute (ALI)/UNIDROIT Principles of Transnational Civil Procedure adopted in 2004,[12] and Articles 17B–17C of Section 2 on 'preliminary orders' added in 2006 to the UNCITRAL Model Law for Arbitration.[13] Based on the 2006 version of the UNCITRAL Model Law, the specific procedure for preliminary orders has become integrated into national arbitration laws in at least 16 jurisdictions to date.[14]

Emergency arbitration

The label 'emergency arbitration' is typically used to describe special procedures of short duration administered under the procedural rules of arbitration institutions for addressing requests for arbitral interim measures during the 'gap period' that precedes the formation of an arbitral tribunal to decide a dispute that is subject to an agreement to arbitrate. The concept effectively expands 'the envelope' of arbitration services so that a party to an arbitration agreement, faced with a situation calling for interim measures that cannot wait, is enabled to request such interim measures from an 'emergency arbitrator'. Formerly, before such 'emergency arbitration' procedures started to be integrated into institutional arbitration rules from 2006,[15] the only venue for seeking pre-arbitration provisional measures was a national court. But with the widespread adoption of 'emergency arbitration' procedures over the past decade, there is now an arbitral alternative.[16]

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12 See www.unidroit.org/instruments/transnational-civil-procedure?tmpl=component&print=1 accessed 4 March 2019.

13 See www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf accessed 4 March 2019.

14 Argentina (2018), Bahrain (2015), British Columbia (2018), the British Virgin Islands (2013), Costa Rica (2011), Fiji (2017), Hong Kong (2010), Ireland (2010), Jamaica (2017), Lithuania (2012), Malaysia (2018), the Marshall Islands (2018), Mongolia (2018), New Zealand (2007), Ontario (2017) and Rwanda (2008).

15 Art 37 of the International Centre for Dispute Resolution (ICDR) International Arbitration Rules (1 May 2006). Older procedures were developed by the International Chamber of Commerce (ICC) (1990 Rules for a Pre-Arbitral Referee Procedure) and the American Arbitration Association (AAA) (1999 Optional Rules for Emergency Measures of Protection), but these were opt-in procedures that attracted few volunteers.

16 See, eg, ICDR (since 2006), National Chambers of Commerce, Services and Tourism (Cámaras Nacionales de Comercio, Servicios y Turismo (CANACO)) (since 2008), Stockholm Chamber of Commerce (SCC) (since 2010), Singapore International Arbitration Centre (SIAC) (since 2010), Netherlands Arbitration Institute (NAI) (since 2010), ICC (since 2012), Panel of Recognised International Market Experts in Finance (PRIME) (since 2012), Swiss Chambers' Arbitration Institution (SCAI) (Swiss Rules) (since 2012), AAA (since 2013), Hong Kong International Arbitration Centre (HKIAC) (since 2013), JAMS (since 2014), Japan Commercial Arbitration Association (JCAA) (since 2014), London Court of International Arbitration (LCIA) (since 2014), World Intellectual Property Organization (WIPO) (since 2014), China International Economic Trade and Arbitration Commission (CIETAC) (since 2015), JAMS International (since 2016), Arbitrators' and Mediators' Institute of New Zealand (AMINZ) (since 2017) and Court of International Commercial Arbitration-Chamber of Commerce and Industry of Romania (CICA-CCIR) (since 2018).

An emergency arbitrator usually has the same interim measures powers that the arbitral tribunal has during the course of regular arbitration proceedings. The major difference between the two instances is that interim measures decided by an emergency arbitrator do not bind the regular arbitral tribunal that is subsequently constituted to decide the dispute (their interim effect on a party to the dispute is of course a different subject).

This equivalence between interim measures in the abbreviated context of emergency arbitration and interim measures in the context of regular arbitration proceedings is increasingly being reinforced by a trend launched by countries in Asia and Oceania to amend their national arbitration laws in order to add express mention of the emergency arbitrator alongside the regular arbitrator as part of the statutory definition of 'arbitral tribunal'.[17] The apparent purpose of this development is to preclude quarrels over the status of 'emergency arbitrators' in the context of seeking court orders to give effect to emergency arbitrator decisions.[18]

It may also be observed that urgent situations are not confined to the period that precedes the formation of an arbitral tribunal, considering that emergency situations can just as well arise during the main proceedings as well. In this sense, the present article does not limit the scope of the discussion only to 'emergency arbitration' during the period before the formation of the regular tribunal, but also considers ex parte preliminary orders for interim measures issued in the context of regular proceedings.

'Ex parte'

Claude Reymond, writing in 1989 about preliminary orders and interim measures under the Swiss international arbitration law, characterised the expression 'ex parte' as belonging to English terminology (with the implication that the expression is essentially absent from French and civil law terminology).[19] While still found in the civil procedure codes of many common law jurisdictions, the phrase 'ex parte' has started to be replaced by 'without notice' in modernised English terminology for civil procedure.[20]

17 To date, the assimilation of 'emergency arbitrator' with 'arbitrator' has been integrated into the arbitration laws of such countries as Fiji, Malaysia, New Zealand and Singapore.

18 Interesting questions will arise when judges are asked in future to rescind court orders given on the basis of emergency arbitration decisions that subsequently are countermanded by the regular arbitral tribunal formed to decide the dispute, but that will provide a topic for another day.

19 Claude Reymond re Art 183 PIL Act in P Lalive/J-F Poudret/C Reymond, Le Droit de l'arbitrage interne et international en Suisse, Lausanne, 1989, p 362. See also Andreas Bucher, Le nouvel arbitrage international en Suisse, Basel, 1988, p 75.

20 This language-driven evolution in legal terminology finds further confirmation in the adoption of 'without notice' in place of 'ex parte' in the text on 'preliminary orders' added in 2006 to Art 17 of the UNCITRAL Model Law for Arbitration.

The formulation 'without notice' carries with it the advantage of clarity, but even so a great deal of misunderstanding can flow from the narrowness of this precision. In most common law jurisdictions, an ex parte injunction[21] (or in the US a 'temporary restraining order (TRO)'[22]) describes a temporary order issued before hearing the affected party. Indeed, an ex parte preliminary order can very well follow upon an application made 'with notice' (including informal courtesy notifications). The terminology now centred on 'without notice' thus essentially fails to cover the most salient characteristic of ex parte proceedings, that is, that notice is typically given but due to exigencies of urgency a temporary decision is announced before the affected party is afforded an opportunity to be heard. In most civil law jurisdictions, notifications of procedural acts are administered directly by the court; completely opposite to the usual practice in common law jurisdictions where the task of notification is allocated to the moving party. Consequently, in civil law jurisdictions the procedural rulebook does not need to establish a distinction between situations where the matter comes before the judge 'with notice' or 'without notice'.[23] Instead, the texts focus on the judge's power in exceptional situations to proceed to take temporary measures urgently, prior to giving the affected party the required

21 In England and Wales, the Civil Procedure Rules (CPR) now use the English words 'without notice' in place of 'ex parte' following 'plain language' reforms adopted in 1998. Thus, under CPR Art 25.3 (1), '[t]he court may grant an interim remedy on an application made *without notice* if it appears to the court that there are good reasons for not giving notice' [emphasis author's own]. However, para 4.3 (3) of the CPR Practice Directions provides that 'except in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application'. In practical effect, the 'without notice' application blocks the affected party from being heard on the urgent application (although informal notice is generally provided), while a truly 'no notice' situation will be restricted to matters such as asset freezing, where taking the affected party by surprise is considered essential for avoiding unfairness.

22 It bears emphasising that in the US, based on due process rights vested in the Constitution, no court may issue an 'injunction' without providing notice and an opportunity to be heard. See, eg, FRCP Rule 65(a). However, it is nonetheless constitutionally permissible to issue a 'temporary restraining order' of very short duration prior to providing the affected party with notice and an opportunity to be heard in follow-on proceedings. See, eg, FRCP Rule 65(b).

23 An interesting exception is provided by Uruguay's new Arbitration Act (Ley 19.636) published in the *Diario Oficial* on 26 July 2018. The new legislation is based on the original version of the UNCITRAL Model Law (1985) but also incorporates some elements from the 2006 amendments. For interim measures, the new law does not provide for preliminary orders but does specify as an exception to the basic rule of notice that special urgency can justify interim measures taken without notice (Artículo 17(5): 'Toda medida cautelar se decretará previa comunicación a la contraparte, salvo que el tribunal arbitral considere que, en razón del peligro en la demora, debe resolverse sin dar aviso previo' (notice to the non-requesting party must be given before the measure is granted, unless the tribunal determines otherwise due to the harm that would be caused by the delay).

opportunity to be heard.[24] The crux of the matter thus appears to concern the temporary deferral of the respondent's right to be heard, that is, the characteristic that is shared by both civil and common law systems. It seems unfortunate that this defining characteristic is not adequately conveyed by the new 'plain English' phraseology 'without notice'.

Indeed, ex parte procedures often stipulate advance notice to the other party while nonetheless also providing for 'without notice' proceedings as an exception to the general rule.[25] Only in exceptional situations of special urgency or necessity for secrecy will the initial phase take place without notice to the other party. Moreover, the fundamental rule governing ex parte proceedings is that after an initial phase has been conducted ex parte, a second phase must follow within a very short time so that the respondent party is provided an opportunity to be heard in the course of an *inter partes* process.

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24 Eg, in France, Art 812 NCPC provides '*[Le juge] peut également ordonner sur requête toutes mesures urgentes lorsque les circonstances exigent qu'elles ne soient pas prises contradictoirement*' ('[the president of the court] may also order such urgent measures where the circumstances so demand that they must not be taken after an adversarial proceeding') and in Switzerland, Art 265 CPC (*Mesures super-provisionnelles*) provides '*1. En cas d'urgence particulière, notamment s'il y a risque d'entrave à leur exécution, le tribunal peut ordonner des mesures provisionnelles immédiatement, sans entendre la partie adverse. 2. Le tribunal cite en même temps les parties à une audience qui doit avoir lieu sans délai ou impartit à la partie adverse un délai pour se prononcer par écrit. Après avoir entendu la partie adverse, le tribunal statue sur la requête sans délai.*' ('1. In cases of special urgency, and in particular where there is a risk that the enforcement of the measure will be frustrated, the court may order the interim measure immediately and without hearing the opposing party. 2. At the same time, the court shall summon the parties to a hearing, which must take place immediately, or set a deadline for the opposing party to comment in writing. Having heard the opposing party, the court shall decide on the application immediately.').

25 See, eg, California Code of Civil Procedure section 527 (c):

'(c) No temporary restraining order shall be granted without notice to the opposing party, unless both of the following requirements are satisfied:

(1) It appears from facts shown by affidavit or by the verified complaint that great or irreparable injury will result to the applicant before the matter can be heard on notice.

(2) The applicant or the applicant's attorney certifies one of the following to the court under oath:

(A) That within a reasonable time prior to the application the applicant informed the opposing party or the opposing party's attorney at what time and where the application would be made.

(B) That the applicant in good faith attempted but was unable to inform the opposing party and the opposing party's attorney, specifying the efforts made to contact them.

(C) That for reasons specified the applicant should not be required to so inform the opposing party or the opposing party's attorney.'

Emergency arbitration ex parte

The preceding overview of interim measures and preliminary orders, emergency arbitration and the core meaning of 'ex parte' was undertaken in order to establish a foundation for the proposition that, in principle, preliminary orders can just as well be requested in the abbreviated context of emergency arbitration proceedings as they can be requested in the context of regular arbitration proceedings conducted under, for example, the UNCITRAL Rules (2010 or 1976) (which, unlike the UNCITRAL Model Law (2006), do not include any express provisions concerning preliminary orders).

Indeed, some institutional rules for arbitration expressly allow for emergency arbitration ex parte. For example, the 2017 Arbitration Rules of the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) allow a party to request appointment of an AMINZ emergency arbitrator to issue preliminary orders without notice to the other side 'where to give notice would defeat the entire purpose of the application' (AMINZ Article 50.2). These new rules permit the AMINZ emergency arbitrator to grant interim relief or preliminary orders 'without notice to the other Parties and without the requirement for an oral hearing' (AMINZ Article 52.2).[26] In a similar vein, in cases of utmost urgency the President of a panel of the Court of Arbitration for Sport (CAS)[27] is authorised to act by issuing an order without hearing the affected party, provided that the opponent is subsequently heard.[28] The Swiss Rules essentially transpose preliminary orders into the context of emergency arbitration procedures.[29] In line with the above proposition, the London Court of International Arbitration (LCIA) Rules might also be construed in a manner that allows room for preliminary orders.[30]

26 The party affected by such an ex parte order can later seek discharge of the measure before the regular arbitral tribunal. Also, the emergency order is subject to confirmation by the regular arbitral tribunal and expires automatically if not confirmed within a time limit of 60 days.

27 Or the President of a Division of the Court prior to the transfer of the file to the panel.

28 Art R37 of the Procedural Rules; Art 14 of the Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games (and likewise the ad hoc divisions established for the Asian Games, the FIFA World Cup, etc).

29 See Art 43, para 6 concerning Emergency Relief, read with Art 26, para 3 concerning Interim Measures of Protection.

30 See Art 9B.7 concerning the emergency arbitrator ('The Emergency Arbitrator may conduct the emergency proceedings in any manner determined by the Emergency Arbitrator to be appropriate in the circumstances, taking account of the nature of such emergency proceedings, the need to afford to each party, if possible, an opportunity to be consulted on the claim for emergency relief (whether or not it avails itself of such opportunity), the claim and reasons for emergency relief and the parties' further submissions (if any)').

However, most sets of procedural rules for emergency arbitration make clear that even before appointment of the emergency arbitrator the respondent party will be provided with notice of the emergency proceedings. And a further subset group within this majority category stipulates that the respondent party shall be provided with an opportunity to be heard before the emergency arbitration decision is issued. At first glance, such conditions would appear to preclude preliminary orders from the emergency arbitration procedures of these institutions. But even within this large category and its subset, it must be observed that temporary measures that could involve ex parte procedures are not expressly foreclosed. At least notionally, therefore, a request for a preliminary order pending resolution of the requested emergency relief (with or without notice but in any event without hearing the affected party in respect to the temporary measure) might be squeezed within the parameters of even the short time period for an emergency arbitration procedure that provides for both notice and an opportunity to be heard in respect to the 'final' outcome from the emergency procedure.

Three recent examples

'EC, LLC' v 'Peggy Peterson' (ADRS Case no 18-1118-JAC)

On 7 March 2018, a rather discouraging example of emergency arbitration ex parte burst into the news on the heels of a most unusual statement by the press secretary to the President of the US: '…this case has already been won in arbitration'.

The day before, Stephanie Clifford aka 'Stormy Daniels' filed a civil suit against President Trump and a Delaware company named Essential Consultants LLC in California state court seeking declaratory relief that she was not bound by a putative non-disclosure or 'hush' agreement between undisclosed persons described under the contract pseudonyms 'Peggy Peterson' and 'David Dennison'.[31] On 28 October 2016, Clifford signed the hush agreement in exchange for payment of $130,000 from a pseudonymous entity called 'EC, LLC'.[32] As plaintiff, Stephanie Clifford contends, that the so-called 'confidential settlement agreement' was not

31 Formally entitled 'Confidential Settlement Agreement and Mutual Release; Assignment of Copyright and Non-Disparagment [*sic*] Agreement'.

32 Case no BC 696568 as originally filed in California Superior Court for the County of Los Angeles; subsequently became Case no 2:18-cv-02217 following removal to the US District Court for the Central District of California.

perfected or is otherwise not enforceable.[33] The complaint also included the allegation that President Trump's private attorney Michael Cohen had surreptitiously initiated against Stephanie Clifford 'a bogus arbitration' (also characterised as 'improper and procedurally defective').[34]

Copies of the civil complaint as well as the contested 'settlement agreement' were promptly distributed via Twitter by Stephanie Clifford's lawyer, with the result that he was promptly booked on several television news programmes for the morning of 7 March 2018 to talk about his client's court case against President Trump. Hours later, the President's press secretary was consequently asked during a televised White House

33 See Complaint and First Amended Complaint, Documents 1-1 and 14 filed in Case no 2:18-cv-02217. The grounds asserted are that, principally, the agreement was never formed because President Trump: (1) did not sign the document as required by its terms; and (2) did not furnish consideration for the personal promises to Stephanie Clifford stated in the agreement, alternatively, that the agreement is unconscionable or is otherwise unenforceable on grounds of illegality and public policy.

With relevance to the illegality and public policy contentions, on 21 August 2018 Michael Cohen (signatory of the 'settlement agreement' for 'EC, LLC') entered a plea of guilty in criminal information proceedings before the US District Court in the Southern District of New York in respect of eight counts for tax evasion, bank fraud and election campaign finance violations, including one such count in violation of Title 52, US Code, Sections 30116(a)(1)(A), 30116(a)(7) and 30109(d)(1)(A), and Title 18, US Code, Section 2(b), for an excessive campaign contribution in the form of the payment of $130,000 so as to ensure that a woman did not publicise damaging allegations before the 2016 presidential election and thereby influence the outcome of that election, with Michael Cohen stating to the court under oath that he made the payment 'in coordination with and at the direction of a candidate for federal office'. In the Sentencing Memorandum filed by the US District Attorney's Office for the Southern District of New York, the US Government recorded that in making payment of $130,000 to Stephanie Clifford at the direction of the presidential candidate, '…Cohen acted with the intent to influence the 2016 presidential election' (*United States v Michael Cohen*, Case no 18-Cr-602-WHP, Document no 27). For this campaign finance violation together with the seven other counts of criminal conduct, Michael Cohen was sentenced to serve concurrent terms of three years in federal prison with three years of supervised release, plus a fine of $50,000 and forfeiture of $500,000 (*United States v Michael Cohen*, Case no 18-Cr-602-WHP, Document no 29). Michael Cohen was initially ordered to surrender to federal prison on 6 March 2019, ie, exactly one year after Stormy Daniels first asserted in court that her 'hush agreement' with President Trump is void for illegality. For post-surgery medical reasons, the surrender date was later adjourned for 60 days until 6 May 2019.

With relevance to the contract formation contention, on 7 and 8 September 2018, both defendants filed court submissions purporting to accept 'rescission' of the settlement agreement and offered covenants not to sue Stephanie Clifford. See Documents 78 and 80 filed in Case no 2:18-cv-02217. These actions were followed on 12 September 2018 by the purported 'notice of dismissal' of 'EC, LLC' of its claims in the Arbitration Rules of ADR Services Inc ('ADRS') arbitration proceedings initiated against 'Peggy Peterson' https://pbs.twimg.com/media/Dm68_AKX4AElr1r.jpg:large accessed 4 March 2019.

34 *Ibid*. In fact, the arbitration was initiated by 'EC, LLC' (a pseudonym) against 'Peggy Peterson' (a pseudonym).

press briefing whether President Trump had approved the payment made to 'Stormy Daniels' in late October 2016 (ie, shortly before election day) by his company executive and legal adviser Michael Cohen.[35] The President's press secretary responded that 'none of these allegations are true' and then made news with the added statement that 'this case has already been won in arbitration'. That same evening, *The New York Times* and all the major television news programmes (network and cable) focused on the news about the arbitration, supplementing their reporting with the website publication of a copy of the confidential 'temporary restraining order' that had been issued ex parte by an emergency arbitrator in without notice proceedings brought by 'EC, LLC' against 'Peggy Peterson'.[36]

The emergency arbitrator's so-called 'temporary restraining order'[37] recites that it is issued in accordance with Rule 24 of the Arbitration Rules of ADR Services Inc (ADRS) concerning 'Emergency Provisional Relief'.[38] In relevant parts, ADRS Rule 24 requires prompt written notice to all parties of the requested emergency relief, although an exception is specified where the applicant can by sworn declaration provide reasons for which it should

35 Prior to the election, Michael Cohen's position with the Trump Organization was 'Executive Vice President and Special Counsel to Donald J Trump'. He also functioned at times for the Trump campaign as a surrogate for the candidate. Following the November 2016 election, Michael Cohen left the employ of the Trump Organization and set up an independent legal practice as 'Personal Attorney to President Donald J Trump' (a relationship discontinued after April 2018), as well as a private consulting practice predicated on his access to President Trump.

36 ADRS Case no 18-1118-JAC administered by ADR Services Inc based in California. The emergency provisional relief was requested on 21 February 2018 and the 'temporary restraining order' was issued on 27 February 2018 by a retired judge with over 25 years of trial court experience. On 13 March 2018, ADR Services Inc allegedly stayed the arbitration proceedings (ie, the formation of an arbitral tribunal for the dispute) pending the outcome of the court challenge. See para 26 of Declaration of Charles J Harder in Support of Motion (to Transfer), Document no 11-2 dated 23 July 2018 filed in Civil Action 1:18-cv-03842-JMF before the US District Court for the Southern District of New York (*Stephanie Clifford aka Stormy Daniels v Donald J Trump*) (defamation complaint). On 12 September 2018, 'EC, LLC' issued 'notice' to the ADRS emergency arbitrator of its 'dismissal' of all claims against 'Peggy Peterson' (see n 33 above).

37 See Exhibit E to Declaration of Michael D Cohen in Support of Motion to Compel Arbitration, pp 22–24, Document no 20-5 dated 2 April 2018 filed in Civil Action 2:18-cv-02217-SJO-FFM before the US District Court for the Central District of California (*Stephanie Clifford aka Stormy Daniels aka Peggy Peterson v Donald J Trump aka David Dennison and Essential Consultants LLC*).

38 See www.adrservices.com/wp-content/uploads/2017/04/ADR-ARBITRATION-RULES-Final-Version-4-11-17.pdf accessed 4 March 2019.

not be required to inform the opposing party.[39] Apart from requiring notice (unless excused), ADRS Rule 24 also requires that the emergency arbitrator consider the emergency application in a 'manner calculated to provide all parties with a reasonable opportunity to be heard'. It is therefore surprising – to put it indulgently – that the emergency arbitrator's order was issued in a manner that precluded the affected party from receiving an opportunity to be heard by the emergency arbitrator.

Basically, the emergency arbitrator's so-called 'temporary restraining order' was intended to prevent 'Peggy Peterson' from disclosing in the media, court filings or otherwise any confidential information as defined in the 'settlement agreement'.

Without dwelling on points that have to do with serious questions about jurisdiction and admissibility that are specific to this particular case,[40] the emergency arbitrator's so-called 'temporary restraining order', when considered in light of California law and the ADRS Rules, plainly lacks a

39 The wording basically replicates California Code of Civil Procedure section 527(c)(2)(C) (quoted above). The required declaration was sworn on 22 February 2018 by an in-house lawyer employed by the Trump Organization with the title of Vice President and Assistant General Counsel.

40 The ex parte emergency arbitration order does not contain any discussion of jurisdiction, which appears surprising considering that ADRS Rule 24 grants to the emergency arbitrator the authority to determine jurisdiction and that the scope of the arbitration clause invoked by 'EC, LLC' appears on its face to be restricted to claims or controversies between 'DD' and 'PP' only, without any mention of 'EC, LLC'. See Document 1-1 filed in Case no 2:18-cv-02217. Seven months later, both Donald J Trump and Essential Consultants, LLC accepted in court filings that the 'settlement agreement' was never formed or should be rescinded, thus effectively mooting their April 2018 motion to compel arbitration. In May 2018, President Trump had tweeted that that the 'settlement agreement' 'is in full force and effect' and 'will be used in Arbitration for damages against Clifford (Daniels)'.

Moreover, the ex parte order does not contain any discussion of admissibility even though the only reasoning explained in the ex parte order is that the 'settlement agreement' expressly authorises that an ex parte restraining order can be granted without advance notice to Peterson. See Document no 20-5 filed in Civil Action 2:18-cv-02217-SJO-FFM. In other words, the emergency arbitrator simply applied a contract provision without assessing whether the applicant party, 'EC, LLC', had made a 'factual showing of irreparable harm, immediate danger, or any other statutory basis for granting relief' as required by ADRS Rule 24. The reasoning thus omits mention that the 'injunctive relief' clause in the 'settlement agreement' recites that unauthorised disclosure of confidential information would cause irreparable harm to 'DD', and that any unauthorised disclosure or threat of disclosure would consequently entitle 'DD' to obtain ex parte issuance of a restraining order and preliminary injunction or other similar relief without advance notice to 'PP'. The 'settlement agreement' invoked as the entire rationale for the ex parte restraining order thus does not appear to grant any such contract right or benefit to 'EC, LLC', the party having applied for the emergency provisional relief on the back of a sworn declaration. In all events, it would seem obvious that disclosure of confidential information pertaining to 'DD' could not cause harm to 'EC, LLC'.

time limit on its duration (despite California law limiting the validity of a TRO to 'not more than 15 days'), and it also plainly lacks any provision for second-stage follow-on proceedings during which the 'temporary' order would be subjected to reconsideration in the context of regular *inter partes* proceedings so that 'Peggy Peterson' could receive an opportunity to be heard (see ADRS Rule 24).

Apart from these elementary deficiencies, had 'Peggy Peterson' been afforded the requisite due process right of an opportunity to be heard in the context of follow-on proceedings, it would not have been difficult for her attorney to demonstrate to the emergency arbitrator that 'EC, LLC', represented by a Vice President and Assistant General Counsel for the Trump Organization, had failed to fulfil its obligation of full and frank disclosure, with the consequence that the emergency arbitrator's 'temporary restraining order' was – in any event – highly susceptible to discharge.[41]

To emphasise the obvious, the 'temporary restraining order' that resulted from this emergency arbitration proceeding provides a spectacular illustration of the disastrous results that can flow from venturing outside 'the envelope'.

Igor Boyko and Ukraine (PCA Case No 2017-23)

Permanent Court of Arbitration Case No 2017-23 is an ongoing bilateral investment treaty (BIT) arbitration conducted under the 1976 UNCITRAL Arbitration Rules on the basis of the Agreement between the Russian Federation and Ukraine on the Encouragement and Mutual Protection of Investments dated 27 November 1998. A three-member tribunal was constituted in June 2017. On 2 December 2017 (a Saturday), the tribunal received a letter from counsel for the claimant Igor Boyko presenting an application for immediate emergency relief.[42] The application stated that Boyko was in the emergency care unit of a hospital awaiting medical examination following alleged events of the late afternoon and evening of Friday 1 December 2017. The alleged events consisted of their client having been arrested, taken into custody and referred to a pre-trial detention centre, and that while in transport to the detention centre, their client was first taken to an unknown place and beaten to the point of being refused admission to the detention centre but instead sent away to hospital for treatment. On 3 December 2017 (a Sunday), the presiding member of the arbitral tribunal issued temporary protective measures under Article 26 of the 1976 UNCITRAL Rules. The ex parte measures were directed

41 See, eg, *Tate Access Floors Inc v Boswell*, [1991] CH 512, at 532.

42 By inference from the content of the procedural order, the respondent was provided with notice through receipt of a copy of the application.

at protecting the health, life, physical safety and psychological integrity of the individual claimant party, pending a review of the preliminary order following receipt of comments from the state respondent party to be filed within 48 hours. However, only this first, temporary phase of the two-step process found its way into the public domain.[43] Until some future publication of what transpired in the second phase of this emergency procedure, the salient observations that can made are that: (1) the decision to order temporary protective measures was supported by citations to legal authority;[44] and (2) the preliminary order respected proper procedural steps: immediate but temporary measures issued ex parte pending an opportunity for the respondent party to be heard in the context of regular process within a very short time.

Alleged violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (Iran v United States)

A third recent example comes from the realm of litigation between sovereigns before the ICJ, but it nonetheless provides an example of some relevance to the topic at hand.

43 See, eg, www.italaw.com/sites/default/files/case-documents/italaw9400.pdf; https://arbitration.org/sites/default/files/awards/arb5129.pdf accessed 4 March 2019.

44 Iran-US Claims Tribunal, *Rockwell International Systems v The Islamic Republic of Iran*, Interim Award No 17-430-1 (5 May 1983), 2 Iran-US CTR 310-11, recounting that '…the Tribunal has not yet sought comments from the Government of Iran to the Claimant's request of 2 May 1983. The Tribunal therefore holds that the Government of Iran should be granted a possibility to reply to the Claimant's request. However, in view of Rockwell's allegation that it has been ordered to appear before the Public Court of Tehran on 7 May 1983 and the Tribunal's inherent power to issue orders to conserve the respective rights of the Parties and to ensure that its jurisdiction and authority are made fully effective, the Tribunal finds it appropriate immediately to request the Government of Iran to move for a stay of the proceedings before the Public Court of Tehran until such time that the Tribunal can make a decision on the Claimant's request based on the views of both Parties' (ie, until 8 June 1983), and following receipt of a reply from the respondent the initially temporary measure was confirmed for the duration of the proceedings by Interim Award No 20-430-1 (6 June 1983), 2 Iran-US CTR 369-71 ('The Tribunal requests the Government of the Islamic Republic of Iran to take all appropriate measures to ensure that the proceedings before the Public Court of Tehran be stayed, pending determination of the proceedings in the present case before the Iran-United States Claims Tribunal'); 1976 UNCITRAL Arbitration Rules (*travaux préparatoires*), Observation of Norway on Preliminary Draft, 8th Sess (Geneva, April 1975), UN Doc A/CN.9/97/Add. 3/Annex 1; Rule 74(4) of Rules of Court for the ICJ (1978); Jerzy Sztucki, Interim Measures in The Hague Court, An Attempt at Scrutiny (1983), pp 161–162.

On 16 July 2018, the Islamic Republic of Iran introduced a new case against the US.[45] Simultaneously, Iran also requested as provisional measures that the US be ordered by the court to suspend implementation of announced economic sanctions, among other forms of interim relief.[46]

On 26 July 2018, the ICJ President scheduled a hearing of the parties on the request for provisional measures, to take place during the final week of August 2018.[47] Consequently, the court's decision on Iran's request for provisional measures could not be forthcoming before September 2018 at the earliest, that is, several weeks after the announced starting date for entry into effect of the first set of the challenged sanctions in early August 2018. In these circumstances, the President of the court addressed an urgent communication to the US Government calling on it to act in such a way as will enable any order the court may make on the request for provisional measures to have its appropriate effects,[48] thus exercising a presidential prerogative provided in Rule 74(4) of the ICJ's Rules of Court.[49] In the event, the court's order granting limited provisional measures was issued on 3 October 2018.

This presidential authority to take an immediate but temporary action ex parte stems from the practice developed initially by the President of the Permanent Court of International Justice under the first version of the Rules of Court adopted in 1922 (but changed under the second revision of the Rules of Court adopted in 1931). In its present form as a presidential communication, the practice was first deployed spontaneously in May 1933 (with positive results).[50] As subsequently

45 Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (*Islamic Republic of Iran v United States of America*). Iran's application alleges that economic sanctions scheduled to be restored by the US following its unilateral withdrawal from the Joint Comprehensive Plan of Action (JCPOA) amounted to a breach of the Treaty of Amity. ICJ Press Release no 2018/34 dated 17 July 2018.

46 ICJ Press Release no 2018/34 dated 17 July 2018.

47 ICJ Press Release no 2018/38 dated 26 July 2018. The ICJ Rules of Court require oral proceedings before the court in respect to applications for provisional measures. Prior to revision in 1931 of the Rules of Court of the predecessor Permanent Court of International Justice (PCIJ), a decision to indicate provisional measures could, if the court was not sitting, be taken by the President ex parte, without giving the parties an opportunity to present observations.

48 ICJ Press Release no 2018/37 dated 25 July 2018.

49 Art 74, para 4 of the ICJ Rules of Court (1978) states that 'Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects'.

50 PCIJ, Case Concerning the Administration of the Prince of Pless (*Germany v Poland*), Application for the Indication of Interim Measures of Protection, Item 113, Telegram from the President to the Government of Poland dated 5 May 1933, Series C.70, p 429.

integrated into the Rules of Court in 1936,[51] it is an interim power limited to the time period that precedes the oral proceedings and subsequent decision of the court on the request for provisional measures. Since 1946 and the transformation of the court into the ICJ of the UN, this presidential authority has been deployed in roughly 28 per cent of cases involving requests for the indication of provisional measures.

This presidential authority is characterised as a provisional measure of 'a second order'.[52] A communication by the President pursuant to Article 74(4) of the Rules of Court constitutes a preliminary measure that stands in the same relation to provisional measures subsequently indicated by the court pursuant to Article 41 of the ICJ Statute as the latter type of interim measures stands in relation to the final relief afforded by the court's judgment on the merits. The object of each type of measure is to enable the court's decision in a succeeding stage of the proceedings to have its appropriate effects.

Such measures of a second order thus resemble the nesting elements of a Russian *matryoshka* doll, each embedded within a larger procedural context. They are thus similar in fashion to how a preliminary order stands in relation to an interim measure, or an interim measure rendered in an emergency arbitration stands in relation to the succeeding interim measure rendered by the arbitral tribunal for the dispute, and indeed in the same relation to an interim measure rendered in regular arbitral proceedings stands in relation to the arbitral tribunal's final decision on the merits.

Concluding observations

Preliminary interim measures are not fully congruent with regular interim measures, notably because they feature short-term decisions taken before hearing from the affected party and sometimes without notice, that is, ex parte preliminary orders that are in themselves incomplete because they must entail follow-on *inter partes* proceedings and a supplemental decision.

As seen from the three current examples described above, emergency arbitrators need to be extra careful when confronted with requests for preliminary interim measures on an ex parte basis. Pushing the envelope may sound exciting, but a healthy respect for fundamentals will assist better

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51 Art 61, para 3 of the PCIJ Rules of Court (1936): 'Pending the meeting of the Court and a decision by it, the President shall, if need be, take such measures as may appear to him necessary in order to enable the Court to give an effective decision'.

52 Edward Dumbauld, 'Relief Pendente Lite in the Permanent Court of International Justice' (1945) 39 *American Journal of International Law 391* at 404; see also Jerzy Sztucki, Interim Measures in The Hague Court, An Attempt at Scrutiny (1983), pp 161–162 (same characterisation but without attribution to Dumbauld).

than any last-second look around for some notional parachute. Out at the edge of the envelope there is no safety margin, and in the context of a mix between preliminary orders and emergency arbitration the factors of skill and experience will be at their lowest levels of effectiveness. Therefore, the fundamentals for arbitrators to bear reflexively in mind involve verification of a jurisdictional basis,[53] a gut check as to whether the applicant appears credible in respect to fulfilment of the obligation to make full and frank disclosure, specification of the ephemeral effect for the decision, notice of the decision if the request was considered without notice, prompt provision of an opportunity to be heard, and prompt review and reconsideration during an *inter partes* process. This second-stage step is the context in which an interim measure can issue. Accordingly, preliminary interim measures may not be equated with interim measures as such.

Fundamentally, no distinction of principle can be drawn between ex parte actions and decisions in the context of a preliminary, first stage process of *regular* interim measures proceedings and ex parte actions and decisions in the context of a preliminary, first stage process of *emergency arbitration* proceedings for interim measures. What is true for regular interim measures applies *mutatis mutandis* for emergency arbitration unless expressly regulated otherwise. In particular, even requirements for notice and an opportunity to be heard do not in themselves preclude requests for ex parte decisions in the context of emergency arbitration because the defining characteristic of an ex parte decision is the temporary postponement of an opportunity to be heard. Surprise actions taken without notice are really only exceptions to that general rule.

53 One of the two instances of ex parte requests denied under the Swiss Rules (see n 3 above) involved a conditional forum selection/arbitration clause that was subject to election by the respondent party. In the event, the respondent party did not manifest itself and the emergency arbitrator concluded that there was not a sufficient jurisdictional basis to proceed with the request for emergency relief. Indeed, the request for arbitration was subsequently withdrawn by the claimant party.