DESIGNING AN EMERGENCY ARBITRATION MECHANISM FOR AFGHANISTAN: A COMPOSITE OF SUCCESSFUL MODELS FROM THE INTERNATIONAL COMMUNITY

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ABSTRACT

Although Afghanistan is in the process of improving its commercial arbitration services, it currently has no emergency commercial arbitration mechanism prior to the formation of a tribunal. As such, courts provide the only means to secure interim measures prior to designating an arbitral panel. However, court proceedings in Afghanistan cannot provide expedited and efficient preliminary relief because of the complexity of Afghanistan's legal pluralism (encompassing Afghan codes, Sharia law, and customary law), lack of trained officials, and corruption. The difficulties created by these barriers have discouraged foreign companies from investing in Afghanistan. This article suggests that by introducing an emergency arbitration mechanism, Afghanistan could provide a necessary alternative to judicial dispute resolution, attracting foreign investment to Afghanistan, and promoting economic growth and financial welfare for Afghan people. To support this claim, this article begins by discussing commercial dispute resolution and its shortcomings and challenges for the business sector in terms of emergency or interim relief, including arbitration in Afghanistan. Next, it examines and

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compares the development of emergency arbitration mechanisms in the international commercial arbitration systems of the International Center for Dispute Resolution of American Arbitration Association (ICDR/AAA), Singapore International Arbitration Center (SIAC), and the International Chamber of Commerce International Court of Arbitration (ICC). Through this comparison it identifies weaknesses and strengths from these systems. Ultimately, it proposes an emergency arbitration mechanism, designed from a combination of the features of emergency arbitration procedures in the three institutions, to the Afghan Chamber of Commerce and Industries and the Afghan government.

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INTRODUCTION

Unlike commercial courts, in which publicly appointed judges decide commercial disputes, arbitration is a private procedure in which arbitrators, who are appointed through a procedure selected by parties to the case, fill the role of decision makers.[1] Some international commercial arbitration institutions have adopted a supplemental procedure called emergency arbitration that provides interim measures when a party needs urgent relief and cannot wait for an arbitral tribunal to convene.[2]

Although Afghanistan is in the process of improving its commercial arbitration services, it currently has no emergency commercial ar-

1. TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 3 (Christopher R. Drahozal & Richard W. Naimark eds., 2005).

2. Jason Fry, *The Emergency Arbitrator—Flawed Fashion or Sensible Solution?*, 7 DISP. RESOL. INT'L 179, 182 (2013).

bitration mechanism prior to the formation of a tribunal.[3] As such, court proceedings provide the only means to secure an interim measure before designating an arbitral panel. However, court proceedings in Afghanistan do not provide expedited and efficient preliminary relief for various reasons, including: (1) the complexity caused by legal pluralism (encompassing Afghan codes, Sharia law, and customary law), (2) the lack of trained officials, and (3) the effects of corruption. These barriers discourage foreign investment in Afghanistan, in part, because companies cannot trust that their investments will be protected in a timely and reliable manner. This article suggests that by introducing an emergency arbitration mechanism into its commercial arbitration law, Afghanistan could improve conditions for foreign companies and investors, as well as Afghan litigants, providing a needed alternative to court procedure and promoting economic growth and financial welfare for Afghan people.

This article begins by evaluating the current means of commercial dispute resolution in Afghanistan, including customary dispute resolution, commercial courts, and commercial arbitration, to identify the shortcomings of these systems and the challenges the business sector faces when it needs emergency or interim relief. This discussion establishes the need for adopting an emergency arbitration mechanism by showing that none of these existing means are sufficient to respond to emergencies in commercial disputes. Next, this article studies and compares emergency arbitrator mechanisms of international commercial arbitration systems in institutions like the International Center for Dispute Resolution of American Arbitration Association (ICDR/AAA), the Singapore International Arbitration Center (SIAC), and the International Chamber of Commerce International Court of Arbitration (ICC). Finally, this article offers possible language for Afghan legislative reforms that would establish an emergency arbitrator mechanism, and it gives recommendations for developing emergency arbitration rules to Afghanistan's Chamber of Commerce.

I. COMMERCIAL DISPUTE RESOLUTION MECHANISMS IN AFGHANISTAN

A. Customary Dispute Resolution in Afghanistan

In Afghanistan, the oldest and most common methods of dispute resolution are customary dispute resolution mechanisms such as

3. *See* QANUNI HAKAMYATI TEJARATI [COMMERCIAL ARBITRATION LAW] Kabul 1385 [2007] (Afg.).

Shuras and Jirgas.[4] In general, these mechanisms are run by community elders and leaders who sit together and either make a decision on an issue or solve a dispute.[5] These decisions are not based on any formal law; instead, they reflect a combination of provisions of Sharia law and local customs.[6] Although these informal institutions do not apply formal, written laws of the country while making decisions, individuals and small businesses continue to turn to these institutions to settle their commercial disputes because these bodies address problems in a cooperative manner.[7] Their aim is to help parties accept the decisions and live peacefully. General satisfaction with these decisions has resulted in a continued role for traditional means of dispute resolution in the Afghan dispute settlement framework.[8]

However, because these informal mechanisms do not follow formal law, their decisions can be irregular or even unlawful, weakening the rule of law in general. In fact, because members of Shuras and Jirgas are not always familiar with codified laws or Sharia law, their decisions may contradict these sources.[9] Further, sometimes the customary decision makers are unduly or inappropriately influenced by local leaders or commanders, who may have a vested interest in a certain outcome; this dynamic makes customary dispute resolution vulnerable to corruption, and at times, prevents these bodies from making fair and equitable decisions.[10] Afghanistan also has commercial courts that provide for a formal means of dispute resolution; this system is discussed below.

B. Commercial Courts in Afghanistan

Currently, commercial courts in Afghanistan constitute the formal means of commercial dispute resolution.[11] These courts were first established by the 1964 Constitution of Afghanistan as part of the judiciary.[12] Articles 116 and 123 of the 2004 Constitution of Afghanistan

4. STEPHANIE AHMAD ET AL., AN INTRODUCTION TO THE LAW OF AFGHANISTAN 3 (Catherine Baylin et al. eds., 3d ed. 2011), https://www-cdn.law.stanford.edu/wp-content/uploads/2015/12/Intro-to-Law-of-Afg-3d-Ed.pdf.

5. *Id.* at 3-4.

6. *Id.* at 4.

7. UNA AU ET AL., AN INTRODUCTION TO THE COMMERCIAL LAW OF AFGHANISTAN 66 (Will Havemann et al. eds., 2d ed. 2011), https://www-cdn.law.stanford.edu/wp-content/uploads/2015/12/Intro-to-Commercial-Law-of-Afg-2d-Ed.pdf; *see also* AHMAD ET AL., *supra* note 4, at 4.

8. AU ET AL., *supra* note 7, at 115.

9. AHMAD ET AL., *supra* note 4, at 168.

10. *Id.*

11. *Id.* at 166.

12. *Id.*

provide for an independent judiciary, and state that separate statutes would regulate the formation and authority of courts and judges; they do not specifically address the creation of commercial courts.[13] Article 95 of this Constitution grants the Supreme Court of Afghanistan the authority to establish new courts, as needed.[14] As such, commercial courts in Afghanistan are unable to act as a commercial dispute resolution forum independent of the Afghanistan Supreme Court.[15] Therefore, the Afghanistan Supreme Court, rather than Parliament, bears the ultimate responsibility of establishing and running an effective commercial court system.[16]

Although the 2013 Law of Afghanistan on Organization and Authority of the Judiciary states a primary commercial court should be established in each province, it also recognizes that in provinces where there is no commercial court established, commercial cases should be referred to the civil division of the city's primary courts.[17] In practice, a majority of the provinces do not have a functioning commercial court.[18] In addition to the inaccessibility of these Commercial Courts, there are many other problems associated with courts and judges in Afghanistan. For example, the U.S. State Department report of 2014 on the investment climate in Afghanistan states that foreign investors in Afghanistan have not generally benefited from court proceedings.[19] For instance, in some cases, courts have prevented foreign investors from going to arbitration—even when their contracts clearly provided for arbitration.[20] Such treatment of foreign investors by courts comes from a series of fundamental problems that courts bear, including legal pluralism, lack of trained officials, and corruption, which have resulted in investors' discontent with the Afghan court procedure.[21] The Afghan government has made some efforts to deal with these challenges.[22] In 2007, the Parliament of Afghanistan passed the Arbitra-

13. *Id.*

14. *See id.* at 167.

15. *Id.*

16. *Id.*

17. QANUNI TASHKIL WA SELAHIYATI QUWAYI QAZAEYA JUMHURI ISLAMI AFGHANISTAN [LAW ON THE ORGANIZATION AND AUTHORITY OF THE JUDICIARY OF THE ISLAMIC REPUBLIC OF AFGHANISTAN] Kabul 1392 [2013], art. 65 (Afg.).

18. AHMAD ET AL., *supra* note 4, at 166.

19. U.S. DEP'T OF STATE, 2014 INVESTMENT CLIMATE 6 (2014), http://www.state.gov/documents/organization/226764.pdf.

20. *Id.*

21. U.S. COMMERCIAL SERVICE, 2013 COUNTRY COMMERCIAL GUIDE FOR DOING BUSINESS IN AFGHANISTAN 37 (2013), http://www.trade.gov/afghanistan/static/2013%20CCG%20Afghanistan_Latest_tg_aftf_004071.pdf.

22. *See id.*

tion Law, which required Afghan courts to enforce arbitration agreements.[23] In addition, the government has promulgated many other laws to provide for a clear legal framework for courts.[24] The Supreme Court of Afghanistan has had exchange training programs with Islamic countries like Egypt to enhance the knowledge and skills of their judges and other judicial personnel.[25] The government has also taken some measures to combat corruption in the country.[26] However, the persistence of some fundamental problems with the Commercial Court system in Afghanistan has rendered them inefficient, at least for foreign investors in the country.[27] The following is a discussion of these problems.

i. Legal Pluralism

Although the term "legal pluralism" can have nuanced definitions and meanings, in this article, it is used to mean "the application of different legal sources to identical cases,"[28] or "situations in which there is more than one source of law, each of which exerts control over the behavior of individuals in that society."[29] This legal pluralism affects the Afghan legal and regulatory framework. Although Afghanistan's new government is in a period of post-war redevelopment, there are currently three different regulatory mechanisms that continue to affect court rulings.[30] These sources include Sharia (Islamic Law), customary law (as applied by Jirga and Shura), and formal laws.[31] This pluralism leads to some confusion because sometimes the laws simply supplement each other, but at other times they contradict one another.[32] When this happens, some courts apply their personal interpretation of Sharia and customary law instead of codified law, which gives them broader discretion and creates uncertainty in terms of the legal outcome of disputes.[33]

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23. U.S. DEP'T OF STATE, *supra* note 19, at 5.

24. AU ET AL., *supra* note 7, at 70-71.

25. *Study Programs Abroad*, INT'L INST. OF HIGHER STUDIES IN CRIMINAL SCI., http://www.isisc.org/dms/index.php?option=com_k2&view=item&id=82:study-programs-abroad&Itemid=320 (last visited Mar. 5, 2016).

26. *See* U.S. COMMERCIAL SERVICE, *supra* note 21, at 42.

27. *See* AU ET AL., *supra* note 7, at 83.

28. Esther Meininghaus, *Legal Pluralism in Afghanistan* 3 (Univ. of Bonn Ctr. for Dev. Research, Working Paper Amu Darya Series No. 8, Dec. 2007).

29. AHMAD ET AL., *supra* note 4, at 3.

30. *See* U.S. COMMERCIAL SERVICE, *supra* note 21, at 37.

31. *Id.*

32. Meininghaus, *supra* note 28, at 3.

33. U.S. DEP'T OF STATE, *supra* note 19, at 6.

Professor Jon Eddy gives an example of this predicament in his article, "Rule of Law in Afghanistan: The Intrusion of Reality."[34] He examines Article 3 of the Afghanistan 2004 Constitution, which states that no law in Afghanistan can contradict the tenets of Islam.[35] According to Islamic provisions, loans with interest are called Riba, and they are prohibited. Eddy claims that various articles of the Afghanistan civil code and the country's commercial code "clearly provide for loans with interest."[36] Under Article 130 of the Constitution, Hanafi jurisprudence of Islamic law applies when there is a gap not covered by the Afghanistan Constitution and other statutory laws.[37] However, Eddy argues that in practice, the hierarchy is not applied in accordance with the Constitution.[38] He asked faculty and students at Afghani law schools and Sharia schools on whether loans with interest, allowed under the codes, contradict Islamic provisions, and whether courts enforce them, but he received different and contradictory responses.[39] According to Eddy, some of the respondents stated that the codes were consistent with Sharia provisions, while others argued the opposite.[40] Some of them responded that the courts should not apply the codes, but others claimed that the courts should apply the codes because it is a necessity of life in modern society.[41] This lack of consensus shows that there is no certainty as to the outcome of commercial cases, at least when it comes to loans with interest.

ii. Lack of Trained Officials

In general, Afghan governmental organs lack trained personnel. For example, the judiciary is understaffed, and judicial officials are inadequately trained, leaving the judiciary as an ineffective means of dispute resolution.[42] To improve the quality of the Afghan judiciary, the Supreme Court of Afghanistan provides a two-year training program, Stage, for graduates of the Sharia and Law and Politics schools

34. Jon Eddy, *Rule of Law in Afghanistan: The Intrusion of Reality*, 17 J. INT'L COOPERATION STUDIES 8 (2009), http://www.research.kobe-u.ac.jp/gsics-publication/jics/eddy_17-2.pdf.

35. *Id.*

36. *Id.*

37. QANUNI ASSASSI JUMHORI ISLAMI AFGHANISTAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN] 1382 [2004], art. 130 (Afg.).

38. Eddy, *supra* note 34, at 8.

39. *Id.* at 8-9.

40. *See id.*

41. *Id.*

42. U.S. DEP'T OF STATE, *supra* 19, at 6.

to qualify to become a judge in the Afghan judiciary.[43] However, a 2006 study by the Afghan Supreme Court indicated that only around sixty percent of Afghan judges had completed the Stage training requirement, and approximately half of the judges employed during Hamid Karzai's presidency did not have Stage training.[44] Additionally, a majority of the judges and other judiciary personnel are hired through corrupt means, including nepotism, bribery, and favoritism, so these individuals often do not possess the requisite qualifications.[45] According to the survey, many judges showed interest in training to gain knowledge of both substantive law and procedural law.[46] The four-year university degree requirement for judges can be either from a Sharia school or from a Law and Politics school, but this is problematic; the curricula of the two kinds of schools differ greatly, and both schools predominantly rely on theoretical teachings, providing students with no practical experience handling court cases.[47]

In December 2014, two Egyptian experts travelled to Kabul under an agreement and conducted training for twenty Afghan judges from major provinces.[48] Notably, participants expressed that they had never known about the law on bankruptcy and money laundering before participating in the program.[49] This lack of awareness is common among the judiciary in Afghanistan, adding to the already complex task of managing cases in a pluralistic legal system. Furthermore, the lack of trained judges contributes to the limited number of commercial courts among the various provinces.[50] In addition, because there are not enough qualified and competent judges in the courts, disputants are less likely to take their cases to court because they assume courts cannot render just decisions. Furthermore, the lack of qualified professionals, including judges, attorneys, and other staff within the court system, contributes to the overload of cases, causing

43. JON LEETH ET AL., AFGHANISTAN RULE OF LAW STABILIZATION—FORMAL SECTOR COMPONENT PROGRAM EVALUATION 6 (2012), http://pdf.usaid.gov/pdf_docs/PDACU496.pdf.

44. Livingston Armytage, *Justice in Afghanistan: Rebuilding Judicial Competence After the Generation of War*, 67 HEIDELBERG J. INT'L L. 189, 191 (2007), http://www.centreforjudicial-studies.com/wp-content/uploads/HeidelbergJournalIntLaw.pdf.

45. Laurel Miller & Robert Perito, *Establishing the Rule of Law in Afghanistan* 5 (U.S. Inst. of Peace, Special Report No. 17, 2004), http:// www.usip.org/sites/default/files/sr117.pdf.

46. Armytage, *supra* note 44, at 197.

47. *Id.* at 192.

48. *Egypt Experts Concluded the Commercial Law Training for Afghan Judges*, SPECIAL BULL. SUP. CT. (Sup. Ct. Islamic Republic of Afghanistan, Afg.), Dec. 20, 2014, at 8, http:// supremecourt.gov.af/Content/files/Bulletin_49.pdf.

49. *Id.*

50. AU ET AL., *supra* note 7, at 83.

long delays and disruptions. This situation discourages foreign investors and businesses from trusting Afghan courts.

iii. Corruption

Corruption in the Afghan legal system takes different forms, including bribery, pressure from public officials and other influential people, and persons associated with insurgency, among others.[51] These common practices adversely affect impartiality of the legal system and its image among investors and others.[52] For example, Belquis Ahmadi, an expert on rule of law in Afghanistan at United States Institute for Peace (USIP), stated in an interview for Deutsche Welle (DW) that in most cases brought before Afghan courts, corruption plays a significant role, resulting in distrust of the judiciary among Afghans.[53] As a result, most Afghans turn toward traditional means of dispute resolution—Shura and Jirga and even toward the Taliban.[54] However, these mechanisms have their own problems, ranging from lack of predictability to outright human rights violations.[55]

The distrust of the judiciary is reflected in the Transparency International (TI) Corruption Perception Index 2014, which ranked Afghanistan 172 out of the 175 countries it evaluated—175 being the most corrupt.[56] In other words, according to the study, Afghanistan is perceived as being among the five most corrupt countries in the world.[57]

Indeed, signs consistent with this rank are evident at almost all levels of government in Afghanistan, which most often take the form of bribery.[58] Although the government of Afghanistan has made an effort to combat corruption, such as President Karzai's 2012 decree, no considerable improvements have been made.[59] Almost all corrupt officials retain their positions unpunished.[60] This impunity contributes to the increase in the level of corruption in Afghanistan.

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51. U.S. DEPT. OF STATE, *supra* note 19, at 6.

52. *Id.*

53. Gabriel Dominguez, *Why Many Afghans Distrust Their Judicial System*, DEUTSCHE WELLE (May 2, 2015), http://www.dw.de/why-many-afghans-distrust-their-judicial-system/a-18235687.

54. *Id.*

55. *See id.*

56. TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2014 (2014), https://www.transparency.org/cpi2014/results.

57. *See id.*

58. AHMAD ET AL., *supra* note 4, at 40.

59. U.S. DEPT. OF STATE, *supra* note 19, at 11.

60. *See id.*

Therefore, corruption, alongside legal pluralism and the inadequacy of trained officials in the judiciary of Afghanistan, undermines the capability of the system to provide just and efficient judicial decisions. In such a situation, there is a need to look for an alternative mechanism to provide equitable and satisfactory dispute resolution services for commercial cases. In response to this need, the Afghan government has adopted commercial arbitration law and has attempted to establish an alternative dispute resolution center to provide commercial arbitration services.

C. *Commercial Arbitration in Afghanistan*

Since the promulgation of the 1964 Constitution, various Afghan governments have signed international conventions and enacted several laws that establish commercial arbitration. Still, the country has not institutionalized an effective commercial arbitration system as a sufficient alternative dispute resolution procedure for commercial courts and other unregulated customary dispute resolution methods. The 1964 Constitution enacted a Law on Commercial Court Procedure, which authorized commercial courts, among others, to make arbitration rulings.[61] Afghanistan ratified the International Convention on Settlement of Investment Disputes Between States and Nationals of other States in 1968.[62] According to this convention, Afghanistan, alongside other contracting countries, agreed to settle investment disputes with nationals of other contracting parties on a voluntary basis through the arbitration or conciliation processes for which the convention provides.[63] In 2004, Afghanistan ratified the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[64] By ratifying this convention, Afghanistan agreed to recognize and enforce commercial arbitral awards made in the territory of another country which is party to the convention.[65]

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61. AU ET AL., *supra* note 7, at 44.

62. Int'l Ctr. For Settlement of Inv. Disputes (ICSID), *List of Contracting States and Other Signatories of the Convention*, at 1, ICSID Doc. ICSID/3 (Nov. 17, 2015), https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf.

63. *Background Information on the International Centre for Settlement of Investment Disputes* (ICSID), WORLD BANK, https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf (last visited Mar. 5, 2016).

64. *Contracting States*, N.Y. ARB. CONVENTION, http://www.newyorkconvention.org/countries (last visited Mar. 5, 2016).

65. Article 1(3) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards reads, "When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it

In 2005, Afghanistan passed its new Private Investment Law (PIL) to support and protect private investment in the country.[66] This law recognized arbitration as a means of dispute resolution.[67] The law provides that parties may agree not to use Afghan law as the governing law, and to hold arbitrations either inside or outside of Afghanistan.[68]

In response to these problems with customary dispute resolution and the inefficiency of court systems, the Afghan government ratified the Commercial Arbitration Law in 2007, which helped the Afghan government comply with its commitments under its international agreements.[69] This law provides for economic and commercial arbitration by third party neutrals outside of the courts.[70] According to this law, arbitration is recognized as an optional but binding procedure for disputes arising out of economic and commercial transactions.[71] This law also asserts that parties can agree for either Afghan or foreign law to govern their dispute(s)[72] and orders Afghan courts to enforce awards rendered by arbitral tribunals unless otherwise provided by the law.[73]

In July 2014, Mr. Atiqullah Nusrat, the acting CEO of the Afghanistan Chamber of Commerce and Industry (ACCI), stated that the ACCI has provided arbitration services to the private sector since its establishment in 1931.[74] However, it should be understood that the ACCI operated with minimal procedural rules[75] and without a devel-

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will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration." Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I(3), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.

66. QANUNI SARMAYAGUZAI KHOSOSI [LAW ON DOMESTIC AND FOREIGN PRIVATE INVESTMENT IN AFGHANISTAN] Kabul 1384 [2005], art. 1 (Afg.), http://mfa.gov.af/Content/files/private_investment_law_afghanistan.pdf [hereinafter PRIVATE INVESTMENT LAW].

67. *Id.* art. 26.

68. *Id.* art. 30(2).

69. COMMERCIAL ARBITRATION LAW art. 1 (Afg.).

70. *Id.* art. 2(2).

71. *Id.*

72. *See id.* art. 43.

73. *Id.* art. 56.

74. *Establishment of Center for Commercial Dispute Resolution (ACDR) in Afghanistan*, AFGHANISTAN CHAMBER OF COM. & INDUSTRIES (ACCI) (July 6, 2014, 10:47 AM), http://www.acci.org.af/component/content/article/38-news/508-establishment-of-center-for-commercial-dispute-resolution-acdr-in-afghanistan.html [hereinafter *Establishment of ACDR*].

75. The ACCI Rules of Procedure for Commercial Arbitration and Mediation is a two-page set of twenty procedural rules. These rules are brief and minimal—the rules only provide for definitions, appointments, responsibilities, securities, costs, and payments of both mediation and

oped arbitration law until 2007, the year that Afghanistan's arbitration law was passed. In addition, the center has lacked well-trained professional arbitrators. For these reasons, the arbitration services rendered by the ACCI have not been sufficiently professional and therefore are not always satisfactory. In July 2014, the ACCI and the Afghanistan Investment Climate Facility Organization (HARAKAT) officially agreed to conduct a project in order to institutionalize professional arbitration, among others, in Afghanistan.[76] The project started on January 1, 2015, and is to be completed by the end of 2017.[77]

Currently, as the ACCI is in progress with the institutionalization of the alternative dispute resolution (ADR) in Afghanistan, arbitration is conducted by the Arbitration and Legal Services Department of the ACCI.[78] They received more than 100 cases in 2012 and 2013.[79] As the project goes ahead with the institutionalization and professionalization of the ADR, the ACCI, in coordination with other organizations such as the Commercial Law Development Program (CLDP) of the U.S. Department of State, American Arbitration Association, and the HARAKAT, has been conducting capacity building programs for their arbitrators, mediators, and other personnel.[80]

i. Means of Achieving Emergency Relief in Commercial Arbitration in Afghanistan

Under the Afghanistan Commercial Arbitration Law, both courts and arbitral tribunals are authorized to render emergency relief or interim orders to protect the subject matter of arbitration, pending final determination of the dispute during arbitration proceedings.[81] Nevertheless, neither the Afghanistan Commercial Arbitration Law nor the ACCI Rules of Procedure for Commercial Arbitration and Mediation provide for this process of emergency or interim relief by an emergency arbitrator prior to the formation of an arbitral tribunal or any

arbitration. In comparison, other institutions' rules of procedure have separate rules for arbitration and mediation with much more detail. *ACCI Rules of Procedure for Commercial Arbitration and Mediation*, AFGHANISTAN CHAMBER OF COM. & INDUSTRIES (ACCI), http://www.acci.org.af/media/Arbitration.pdf (last visited Mar. 5, 2016).

76. *Establishment of ACDR*, *supra* note 74.

77. *Id.*

78. *Id.*

79. *Id.*

80. *ACCI's Delegation Attends the Workshop on Development of ACDR*, AFGHANISTAN CHAMBER OF COM. & INDUSTRIES (ACCI), (May 8, 2014, 8:39AM), http://www.acci.org.af/component/content/article/38-news/485-accis-delegation-attends-the-workshop-on-development-of-acdr.html.

81. COMMERCIAL ARBITRATION LAW arts. 15 & 29 (Afg.).

other expedited procedure by an arbitration institution when a party cannot wait until the arbitral tribunal is formed.

Although Afghan commercial courts do provide a means of acquiring interim relief for parties to domestic or international commercial disputes prior to the formation of an arbitral tribunal, foreign investors may be reluctant to go to Afghan commercial courts because such courts cannot efficiently provide provisional measures or other judicial decisions due to their aforementioned fundamental problems. In addition, when a party prefers going to arbitration for advantages such as forum neutrality, confidentiality, and expertise of decision makers, it may also prefer to apply these advantages to the interim relief.[82] The next section analyzes how some of the well-established arbitration systems have dealt with this issue by adopting forms of emergency arbitrator mechanisms.

II. EMERGENCY ARBITRATION MECHANISM IN THE ICDR/AAA, THE SIAC, AND THE ICC

A. *The Role of an Emergency Arbitrator*

Arbitration is commonly used to solve disputes arising out of international commercial transactions.[83] Depending on the circumstances, an arbitration procedure can include: application process and the exchange of documents, the appointment of arbitrators, hearings, and awards. Notably, the application process and the formation of arbitral tribunals sometimes take months to complete.[84]

In international commercial arbitration, the demand for an emergency arbitrator arises when a party to arbitration needs urgent relief before the constitution of an arbitral tribunal and cannot wait until the tribunal is formed because of the need to maintain the "status quo."[85] Under these circumstances, traditionally, courts have offered the only means for achieving emergency relief.[86] Recently, however, a number of international arbitral institutions have adopted rules providing for some forms of emergency relief by an emergency arbitrator before an

82. Andrea Carlevaris & Jose Ricardo Feris, *Running in the ICC Emergency Arbitrator Rules: The First Ten Cases*, 25 ICC INT'L CT. ARB. BULL. 27 (2014).

83. Erin Collins, *Pre-Tribunal Emergency Relief in International Commercial Arbitration*, 10 LOY. U. CHI. INT'L L. REV. 105, 105 (2012).

84. Guillaume Lemenez & Paul Quigley, *The ICDR's Emergency Arbitrator Procedure in Action*, AM. ARB. ASS'N DISP. RESOL. J., Aug.–Oct. 2008, at 1-2, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004356.

85. Peter J.W. Sherwin & Douglas C. Rennie, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 AM. REV. INT'L ARB. 317, 320 (2009).

86. Lemenez & Quigley, *supra* note 84, at 2.

arbitral tribunal is formed.[87] These institutions include, but are not limited to, Singapore International Arbitration Center (SIAC),[88] Arbitration Institute of the Stockholm Chamber of Commerce (SCC Arbitration Institute),[89] Swiss Chambers' Arbitration Institution (SCAI),[90] the International Center for Dispute Resolution of the American Arbitration Association (ICDR/AAA),[91] and the International Chamber of Commerce International Court of Arbitration (ICC).[92] Although the emergency arbitration procedures somewhat differ from one institution to the other, they have been developed as commonly used, practical alternatives.[93]

In general, an emergency arbitrator is "an arbitrator appointed by an arbitral institution on an urgent basis specifically to deal with an application for interim relief[,] which cannot wait for the constitution of the tribunal that is to deal with the substantive dispute between the parties."[94] In other words, an emergency arbitrator is an individual who is appointed[95] to render an interim measure made on prima facie basis when a party "needs urgent interim or conservatory measures [and] cannot await the constitution of an arbitral tribunal."[96]

B. Justifications for the Need for an Emergency Arbitrator

Although the UNCITRAL Model Law on International Commercial Arbitration does not offer an emergency arbitrator procedure, it does provide for emergency relief by an arbitration tribunal. The

87. Raja Bose & Ian Meredith, *Emergency Arbitration Procedures: A Comparative Analysis*, 15 INT. ARB. L. REV. 186, 186 (2012).

88. SINGAPORE INT'L ARB. CENTER (SIAC), http://www.siac.org.sg/ (last visited Mar. 5, 2016).

89. ARB. INST. OF THE STOCKHOLM CHAMBER COM., http://www.sccinstitute.com/ (last visited Mar. 5, 2016).

90. SWISS CHAMBERS' ARB. INST., https://www.swissarbitration.org/sa/en/ (last visited Mar. 5, 2016).

91. INT'L CENTRE FOR DISP. RESOL., https://www.icdr.org/ (last visited Mar. 5, 2016).

92. INT'L CHAMBER OF COM. INT'L CT. ARB. (ICC INT'L CT. ARB.), http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/icc-international-court-of-arbitration/ (last visited Mar. 5, 2016).

93. Bose & Meredith, *supra* note 87, at 186.

94. Barry Fletcher, *Emergency Arbitration—What's it all About?*, LEXISNEXIS DISP. RESOL. (Oct. 14, 2013), http://blogs.lexisnexis.co.uk/dr/emergency-arbitration-whats-it-all-about/.

95. DOUG JONES, "EMERGENCY! IS THERE AN ARBITRATOR IN THE BUILDING?!"—THE PRACTICAL UTILITY OF EMERGENCY ARBITRATOR PROVISIONS 2 (2013), http://acica.org.au/assets/media/Resources/APRAG2013AddressDougJonesAO.pdf.

96. Int'l Chamber of Com. [ICC], *ICC Rules of Arbitration*, art. 29(1) (Jan. 2012), http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Mediation/Rules/2012-Arbitration-Rules-and-2014-Mediation-Rules-ENGLISH-version/ [hereinafter *ICC Rules*].

Model Law has more comprehensive requirements for parties asking for emergency measures, which is similar to applications demanding an emergency arbitrator procedure. Article 17A of the Model Law on conditions for granting interim measures states the following:

> The party requesting an interim measure . . . shall satisfy the arbitral tribunal that: (a) 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 directed if the measure is granted; and (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim.[97]

The ICDR/AAA, the SIAC, and the ICC International Court of Arbitration have adopted more lenient conditions and requirements than those in the UNCITRAL Model Law on International Commercial Arbitration for parties who demand an emergency arbitrator procedure for urgent relief.

i. International Center for Dispute Resolution of American Arbitration Association

Under the ICDR/AAA Rules, parties to arbitration can demand emergency arbitration from the Center unless the parties have opted out of the mechanism or have agreed upon other means of expedited relief.[98] The rules imply that a demand for emergency arbitration must be made subsequent to or simultaneously with filing request for arbitration, but it is explicitly required that demand be made before the formation of the arbitral tribunal.[99] According to the ICDR/AAA Rules, an applicant seeking an emergency arbitrator must demonstrate to the administrator of the International Center for Dispute Resolution the nature of the relief sought, the reasons for the emergency relief, and the legal basis for its award.[100] The applicant is also required to give written notice to the other parties when submitting this application[101] and incorporate in the application a statement dem-

97. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 17A, U.N. Doc. A/40/17, U.N. Sales No. E.08.V.4 (1985), https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [hereinafter MODEL LAW].

98. Int'l Ctr. for Dispute Resolution, *International Dispute Resolution Procedures Including Mediation and Arbitration Rules*, art. 37(1) (June 1, 2009), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_002037 [hereinafter *ICDR Rules*].

99. *Id.*

100. *Id.*

101. *Id.*

onstrating notification of other parties in the case, or indicating that good faith steps have been taken to inform all other parties.[102]

ii. Singapore International Arbitration Center

Schedule one of the SIAC Rules stipulates, "[a] party in need of emergency relief may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Tribunal, make an application for emergency interim relief."[103] Similar to the ICDR/AAA Rules, the SIAC Rules also require the applicant to clearly state the nature of the relief sought, "the reasons why such relief is required on an emergency basis," and the basis of the parties entitlement to such relief.[104] Unlike the ICDR/AAA Rules, the application must also be accompanied by a receipt of the fees paid for the proceeding as required by the rules.[105] This requirement prevents uncompensated efforts of the institution when a party demands emergency arbitration but later withdraws.

iii. The ICC International Court of Arbitration

The ICC Rules of Arbitration also apparently does not require drastic circumstances to justify a request for an emergency arbitrator. It only requires that an application for an emergency arbitrator should describe (1) the circumstances creating the dispute and causing the applicant to arbitrate and (2) the reasons why the applicant cannot wait until the formation of the arbitral tribunal, and why the applicant needs urgent relief.[106] Unlike the ICDR/AAA and the SIAC, where an application for an emergency arbitrator must be made simultaneously with a request for the underlying arbitration or after that, a party under the ICC Rules can apply for an emergency arbitrator even prior to requesting arbitration. The condition, however, is that the party must apply for arbitration within ten business days after demanding emergency arbitration, unless specific circumstances exist based on the emergency arbitrator's proposal and the president's discretion in extending the due date.[107]

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102. *Id.*

103. Sing. Int'l Arbitration Ctr., *Arbitration Rules of the Singapore International Arbitration Centre*, sched. 1(1) (Apr. 1, 2013), http://www.siac.org.sg/our-rules/rules/siac-rules-2013 [hereinafter *SIAC Rules*].

104. *Id.*

105. *Id.*

106. *ICC Rules*, *supra* note 96, app. V, art. 1(3).

107. *Id.* app. V, art. 1(6).

A party's ability to demand emergency arbitration either before or after requesting the underlying arbitration has its own advantages and disadvantages. Parties who are allowed to apply for an emergency arbitrator before requesting arbitration could protect their property in very urgent situations because it typically takes time for the party to submit a detailed request for arbitration. On the other hand, depending on the circumstances, such an opportunity can also pave the way for thoughtless actions that could potentially harm the other party in the case. A party could also abuse this mechanism altogether by later rejecting the request for arbitration.

C. *The Process of Selecting an Emergency Arbitrator*

i. International Center for Dispute Resolution of American Arbitration Association

The ICDR/AAA Rules provide that after an application for emergency arbitration is filed, the center's administrator appoints an emergency arbitrator within one business day from a list of emergency arbitrators.[108] Before the appointment, the emergency arbitrator must disclose any conflicts of interest to the administrator.[109] The parties may challenge the appointment of the arbitrator so long as the challenge is made within one business day of the communication by the administrator.[110] Otherwise, the arbitrator is authorized to proceed with the case on an emergency basis and make a decision.[111] As a result, it is the administrator in the ICDR/AAA who decides the acceptability of the application for an emergency arbitrator and determines the appropriate emergency arbitrator for that case. Accepting or rejecting an application for an emergency arbitrator and appointing the appropriate emergency arbitrator are often important decisions. Therefore, it seems more reasonable for someone in a higher position within the institution to make such a decision.

ii. Singapore International Arbitration Center

The SIAC better addresses this concern that an individual in a higher position within the institution should appoint emergency arbitrators rather than the administrator of the institution. The SIAC Rules gives the president of the institution the power to decide whether an application for an emergency arbitrator is acceptable and

108. *ICDR Rules*, *supra* note 98, art. 37(3).
109. *Id.*
110. *Id.*
111. *Id.*

appoints the appropriate emergency arbitrator.[112] After the application for an emergency arbitrator is submitted to the registrar alongside the required fees, the president of the institution determines within one business day whether an application for an emergency arbitrator is acceptable and appoints an arbitrator that he or she deems appropriate in a given case.[113] However, like the ICDR/AAA Rules, the SIAC Rules also provide for a prospective emergency arbitrator to disclose any conflict of interest to the registrar prior to appointment, and parties are entitled to challenge the appointment within one business day after the appointment and disclosure is communicated to them by the registrar.[114]

The similarity of the two institutions about disclosing conflicts of interest by a prospective emergency arbitrator and the right to challenge an appointment is an important rule. Applying such a requirement prevents any possibility of partiality and contributes to the enforcement of the measure rendered by the emergency arbitrator, later on.

iii. The ICC International Court of Arbitration

This section explains the practical procedures involved in applying for and the appointment of an emergency arbitrator in the ICC International Court of Arbitration. According to Appendix V of the ICC Rules, a party who applies for an emergency arbitrator should submit its application to the Secretariat of the ICC International Court of Arbitration.[115] The rules require the applying party to give a copy of the request to each party, to the secretariat, and to the emergency arbitrator.[116] The request should contain the address of the parties, justifications for the request, proof of the amount of the cost paid, and any application for the underlying arbitration.[117] The rules specify that the application must be drawn up in the language of the arbitration agreement or a language that the parties agree upon.[118]

Under the ICC Rules, it is the president of the institution who decides whether the emergency arbitrator's rules of the institution are applicable in the specific case referred to them,[119] unlike the ICDR/

112. *SIAC Rules*, *supra* note 103, sched. 1(2).
113. *Id.*
114. *Id.* sched. 1 (3).
115. *ICC Rules*, *supra* note 96, app. V, art. 1(1).
116. *Id.* app. V, art. 1(2).
117. *Id.* app. V, art. 1(3).
118. *Id.* app. V, art. 1(4).
119. *Id.* app. V, art. 1(5).

AAA, where the administrator decides this issue. Unlike both the ICDR/AAA and the SIAC, where a request for an emergency arbitrator must be made simultaneously with or subsequent to the application for arbitration, the ICC Rules allow a request for an emergency arbitrator to be made even before filing a request for arbitration; however, the request for arbitration must be submitted to the Secretariat within ten business days from the receipt of the application for an emergency arbitrator.[120] Otherwise, the president is authorized to terminate the emergency arbitrator proceedings, unless the emergency arbitrator decides that a longer time is needed for the application to be submitted.[121]

The president appoints the emergency arbitrator within two days of receiving the request.[122] Although the rules do not specifically mention disclosure of any conflict of interest, they clearly require the emergency arbitrator to remain impartial in its role.[123] Before appointment, the prospective emergency arbitrator must sign a statement of availability, impartiality, and independence, and send a copy of this statement to the parties.[124] Where the ICDR/AAA and the SIAC Rules want a party to submit its challenge, if any, within one business day following receipt of the appointment, the ICC Rules give three days after the receipt of the notification of the appointment to parties to bring their challenge, if any, to the appointment.[125] The ICC Rules even increase the length of time that a party can challenge the emergency arbitrator at any time the facts and circumstances, based on which the challenge is raised, arise.[126] However, the president would only replace the emergency arbitrator after receiving the comments of the other parties and the emergency arbitrator.[127]

The ICDR/AAA Rules and the SIAC Rules do not designate a specific period of time during which an emergency arbitrator should render a decision, while the ICC Rules clearly state that the emergency arbitrator must issue an order no later than 15 days from the date on which the file was transmitted to him/her, unless the president extends the period.[128] The ICC's time requirement is critical to the

120. *Id.* app. V, art. 1(6).
121. *Id.*
122. *Id.* app. V, art. 2(1).
123. *Id.* app. V, art. 2(4).
124. *Id.* app. V, art. 2(5).
125. *Id.* app. V, art. 3(1).
126. *Id.*
127. *Id.* app. V, art. 3(2).
128. *Id.* app. V, art. 6(4).

emergency relief because the nature of emergency relief requires urgent measures. If the time period within which a measure to be rendered is not clear, emergency relief could be delayed and consequently harm the seeking party. To the contrary, if the time period is clear, an emergency arbitrator would be pushed to make a decision sooner than later.

D. Powers and the Extent of Authority of an Emergency Arbitrator

i. International Center for Dispute Resolution of American Arbitration Association

The ICDR/AAA Rules awards emergency arbitrators broad powers and discretion. For example, an emergency arbitrator sets the schedule of the hearing and decides whether a formal hearing should be conducted, or whether communication over the phone suffices, or whether to rely on written submissions.[129] The emergency arbitrator in the International Center for Dispute Resolution has all the same powers as an arbitral tribunal.[130] The emergency arbitrator has the power to decide on its own jurisdiction over the dispute and resolves disputes over the applicability of Article 37 of the ICDR/AAA Rules about the emergency arbitrator's mechanism.[131] According to this article, an emergency arbitrator can render any relief that "the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property."[132] The relief can be in the form of either an order or an interim award, and the emergency arbitrator has the power to modify or vacate it based on good cause shown later.[133]

The ICDR emergency arbitrator's mandate ends when the related arbitral tribunal is constituted.[134] The emergency arbitrator is not allowed to be a member of the arbitral tribunal unless the parties agree to it.[135] Once the tribunal is formed, it can either modify or vacate the interim award or order that the emergency arbitrator has issued.[136]

That the ICDR/AAA Rules give emergency arbitrators broad powers similar to those given to an arbitral tribunal is a constructive

129. *ICDR Rules*, *supra* note 98, art. 37(4).
130. Bose & Meredith, *supra* note 87, at 194.
131. *ICDR Rules*, *supra* note 98, art. 37(4).
132. *Id.* art. 37(5).
133. *Id.*
134. *Id.* art. 37(6).
135. *Id.*
136. *Id.*

measure in terms of rendering any form of desired measure. This empowerment allows the emergency arbitrator to issue its decision in the form of an award rather than an order. This is important because implementation of an order is challenging since it is not covered under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

ii. Singapore International Arbitration Center

The powers of an emergency arbitrator in the Singapore International Arbitration Center are very similar to those in the ICDR/AAA. In the SIAC, emergency arbitrators can issue any relief with the same power as a tribunal, including rendering any awards and orders that he or she considers appropriate.[137] Unlike the ICDR/AAA Rules, which do not address the validity of the emergency measure if no tribunal takes place, the SIAC Rules provide that the emergency relief ceases to exist if no arbitral tribunal is formed within 90 days after applying for emergency arbitration.[138]

This distinction is important because once the tribunal is constituted, it is more likely to render a final award. If such a requirement does not exist, the mere filing of an application for arbitration does not guarantee that the arbitration will take place, and this invites an opportunity for misuse of the mechanism. For example, under the ICDR regime, which allows a party to apply for emergency arbitration absent conditions on the validity of the emergency relief rendered by the emergency arbitrator—such as formation of the tribunal—a party could receive emergency relief without any arbitration actually taking place at a later point. On the other hand, a requirement—analogous to the SIAC Rules—that an arbitral tribunal be formed within a specific period following an application for emergency arbitration would reduce the likelihood of abuse of the mechanism.

iii. The ICC International Court of Arbitration

In the ICC International Court of Arbitration, an emergency arbitrator is vested with jurisdiction over parties who have signed the arbitration agreement and their successors unless: the parties have opted out of provisions of emergency arbitration, the agreement to arbitrate was concluded before the provision went into force, or the

137. Bose & Meredith, *supra* note 87, at 194.
138. *Id.*

parties agreed to another type of procedure for emergency relief.[139] Under the ICC Rules of arbitration, arbitrators have the authority to:

1. Decide on acceptability of the application;[140]
2. Decide on its jurisdiction to order emergency relief;[141]
3. Conduct the emergency proceeding in such a manner he or she considers appropriate;[142]
4. Fix the cost of emergency proceedings;[143]
5. Determine which party should bear what portion of the cost;[144]
6. Render any interim order he or she finds necessary;[145]
7. Render the order within 15 days after receiving the files unless president extends the time;[146] and
8. "Modify, terminate or annul the Order" if a party makes a reasonable request before the order is sent to the arbitral tribunal.[147]

According to Article 29 of the ICC Rules, the emergency arbitrator renders its emergency relief only in the name and form of an order.[148] In rendering this order, the emergency arbitrator must be fair, act in a neutral manner, and give each party a reasonable opportunity to present its case.[149] The order rendered by the emergency arbitrator is binding upon parties.[150]

However, the arbitral tribunal is not bound by the order of the emergency arbitrator, and it can modify or annul the order at a later point.[151] The emergency arbitrator may also grant an extension, if a party requires it, beyond the ten-day time limit to request arbitration after applying for an emergency arbitrator.[152] The powers of the emergency arbitrator are also limited under the ICC Rules in that the emergency arbitrator cannot act as an arbitrator in a related arbitral tribunal even if the parties consent to his or her participation.[153] This stands in contrast to the rules of the ICDR/AAA and the SIAC, which

139. *ICC Rules*, *supra* note 96, art. 29(5-6).
140. *Id.* app. V, art. 6(2).
141. *Id.*
142. JONES, *supra* note 95, at 3.
143. *ICC Rules*, *supra* note 96, app. V, art. 7(3).
144. *Id.*
145. JONES, *supra* note 95, at 3.
146. *ICC Rules*, *supra* note 96, app. V, art. 6(4).
147. *Id.* app. V, art. 6(8).
148. *Id.* art. 29(2).
149. *Id.* app. V, art. 5(2).
150. *See id.* app. V, art. 6.
151. *Id.* art. 29(3).
152. *Id.* app. V, art. 1(6).
153. *Id.* app. V, art. 2(6).

allow an emergency arbitrator, subject to the parties' consent, to sit on a subsequent arbitral tribunal of the same case.

This comparison demonstrates that there are at least two major differences regarding the powers of an emergency arbitrator. First, under the ICC Rules, an emergency arbitrator has limited power and can only render relief in the form of an order. Although this has the merit of highlighting the temporary nature of the measure—unlike an award, which can be final—its application can nevertheless be troublesome because courts are often bound not by an order, but by the laws of their jurisdiction or by the New York Convention to enforce arbitral awards.

The second major difference regarding the powers of an emergency arbitrator is that, under the ICC, an emergency arbitrator cannot be part of a subsequent arbitral tribunal even if the parties consent. Participation of an emergency arbitrator in the tribunal is both beneficial and problematic. It is advantageous for the tribunal to allow the emergency arbitrator to participate in subsequent proceedings because he or she has already read the case and is more familiar with it than the other members of the tribunal. This way, the emergency arbitrator helps the tribunal to make their decision on the case sooner rather than later. On the other hand, an emergency arbitrator is more likely to make a decision that confirms his or her earlier emergency measure. This bias could also indirectly influence other members of the tribunal in the process. Therefore, the participation of the emergency arbitrator in a subsequent arbitral tribunal on the same case increases the chances of bias.

E. Enforcement of the Decision of an Emergency Arbitrator

The enforcement of an arbitration decision, whether rendered by a tribunal or by an emergency arbitrator—in the form of either an order or an award—depends substantially on the voluntary compliance of the parties.[154] If an interim measure is rendered in the form of an award, it is covered under New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and member countries are obligated to enforce it.[155] To the contrary, it is difficult to enforce an interim measure which was

154. Tijana Kojovic, *Court Enforcement of Arbitral Decisions on Provisional Relief: How Final is Provisional?*, 18 J. INT'L ARB. 511, 513 (2001).

155. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 65, art. I(1).

designated in the form of an order. In this case, courts provide assistance in enforcing it, which increases the chances of judicial review.[156]

The UNCITRAL Model Law on International Commercial Arbitration is aimed at harmonizing and modernizing countries' behavior towards arbitration decisions. Although the Model Law does not provide for an exact procedure on the recognition and enforcement of interim measures,[157] the 2006 amendments to the Model Law addresses enforcement of foreign interim measures.[158] Article 17H(1) provides that "[a]n interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued" unless it is refused based on the grounds recognized under the law.[159] Thus far, the Model Law has been adopted by twelve countries, and more countries are gradually adopting the Model Law.[160]

i. International Center for Dispute Resolution of American Arbitration Association

In the U.S. context, although the ICDR/AAA Rules do not overtly provide for the enforcement of the emergency arbitrator's measures, the American Arbitration Association (AAA) and U.S. courts generally consider emergency measures as binding and enforce them as final decisions. Further, judicial review of emergency measures is limited. For example, in 1984, in *Island Creek Co. v. City of Gainesville*, the Sixth Circuit affirmed the decision of the district court that the emergency measure in the case was final.[161] Similarly, in 1985, the New York District Court in *Southern Seas v. Petroleos Mexicanos*, held that interim awards are final and should be enforced; otherwise having such a measure is meaningless.[162] These two cases show that in

156. Sandeep Adhipathi, Interim Measures in International Commercial Arbitration: Past, Present and Future 29 (Aug. 1, 2003) (unpublished LL.M. thesis, University of Georgia School of Law) (on file with Digital Commons @ Georgia Law, University of Georgia School of Law), http://digitalcommons.law.uga.edu/stu_llm/1.

157. *Id.* at 6.

158. JONES, *supra* note 95, at 7.

159. MODEL LAW, *supra* note 97, art. 17H(1).

160. JONES, *supra* note 95, at 7.

161. Island Creek Coal Sales Co. v. City of Gainesville, 729 F.2d 1046, 1050 (6th Cir. 1984).

162. "That the arbitrators labeled their decision an 'interim' award cannot overcome the fact that if an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made. Such an award is not 'interim' in the sense of being an 'intermediate' step toward a further end. Rather, it is an end in itself, for its very purpose is to clarify the parties' rights in the 'interim' period pending a final decision on the merits. The only meaningful point at which such an award

the U.S., interim measures coming from emergency arbitrators are considered as final and binding by courts. This adds to the reliability of emergency arbitration mechanism as an effective tool.

More recently, in October 2013, in the case between *Yahoo! Inc. v. Microsoft Corp.*, Yahoo! sought to vacate the award of the ICDR/AAA emergency arbitrator before the Southern District Court of New York.[163] Microsoft petitioned for confirmation of the award.[164] The district court held that the arbitrator acted within his authority pursuant to the agreement of the parties and that the equitable relief awarded was final.[165] Accordingly, the district court confirmed the award.[166] The emergency arbitrator mechanism becomes more useful and reliable if more courts enforce emergency arbitrators' interim measures.

ii. Singapore International Arbitration Center

The SIAC Rules have gone one step further than the ICDR/AAA Rules in terms of enforcing emergency arbitrators' interim relief. Unlike the ICDR/AAA Rules, which do not discuss the enforcement of the emergency arbitrator's measures, the SIAC Rules state that any order or award rendered by an emergency arbitrator in accordance with the rules are binding on the parties to an arbitration.[167] The rules stipulate that when parties agree to arbitrate in accordance with these rules, they must immediately comply with such an order or award.[168] Singapore has incorporated the emergency arbitrator regime in its legislation, which bolsters its stance on enforcing provisional measures from emergency arbitrators. The 2012 amendment to the Singapore International Arbitration Act provides that orders or awards rendered by emergency arbitrators are enforceable within Singapore and are treated as if rendered by a court.[169] Therefore, the Act

may be enforced is when it is made, rather than after the arbitrators have completely concluded consideration of all the parties' claims." S. Seas Navigation Ltd. v. Petroleos Mexicanos, 606 F. Supp. 692, 694 (S.D.N.Y. 1985).

163. Yahoo! Inc. v. Microsoft Corp., 983 F. Supp. 2d 310 (S.D.N.Y. 2013).

164. *Id.* at 312.

165. *Id.* at 319.

166. *Id.*

167. *SIAC Rules*, *supra* note 103, sched. 1(9).

168. *Id.*

169. "[T]he Singapore International Arbitration Act has sought to deal with the issues that arise in relation to the enforceability of the decision. It provides that 'all orders or directions made or given by an arbitral tribunal [which, as stated above, includes the emergency arbitrator] in the course of an arbitration shall, by leave of the High Court or a Judge thereof, be enforceable in the same manner as if they were orders made by a court and, where leave is so given, judgment may be entered in terms of the order or direction.'" Jason Fry, *The Emergency Arbi-*

gives courts a clearer framework and legal obligation to enforce interim measures rendered by emergency arbitrators.

iii. The ICC International Court of Arbitration

In the ICC International Court of Arbitration, when parties agree to arbitrate their disputes under the ICC Rules of Arbitration, they automatically agree to be bound by the emergency arbitration provisions and to abide by an emergency arbitrator's decision.[170] Thus, an emergency arbitrator's decision is enforced just as a conventional arbitral tribunal's decision is enforced.[171] Under the ICC Arbitration Rules, parties are required to comply immediately with an emergency arbitrator's order. Article 29.4 of the ICC Rules of Arbitration allows arbitral tribunals to consider any non-compliance of a party with an emergency arbitrator's order in finalizing the costs and damages of the award.[172] Therefore, the threat of diminishing the final award pressures parties into complying with the emergency arbitrator's preliminary interim order. However, because an emergency arbitrator's decision often requires the respondent to comply with an order regarding assets located in at least one jurisdiction, the decision must be enforceable in that jurisdiction.[173]

III. LEARNING FROM THE ICDR/AAA, THE SIAC, AND THE ICC MODELS: IDEAS FOR REFORM IN AFGHANISTAN

The ICDR/AAA, SIAC, and ICC Rules present helpful models for devising an emergency arbitration system in Afghanistan, which would potentially increase foreign investment and improve economic growth. The Afghanistan Chamber of Commerce and Industries (ACCI), however, should not model the new system for Afghanistan Center of Dispute Resolution (ACDR) after just one of these examples; instead, it should make its own mechanism, combining attributes from each of the three. The following is a detailed proposal about how this Afghan model could be designed.

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trator: Flawed Fashion or Sensible Solution?, 7 DISP. RESOL. INT'L 179, 194 (2013); *see also* International Arbitration Act § 12(6) (1994) (amended 2012), http://www.siac.org.sg/images/stories/articles/rules/Singapore_IAA_with_2012_Amendments.pdf.

170. JONES, *supra* note 95, at 3.

171. *Id.*

172. *Id.*

173. *Id.* at 7.

A. *Ex Parte Emergency Arbitration in the ACDR*

Since emergency arbitration mechanisms are used to provide urgent relief to preserve the status quo, the first question that arises is whether an ex parte procedure should be available, which would allow one party to demand preliminary relief from the ACDR without informing the opposing party, if informing the opposing party would frustrate the subject matter of the relief. In other countries, civil or commercial courts typically provide for such procedures. For example, the U.S. Rules of Civil Procedure provides the following:

> The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if: (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.[174]

However, the rules of arbitration in international commercial arbitration institutions do not allow for ex parte emergency relief by an emergency arbitrator for many reasons.[175] For example, although the 2006 UNCITRAL Model Law on International Commercial Arbitration allowed for an ex parte preliminary order by an arbitral tribunal,[176] it was not incorporated in the 2010 UNCITRAL Arbitration Rules. Although the working group on the rules agreed to put this provision in the rules, conditioning it on permission by domestic laws of a state, it could not overcome several objections.[177] First, the nature of arbitration is consensual, and granting parties ex parte relief would negate this consent.[178] Second, ex parte relief could constitute a violation of due process of law in some countries.[179] Therefore, the working group on the rules eliminated ex parte emergency relief from the rules.

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174. FED. R. CIV. P. 65(b).

175. Justin D'Agostino & Herbert Smith Freehills, *First Aid in Arbitration: Emergency Arbitrators to the Rescue*, KLUWER ARB. BLOG (Nov. 15, 2011), http://kluwerarbitrationblog.com/blog/2011/11/15/first-aid-in-arbitration-emergency-arbitrators-to-the-rescue/.

176. MODEL LAW, *supra* note 97, art. 17B.

177. Lee Anna Tucker, *Interim Measures Under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects Both Greater Flexibility and Remaining Uncertainty*, 1 INT'L COM. ARB. BRIEF 15, 20 (2011).

178. *Id.*

179. U.N. Comm'n on Int'l Trade Law, Rep. of Working Group II (Arbitration and Conciliation) on the Work of its Fiftieth Session, June 29–July 17, 2009, ¶ 101, U.N. Doc. A/CN.9/669 (2009).

Almost no international commercial arbitration institution has allowed for such a possibility in its mechanism; and therefore, no one arbitration institution can serve as a model regarding this issue for Afghanistan. As such, permitting an ex parte procedure in the ACDR would be challenging, particularly in terms of enforcing a remedy issued by an emergency arbitrator through an ex parte process.

Although parties may have obstacles to obtaining an injunction or emergency measure in Afghan Commercial Courts, as explained above, ultimately a party in need of ex parte relief can demand it. Article 44 of the Afghanistan Law of Commercial Court Rules states that courts may give notice to the opposing party of the emergency measure to defend their position in court.[180] However, if the circumstances require an ex parte process, the court may proceed and render the measure without informing the other party. Therefore, when there is a need for ex parte relief, disputants may use this option.

B. Security in the Emergency Arbitration of the ACDR

Emergency or preliminary measures rendered by either a court or an arbitration institution can be misused or mistaken. In both cases, the rights of the opposing party are likely to be damaged without convincing justifications. In order to prevent such dire consequences, courts and arbitration institutions often require an applicant to submit a security to the institution before it continues with preliminary relief. For instance, both the SIAC Rules and the ICDR/AAA Rules state that "[a]ny interim award or order of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security."[181] Civil and/or commercial court procedure laws in many countries also require such a relief prior to rendering any emergency relief in these cases. If an emergency measure harms the other party without reasonable cause, the institution could use the security to compensate for the damages.

As such, even if the ACDR Rules do not allow for an ex parte mechanism, it is important for the rules to require security from the applicant. The ACDR Rules should require parties to submit security to the Center when a party applies for emergency arbitration. Having this security ensures that the applying party would not misuse the mechanism, and it guarantees a compensation for possible damages to the opposing side.

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180. USOLI MUHAKEMATI TEJARATI AFGHANISTAN [AFGHANISTAN LAW OF COMMERCIAL COURT RULES] art. 44 (Afg.).

181. *ICDR Rules*, *supra* note 98, art. 37(7); *SIAC Rules*, *supra* note 103, sched. 1(8).

C. *Justifications for the Need for an Emergency Arbitrator in the ACDR*

The Afghan model should have an application process similar to the ICC Rules, with some adjustments. A party should have the right to apply for an emergency arbitrator if that party has an agreement to arbitrate in the ACDR and if that party has not opted out of the mechanism or agreed to another procedure. Although the process of application for an emergency arbitrator is somewhat similar in the three discussed models, the ICC Rules provide for a more detailed process, including more comprehensive guidance for parties. Having such a detailed application procedure gives clear instructions and prevents ambiguity. Despite this, all three models discussed in this article require only simple justifications for obtaining an emergency arbitrator. However, Afghanistan should require stronger justifications for applying for an emergency arbitrator because merely having simple requirements would allow a party to easily access emergency relief, which may pave the way for one party to hurt the other, particularly when there is high level of corruption and low level of professionalism between the two.

Therefore, the Afghan model should incorporate the UNCITRAL Model Law requirements for emergency relief. Consistent with this model, Afghanistan should require the requesting party to satisfy the arbitral institution that: "(a) harm not adequately reparable by an award of damages, is likely to result if the measure is not rendered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim."[182] A requirement to apply for an emergency arbitrator would necessitate stronger and more persuasive justifications. It would also prevent unreasonable damages to any opposing party by eliminating provisional remedies, unless an applicant has a very strong case.

Further, similar to the SIAC Rules, the ACDR Rules should also stipulate that if a tribunal does not convene within three months from receiving demand for an emergency arbitrator, the institution will have the authority to invalidate the emergency measure. Moreover, the rules should require the applicant party to submit its application together with a receipt of the payment for fees of the emergency arbitration process. In the ACDR, as with other institutions, it is possible

182. MODEL LAW, *supra* note 97, art. 17A.

for a party to demand an emergency arbitrator and then withdraw the application. In these circumstances, requiring the submission of a fee receipt with an application for an emergency arbitrator would compensate the institution if a party were to withdraw its application.

D. *The Process of Selection of an Emergency Arbitrator in the ACDR*

The process of selecting an emergency arbitrator in the Afghan model should derive from a combination of the ICC Rules and the SIAC Rules. Similar to the ICC, an applicant party should submit the application to the registrar of the ACDR and send copies of the application to the other parties and to the prospective emergency arbitrator. This puts everyone on notice, informing each party about the initiation of the process. Thereafter, similar to both the SIAC and the ICC, the president of the ACDR should have the sole power to decide whether the application is acceptable. If the president is satisfied with the justifications, the president should be able to appoint an emergency arbitrator as he or she finds appropriate for the case. Having such a procedure for determining the acceptability of the application and appointing the emergency arbitrator is important because making this decision is critical in ensuring a credible emergency measure. A small mistake could damage the viability of the relief and the mechanism as a whole.

Similar to the process in the ICC, this emergency arbitrator should sign a written letter of availability and impartiality to the registrar. Then, the registrar should communicate the appointment and disclosure with the parties and give the parties one day to challenge the appointment. Once the appointment is finalized, the emergency arbitrator should be given one week to make a decision based on the prima facie evaluation of the case. The president should be capable of extending this one-week period to, at most, two weeks if the president deems it necessary based on the emergency arbitrator's reasoning for the possible delay. Putting such a time limit ensures a more useful mechanism because the emergency arbitrator is established based on the urgency of the relief sought.

E. *Powers and the Extent of Authority of an Emergency Arbitrator in Afghanistan ACDR*

An emergency arbitrator in the ACDR should have broad powers similar to those in the ICDR/AAA and the SIAC, unlike the ICC, where an emergency arbitrator can only render an order. In the Af-

ghan model, an emergency arbitrator should have the authority to decide on its own jurisdiction and render both orders and awards, as he or she deems necessary. The emergency arbitrator should have the capability to vacate or revise the emergency measure based on any convincing evidence as long as this occurs before the formation of the arbitral tribunal. The emergency arbitrator should be empowered to decide the cost of emergency arbitration, as well as to determine which party should bear what portion of the cost. Once the arbitral tribunal is created for the same case, the responsibility of the emergency arbitrator should be transferred to the tribunal. The tribunal should be able to either affirm, vacate, or revise the emergency arbitrator's decision.

On the other hand, considering the circumstances in Afghanistan, strong measures may be necessary to reduce any chance of partiality or misuse in the ACDR emergency arbitration mechanism. Therefore, unlike in the ICDR/AAA and the SIAC models, where an emergency arbitrator can be part of the subsequent tribunal if the parties agree to it, in the Afghan model, an emergency arbitrator should not be allowed to serve in the arbitral tribunal at any time, which would be more similar to the ICC Rules. This would safeguard against any possible bias.

F. Enforcement of the Decision of an Emergency Arbitrator in Afghanistan

Enforcement of emergency arbitrators' interim measures is vital to the credibility of the emergency arbitration mechanism. If courts do not enforce these measures, the mechanism loses its value. Therefore, enforcement of the emergency measure in Afghanistan should be similar to Singapore's regulations, with some modifications in light of the ICC. As in Singapore, Afghanistan Arbitration Law should be amended to incorporate some provisions stipulating that an emergency arbitration mechanism should be built into the system, and the courts should enforce its decisions. As in the ICC Rules, the ACDR Rules should also provide that parties are required to abide by the emergency measure. Otherwise, the tribunal could consider disobedience of a party in calculating the final award.

G. Challenges and Barriers to Implementation

Critics may express concern about the feasibility and applicability of emergency arbitrator mechanisms in the Afghanistan Center of Dispute Resolution. Some might question whether this proposal can

be implemented in the Afghan context, where modern arbitration mechanisms are new and are just beginning to take shape. In addition, these critics may express concern that emergency arbitration, thus far, has only been adopted in established and leading arbitration institutions. They might also consider the absence of qualified arbitrators as an insurmountable challenge to overcome.

Although there are a limited number of professional arbitrators and lawyers familiar with professional arbitration in Afghanistan, the country's Chamber of Commerce and Industry and the Ministry of Commerce, in coordination with organizations such as the American Arbitration Association, HARAKAT, and the Commercial Law Development Program (CLDP) of the U.S. State Department, have held trainings and exchange programs for Afghan lawyers and arbitrators to institutionalize a professional arbitration mechanism in the country.[183] This goal, as discussed in the first section of this article, is to be achieved by the end of 2017. Until that time, it is also a possibility for the ACDR to invite and employ some professional arbitrators from other countries to assist them in the process. Therefore, the necessary training for prospective emergency arbitrators is already underway.[184]

Another possible barrier to implementing this proposal may stem from a general lack of familiarity with how the mechanism is intended to work. Critics may consider court procedures to be already adequate for achieving emergency relief. However, if one considers all of the obstacles associated with obtaining relief from courts, and the need for giving protection to foreign investors, one should be persuaded that this proposal is a reasonable alternative to courts. In fact, these criticisms lose much of their strength when compared with the importance of attracting foreign investments, which is essential for countries that need economical growth, like Afghanistan. As this article illustrates, emergency arbitration can give stronger protection to foreign investors through effective and well-developed arbitration practices.

Furthermore, administration, logistics, and the adoption of this proposal as a whole is not costly. Adopting this proposal could be relatively simple, as it is only a supplemental procedure to the existing arbitration system in Afghanistan. It requires far less effort to be adopted when compared with the process of establishing the whole alternative dispute resolution system in the country—or at least, to the arbitration system itself. Therefore, the advantages of having this

183. *ACCI's Delegation Attends the Workshop on Development of ACDR*, *supra* note 80.

184. *See id.*

mechanism in the ACDR far outweigh the minimal costs and other efforts needed to adopt it.

CONCLUSION

This article advocates for the adoption of an emergency arbitration mechanism in Afghanistan. By comparing and contrasting the existing emergency arbitration mechanisms in the International Center for Dispute Resolution of American Arbitration Association, Singapore International Arbitration Center, and the International Chamber of Commerce International Court of Arbitration, this article highlights the weaknesses and strengths of these mechanisms at all stages of the arbitral process, including the application, justification, appointment, challenges, authority, and enforcement in the context of emergency arbitration. Considering the potential benefits of emergency arbitration mechanisms and the current demand in Afghanistan, the Afghan legislature and the Afghanistan Chamber of Commerce and Industries should adopt this mechanism in law, as well as adopt rules of arbitration consistent with the recommendations detailed here. This approach would help arbitration be more effective in Afghanistan, providing parties to commercial disputes with a needed alternative to the courts. Existence of an effective alternative dispute resolution in Afghanistan would give stronger protection to foreign investors and help attract more foreign investment.

Stimulating foreign investment would undoubtedly help Afghanistan in the process of economic development. Therefore, I recommend that the Afghanistan Chamber of Commerce and Industries and Afghanistan Ministry of Commerce and Industries consider adopting emergency arbitration procedures as they institutionalize alternative dispute resolution in the country. These stakeholders may first incorporate the mechanism in the Afghanistan Procedural Rules for Mediation and Arbitration; accordingly, those members could propose to Parliament an amendment to the arbitration law. Given the potential benefits of this relatively simple measure, it is time for the Afghan government to commit to implementing the necessary legislative, structural, and logistic measures to enable emergency arbitration in Afghanistan.