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New Developments in International Commercial Arbitration 2013

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Emergency Arbitration in Practice

BERND EHLE

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I. Introduction

One of the key innovations in the revised rules of various arbitration institutions is the adoption of rules providing for the possibility to obtain pre-arbitral relief from an emergency arbitrator. Several of the world's leading arbitral institutions have followed the trend started by the International Centre for Dispute Resolution of the American Arbitration

Association (ICDR)¹ in 2006 including: the International Institute for Conflict Prevention and Resolution (CPR);² the Stockholm Chamber of Commerce (SCC);³ the Singapore International Arbitration Centre (SIAC);⁴ the Australian Centre for International Commercial Arbitration (ACICA);⁵ the International Chamber of Commerce (ICC);⁶ the Swiss Chambers' Arbitration Institution;⁷ the Court of Arbitration at the Polish Confederation Lewiatan;⁸ and – in November 2013 – the Hong Kong International Arbitration Centre (HKIAC).⁹

This article analyses the reasons why arbitral institutions have decided to adopt rules providing for emergency arbitrator proceedings and the key features of such proceedings. It examines the extent to which pre-arbitral relief is sought in practice as well as the strategic considerations that a claimant or respondent may want to take into account in emergency arbitrator proceedings.

II. The Ambition: a One-Stop-Shop for Arbitral Relief

Arbitration was conceived as a means of dispute resolution adapted to the needs of international business. The possibility of requesting and obtaining urgent interim or

¹ ICDR-AAA Rules (2006), Art. 37.

² CPR Administered Arbitration Rules (2007), Rule 14.

³ SCC Rules (2010), Art. 32(4) and Appendix II.

⁴ SIAC Rules (2010), Art. 26(2) and Schedule I.

⁵ ACICA Rules (2011), Art. 28.1(a) and Schedule 2.

⁶ ICC Rules (2012), Art. 29(1) and Appendix II.

⁷ Swiss Rules (2012), Art. 43.

⁸ Rules of the Lewiatan Court of Arbitration (2012), § 36(4) and Appendix II.

⁹ HKIAC Administered Arbitration Rules (2013), Art. 23.1 and Schedule 4. This article does not discuss the rules on the Expedited Formation of Tribunals under Art. 9(1) of the Rules of the London Court of International Arbitration (LCIA) nor the Summary Arbitral Proceedings under Section Four A, Art. 42(a)-(o) of the Netherlands Arbitration Institute (NAI).

conservatory measures is of great practical significance to the business community.

In particular, at the outset of a dispute, parties may have a pressing need, for instance, to preserve evidence that may be relevant and material to the resolution of the dispute, to prevent an abusive call of a bank guarantee or the dissipation of assets, to preserve or restore the status quo, to protect sensitive information or to ensure the continuation of works on a construction site. Without the possibility of obtaining such relief, the arbitral proceedings may be in vain as the ultimate outcome depends on the emergency relief being granted.¹⁰

Prior to the adoption by arbitral institutions of emergency arbitrator provisions, the time between the filing of a request for arbitration and the constitution of the arbitral tribunal – at worst a few months, especially where a three-member tribunal is constituted¹¹ – left an unfortunate gap in which parties to arbitration agreements, and in need of urgent interim relief, had no choice but to resort to state courts.¹²

Resorting to state courts, however, is not always in the parties' best interests. The parties agreed to arbitration in the first place in order to ensure that their dispute would be heard in a neutral forum at a neutral venue and in order to avoid being subject to the often time-consuming and unpredictable (or even distrusted) jurisdiction of the courts.¹³

The parties may also be interested in the confidentiality of the arbitral process or the expertise of specialized

¹⁰ BARRINGTON, p. 39; ROTH/REITH, p. 2.

¹¹ ROTH/REITH, p. 2.

¹² REINER/ASCHAUER, p. 145.

¹³ HOSKING/VALENTINE/LINDSEY, p. 1; BOSE/MEREDITH, p. 186; BOOG, p. 464; CASTINEIRA, p. 66; PALAY/LONDON, p. 2.

arbitrators.¹⁴ Moreover, in some jurisdictions, certain types of interim relief may not be available from state courts which are bound by their *lex fori*.

The adoption by arbitral institutions of emergency arbitrator provisions fills this gap and responds to the needs of the business community.¹⁵ A party in need of urgent interim measures may apply for such relief before the tribunal is constituted. The services provided by arbitral institutions are broadened and party autonomy strengthened.¹⁶ Arbitral relief becomes - so to speak - «seamless».

One should note that the possibility of calling upon an emergency arbitrator is not intended or expected to be used extensively. Indeed, parties do not require emergency relief in a significant number of cases; this remains rather exceptional.

III. The Key Features

Several detailed comparative analyses of the emergency arbitrator provisions contained in the rules of various arbitral institutions already exist.¹⁷ This section provides a brief account of the most important features of these provisions. Given that the institutions' approaches to emergency relief are broadly similar and tend to converge,¹⁸ the presentation is feature-by-feature rather than institution-by-institution.

¹⁴ BOOG, p. 464; D'AGOSTINO, p. 1.

¹⁵ PALAY/LONDON, p. 2.

¹⁶ D'AGOSTINO, p. 3.

¹⁷ See e.g. BOSE/MEREDITH; PALAY/LONDON; ROTH/REITH.

¹⁸ D'AGOSTINO, p. 3.

A. Default application

Across the board, all modern emergency arbitration provisions operate automatically, i.e. by virtue of the parties' agreement to arbitrate under the relevant arbitration rules. A party can apply for emergency measures even if the parties have not expressly agreed on them.¹⁹ Instead, if the parties do not wish these provisions to apply, they must expressly opt out of their application.²⁰

The requirement for unanimous adoption of the opt-out solution can be traced back to the disillusioning experience with the ICC's Pre-arbitral Referee procedure introduced in 1990 (which remains available) and the AAA's Optional Rules for Emergency Measures of Protection created in 1999. Both require an express incorporation of the procedure into the arbitration clause or some other written agreement. Neither was particularly successful: the voluntary opt-in requirement did not take into account the scarce attention (if any) that parties pay to the possibility of seeking emergency relief when entering into a contract and negotiating an arbitration agreement.²¹

The default application of the modern emergency relief provisions certainly leverages their effectiveness and makes them a meaningful alternative to seeking interim relief from state courts.²² In light of the automatic application and the rareness of an express opt-out, the number of applications

¹⁹ REINER/ASCHAUER, p. 144.

²⁰ For such cases, the ICC suggests to add the following sentence to its model clause: «The Emergency Arbitrator Provisions shall not apply».

²¹ There were only about a dozen ICC Pre-arbitral Referee proceedings over 23 years and all of them after 2005. See CASTINEIRA, pp. 66, 70; D'AGOSTINO, p. 1; LEMENEZ/QUIGLEY I, p. 2; ROTH/REITH, pp. 3, 7, 8; BOSE/MEREDITH, p. 187; BOOG, pp. 467, 475.

²² VOSER/BOOG, p. 82.

for emergency relief is likely to rise as parties become increasingly aware of this possibility.²³

Most institutional emergency arbitrator provisions only apply where the arbitration agreement was concluded after the date on which the rules came into force.²⁴ The SCC and Swiss Rules form a notable exception as their emergency arbitration provisions apply retroactively to all arbitration proceedings commenced after 1 January 2010 and 1 June 2012, respectively, regardless of when the arbitration agreement was signed: the parties are deemed to have given implied consent to the most recent version of the arbitration rules.²⁵

B. Timing of application for emergency relief

There are two approaches to the temporal interface between the application for emergency relief and the commencement of the subsequent arbitration.

Under the rules of some institutions (ICDR, SIAC, ACICA, HKIAC), the application for emergency relief can only be filed concurrently with, or after, the request for arbitration has been filed.

Conversely, under the ICC, SCC and Swiss Rules, the application can already be made *before* the request for arbitration is filed. This is certainly more useful to parties who find themselves in an urgent situation. To avoid abuse, and as a safeguard for the respondent,²⁶ the application must then be «validated» by the filing of the request for arbitration within a certain time limit from the submission of

²³ BOSE/MEREDITH, p. 188.

²⁴ See e.g. Art. 29(6)(a) of the ICC Rules.

²⁵ MEIER, pp. 456-457; D'AGOSTINO, p. 1; BOSE/MEREDITH, p. 190; PALAY/LONDON, p. 4.

²⁶ REINER/ASCHAUER, p. 145; ROTH/REITH, p. 11.

the application (10 days under the ICC and Swiss Rules and 30 days under the ICDR and SCC Rules), failing which the institution will terminate the emergency arbitration proceedings.

The cost of initiating emergency arbitrator proceedings significantly exceeds the fees that are due when filing a request for arbitration and thus constitutes another safeguard against frivolous applications. The total fees for commencing emergency relief proceedings (non-refundable administrative fees plus up-front advance for the emergency arbitrator's fees and expenses) range from AUD 12,500 (ACICA), EUR 15,000 (SCC), CHF 24,500 (Swiss Rules) to USD 40,000 (ICC). Under the SIAC Rules, the cost is variable and amounts to SGD 3,000 plus 20% of the maximum sole arbitrator fee. The ICDR does not charge an administrative fee and emergency arbitrators are paid at their normal hourly rates.²⁷ In practice, the ICDR asks the parties to each advance 50% of an appropriate deposit to cover these costs.²⁸

Most institutional provisions provide that it is the emergency arbitrator who fixes the costs of the emergency arbitrator proceedings and decides which of the parties shall bear them, subject to the subsequent arbitral tribunal's final determination.

C. Speedy appointment and timetable

By their nature, emergency relief proceedings must be conducted swiftly. To ensure the necessary speed at the outset, the institutions appoint the emergency arbitrator. The self-imposed time limits to do so are, depending on the institution, one or two business days, 24 or 48 hours

²⁷ BARRINGTON, p. 43.

²⁸ LEMENEZ/QUIGLEY, p. 7.

respectively, of receipt of the application²⁹ – which is in any event short given the need for conflict and availability checks, especially in large law firms. The Swiss Rules take a less rigid approach and ask the Court to appoint an emergency arbitrator «as soon as possible» after receipt of the application and the necessary payments.³⁰

Emergency arbitrators are selected based on their expertise, experience and immediate availability. Some institutions, such as the ICDR,³¹ choose from a special confidential roster of leading practitioners who are, in principle, prepared to take on such appointments.³² Given the time pressure under which the institutions must make the appointment, this seems a sensible measure, as long as the roster is updated regularly to include new blood.

As with any arbitrator, the emergency arbitrator must of course be, and remain, impartial and independent of the parties and disclose any circumstances that may give rise to any justifiable doubts as to his or her impartiality and independence. All institutional emergency relief provisions grant the parties the possibility of filing a challenge to the appointed arbitrator within a short period of time (from one day up to three days).

Given the nature of the proceedings, the procedure follows a very tight schedule and requires virtually full-time availability of the emergency arbitrator. Some institutions require the emergency arbitrator to establish a procedural timetable for the proceedings within as short a time as

²⁹ Art. 2 of Schedule 1 of the SIAC Rules; Art. 2.1 of Schedule 2 to the ACICA Rules; Art. 4(1) of Appendix II to the SCC Rules; Art. 37(c) ICDR Rules; Art. 2(1) of Appendix V to the ICC Rules; §2 of Appendix II to the Rules of the Lewiatan Court of Arbitration.

³⁰ Art. 43(2) Swiss Rules.

³¹ Art. 37(3) ICDR Rules.

³² HOSKING/VALENTINE/LINDSEY, p. 1; BARRINGTON, pp. 40-41; PALAY/LONDON, p. 5.

possible, normally within two days from the transmission of the file.³³

All rules fix a time limit within which the emergency decision should be made. The SCC and ACICA Rules are particularly ambitious as they grant the emergency arbitrator five days from the date on which the file is transmitted to render a decision; this time limit may however be extended upon a request from the emergency arbitrator. Other rules grant the emergency arbitrator either seven (Lewiatan Court of Arbitration) or fifteen days (ICC, Swiss Rules, HKIAC).³⁴

During this short window, the emergency arbitrator enjoys full discretion with respect to how the proceedings should be organized.³⁵ The recurring theme in the different institutional rules is that the proceedings shall be conducted in a manner which the emergency arbitrator considers to be appropriate, taking into account the nature and the urgency of the application and the need to ensure that each party has a reasonable opportunity to be heard on the application.³⁶ The emergency arbitrator may decide to hold a hearing (by telephone or video conference) or to rule on the basis of written submissions and documentary evidence only.

Under most institutional rules containing emergency relief provisions, the emergency arbitrator cannot serve as arbitrator on the subsequent arbitral tribunal and becomes *functus officio* once such arbitral tribunal is constituted.

³³ See e.g. Art. 5(1) of Appendix V to the ICC Rules and Art. 37(4) of the ICDR Rules; FRY/GREENBERG/MAZZA, p. 298.

³⁴ HOSKING/VALENTINE/LINDSEY, p. 1; BARRINGTON, pp. 40-41; PALAY/LANDON, p. 5.

³⁵ MEIER, pp. 465-466; CASTINEIRA, p. 85.

³⁶ Art. 5(2) of Appendix V to the ICC Rules; Art. 19 of the SCC Rules and Art. 7 of Appendix II; Art. 43(6) Swiss Rules; PALAY/LANDON, p. 7.

D. Standard and scope of relief

There is no universally applicable test setting out the requirements which an application for urgent pre-arbitral relief must meet. Emergency arbitrators enjoy broad discretion when assessing the entitlement to emergency relief.³⁷ In general, taking into account the requirements under Art. 26(3) of the UNCITRAL Rules of Arbitration and Art. 28.3 of the ACICA Rules, an application will usually be successful if the requesting party satisfies the emergency arbitrator that:

- (i) irreparable harm is likely to occur if the requested emergency relief is not granted immediately but is only granted once the arbitral tribunal has been constituted (*periculum in mora*);
- (ii) 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 (balance of inconvenience); and
- (iii) the requesting party is *prima facie* entitled to the relief sought, i.e. there is a reasonable possibility that it will succeed on the merits (*fumus boni iuris*), provided that any determination on this possibility shall not bind the subsequent arbitral tribunal.³⁸

Certain rules such as the ICC and Swiss Rules expressly require the application to include the reasons for the purported urgency and to justify why the measure cannot await the constitution of the arbitral tribunal.³⁹ An emergency arbitrator may also refer to other criteria such as proof that no other remedy would be adequate and that any

³⁷ PALAY/LONDON, p. 8.

³⁸ REINER/ASCHAUER, p. 145.

³⁹ REINER/ASCHAUER, p. 145; BOSE/MEREDITH, p. 187.

harm from granting wrongful urgent relief could be compensated by damages.⁴⁰

Regarding the types of emergency measures, the emergency arbitrators' discretion is equally broad and diverse (however limited to the parties to the arbitration agreement).⁴¹ None of the rules under examination contain a catalogue of possible interim measures, quite the contrary: for instance, Art. 37(5) of the ICDR Rules provides that the emergency arbitrator shall have «*the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property*».

This significant flexibility is for a good reason: in order to effectively respond to business needs, the emergency arbitrator's powers should not be confined to certain types of relief.⁴² The scope is possibly broader than the relief the parties could obtain from state courts.⁴³ The examples given in Section IV below show the diversity of relief sought and sometimes granted.

Under all of the institutional rules examined, the emergency arbitrator may order the party requesting interim relief to provide appropriate security in connection with the relief sought.⁴⁴

E. *Ex parte* applications

Certain types of interim measures are only effective if they come as a surprise to the respondent. The vast majority of

⁴⁰ LEMENEZ/QUIGLEY I, p. 5; CASTINEIRA, p. 76.

⁴¹ PALAY/LONDON, p. 7; MEIER, p. 459.

⁴² CASTINEIRA, p. 75.

⁴³ REINER/ASCHAUER, p. 146.

⁴⁴ See, e.g., Art. 43(8) and 26(2) Swiss Rules; Art. 6(7) of Appendix V to the ICC Rules; Art. 26.1 SIAC Rules; Art. 37(g) ICDR Rules; Art. 3(6) of Schedule 2 to the ACICA Rules.

emergency arbitrator provisions, however, do not provide for *ex parte* orders, i.e. where the application is not immediately notified to the respondent. As a result, under these rules, the parties must still rely on national courts if they seek a «surprise effect».

The Swiss Rules are a notable exception.⁴⁵ Art. 26(3) provides that the arbitrator may «*in exceptional circumstances*» rule on an application before it has been communicated to the respondent, provided that such communication is made at the latest together with the preliminary order and that the respondent is immediately granted an opportunity to respond and present its case.⁴⁶ So far there have been no cases where the «exceptional circumstances» requirement was tested; it might be met in cases of extreme urgency, where providing advance notice to the respondent would compromise the very purpose of the requested relief.

F. Concurrent jurisdiction of the state courts

All of the institutions' emergency relief provisions expressly state that the availability of the emergency arbitrator proceedings does not bar the parties from seeking urgent interim or conservatory measures from a competent judicial authority,⁴⁷ thus reflecting the wide acceptance of the

⁴⁵ PALAY/LANDON, p. 6.

⁴⁶ Note that FRY/GREENBERG/MAZZA state at p. 298 that «[w]hile not expressly mentioned in the [ICC] Rules, it is conceivable that the emergency arbitrator might issue an initial order (e.g. a freezing order or an order otherwise maintaining the status quo) before the responding party has filed its response depending on the circumstances, granting the responding party an opportunity to comment after the initial order has been rendered might still be considered as reasonable within the meaning of Article 5(2) of Appendix V».

⁴⁷ See e.g. Art. 26(5) Swiss Rules; Art. 29(7) ICC Rules; Art. 32(5) SCC Rules; Art. 26(3) SIAC Rules; BOSE/MEREDITH, p. 187.

concurrent jurisdiction of arbitral tribunals and state courts when it comes to granting interim relief.⁴⁸

Parties to arbitration agreements may still prefer to apply to courts for interim relief, in particular where the interim measure needs to be directed against third/non-signatory parties,⁴⁹ for instance to freeze funds in bank accounts, or in jurisdictions such as Italy where arbitrators are by statutory law not entitled to grant interim relief. In addition, unless the parties agreed to arbitration under the Swiss Rules, a claimant seeking an *ex parte* decision will have no choice but to resort to a state court.

G. Enforcement

Under most of the examined institutional rules, the emergency arbitrator may render his or her decision as an order or as an interim award. When the ICC Rules apply, the emergency arbitrator can render the decision as an order only.⁵⁰ Whether the decision is rendered as an order or an interim award, the decision is binding on the parties until it is amended or revoked by the emergency arbitrator upon a reasoned request by a party or by the arbitral tribunal, which is not bound by the interim decision.

There is a general consensus that an emergency arbitrator's decision, whether rendered as an interim award or as an order,⁵¹ does not qualify as an award within the meaning of

⁴⁸ EHLE, pp. 157 et seq.

⁴⁹ Art. 29(5) ICC Rules provides that the emergency arbitrator rules «shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories». CASTINEIRA, pp. 71, 72.

⁵⁰ Art. 29(2) and Art. 6 of Appendix V to the ICC Rules.

⁵¹ A national enforcement court could take a «substance-over-form» approach and decide that a certain order issued by an emergency arbitrator qualifies as an award.

Art. I(1) of the 1958 New York Convention.⁵² Much depends on how the courts of a particular jurisdiction apply the Convention to interim measures in general. Emergency arbitrator decisions do however have good chances of being recognized and enforced in States where the arbitration legislation is based on Arts. 17H and 17I of the UNCITRAL Model Law as revised in 2006⁵³ or otherwise provides for the recognition and enforcement of tribunal-ordered interim measures.⁵⁴

Certain States have recently modified legislation in order to accommodate the concerns regarding enforcement – at least with respect to decisions taken within their jurisdiction – and to enhance their attractiveness as a place of arbitration. For example, in April 2012, Singapore passed a bill amending the definitions of «arbitral tribunal» and «arbitral award» with a view to granting orders made by emergency arbitrators the same legal status as decisions made by other arbitral tribunals for purposes of enforcement in Singapore.⁵⁵

Similarly, and in view of the entry into force on 1 November 2013 of HKIAC's revised Administered Arbitration Rules, Hong Kong passed an ordinance in July 2013, which allows the Hong Kong courts to recognise and enforce both domestic and foreign decisions (orders and awards) issued

⁵² See REINER/ASCHAUER, pp. 147, 188; VOSER/BOOG, p. 86; PALAY/LONDON, pp. 9, 10; HOSKING/VALENTINE/LINDSEY, p. 7. The situation appears to be somewhat different in the US, see LEMENEZ/QUIGLEY II, pp. 3-5.

⁵³ Art. 17H(1) of the UNCITRAL Model Law 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, subject to the provisions of article 17 I».

⁵⁴ E.g. Art. 183(2) of the Swiss Private International Law Act and § 1041(2) of the German Code of Civil Procedure; VOSER/BOOG, p. 86; MEIER, p. 469.

⁵⁵ Section 2(a) of the International Arbitration (Amendment) Bill.

by emergency arbitrators ruling under any arbitration rules agreed upon by the parties.⁵⁶

In light of its relative uncertainty, the enforcement of emergency arbitrator decisions has been referred to as the «elephant in the room»:⁵⁷ what is the benefit of emergency relief if it remains without teeth?⁵⁸ Do the users of arbitration really obtain the protection they are paying for?

In practice, the enforcement of emergency arbitrator decisions seems to be less of a problem. Indeed, there appears to be a high level of voluntary compliance.⁵⁹ Respondents tend to abide by emergency arbitrator decisions in particular in view of the subsequent arbitration proceedings. Under most institutions' rules, non-compliance with emergency arbitrator decisions amounts to a breach of contract,⁶⁰ allowing the claimant to seek reimbursement of costs and damages from the subsequent arbitral tribunal.⁶¹ By way of example, Art. 29(4) of the ICC Rules expressly provides that «[t]he arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or noncompliance with the order».

Further, the respondent is at least psychologically under pressure as the subsequent arbitral tribunal may disapprove of the failure to comply with the emergency arbitrator's

⁵⁶ Section 22A and 22B of the Arbitration (Amendment) Ordinance (Cap. 609).

⁵⁷ BARRINGTON, p. 43.

⁵⁸ BOSE/MEREDITH, p. 186.

⁵⁹ D'AGOSTINO, p. 3; MEIER, p. 470; BARRINGTON, p. 43; PALAY/LONDON, p. 9.

⁶⁰ See e.g.: Art. 29(2) ICC Rules, which provides that «[t]he parties undertake to comply with any order made by the emergency arbitrator». See also Art. 9(3) of Appendix II of the SCC Rules and Schedule 1(9) of the SIAC Rules.

⁶¹ PALAY/LONDON, p. 9.

decision and draw adverse inferences against the non-conforming party.

IV. The Use of Emergency Arbitration Procedures in Practice

Given that certain emergency arbitration procedures have now existed for a few years, it is timely to take stock of the use of emergency arbitration in practice.

A. ICDR

The institution, which can claim to be the «pioneer» of emergency arbitrator proceedings (as it was the first to have introduced emergency arbitration in 2006, more than seven years ago) reports more than twenty eight emergency arbitrator proceedings. On average there have been four proceedings per year.

The emergency arbitrators' decisions were taken on average after three weeks.⁶² In four cases, the respondent challenged the emergency arbitrator, which in one case resulted in a removal.⁶³ In the latter case, the entire process, including the replacement of the emergency arbitrator, lasted only five business days.⁶⁴

The applications, which ranged from a short letter to a lengthy submission with numerous exhibits,⁶⁵ were made, *inter alia*: (i) to enjoin the respondent from using and disclosing certain confidential and sensitive data; (ii) to deliver property to the claimant; (iii) to enjoin the respondent from dissolving and distributing its assets; (iv) to

⁶² HOSKING/VALENTINE/LINDSEY, p. 2; BARRINGTON, p. 40.

⁶³ HOSKING/VALENTINE/LINDSEY, p. 2.

⁶⁴ LEMENEZ/QUIGLEY I, p. 4.

⁶⁵ HOSKING/VALENTINE/LINDSEY, p. 2; BARRINGTON, p. 40.

enjoin the respondent from initiating any actions before certain national courts, and from disclosing to the press information about the dispute; and (v) to prevent the respondent from removing certain equipment from a disputed work site.⁶⁶

B. SCC

Since the introduction of the SCC's emergency arbitrator procedure on 1 July 2010, one to four applications for the appointment of an emergency arbitrator have been filed per year, with nine being filed in total.

The applications were made, *inter alia*: (i) to prohibit the respondent from disposing of real estate and shares in a company in order to secure a claim on an outstanding amount that the respondent failed to pay in accordance with a purchase agreement; (ii) to restrain the respondent from receiving payments pursuant to performance guarantees in a construction project; (iii) to deliver certain products and provide the claimant with access to tools for service and maintenance following the termination of the relevant agreement, and (iv) to restrain the respondent from selling, assigning or transferring shares as this would prejudice the claimant's interests arising out of a shareholders' agreement.⁶⁷

In the reported cases, the emergency arbitrator was appointed within twenty-four hours (the shortest time being an appointment within six hours). The appointed emergency arbitrators were all leading arbitrators from Sweden, the UK, the Netherlands and Austria. In six out of nine cases, the emergency arbitrators issued their decisions within the required five days; in the remaining three cases, the SCC

⁶⁶ LEMENEZ/QUIGLEY I, pp. 2, 3.

⁶⁷ In 2010, the SCC has published abstracts of the first four decisions: Lundstedt, SCC Practice: Emergency Arbitrator decisions rendered 2010.

Board granted an extension. The longest emergency arbitration proceedings lasted twelve days. The decisions were between five and sixty pages long.⁶⁸

Two out of the nine applications were successful, seven were denied. In the cases where the emergency relief was denied, this was primarily because the claimant had failed to show that the requested measure was of an urgent nature and that without the measure irreparable harm would have been caused. In two cases the emergency arbitrator ruled that it did not have jurisdiction to bind third parties. In four of the seven cases in which the applications were rejected, the emergency arbitrator found that the claimant was not *prima facie* entitled to the relief sought.⁶⁹

C. SIAC

The SIAC emergency arbitration provisions, which came into force on 1 July 2010, have proven to be very popular: after a slow start,⁷⁰ there has been an upsurge with twenty seven applications filed as at the end of August 2013, probably thanks to the general strong increase in arbitration cases handled by SIAC. All twenty seven applications were accepted by the President of SIAC. In eleven cases, the required emergency relief was granted in full, in one case only in part, and in three cases by consent between the parties. Eleven applications were rejected and in one case the application was withdrawn.

The applications were made, *inter alia*: (i) to restrain the respondent from invoking a bank guarantee; (ii) to restrain the respondent from breaching confidentiality provisions;

⁶⁸ Information provided by Johan Lundstedt during a presentation on «Emergency Arbitration – the SCC experience», at the Annual Meeting of the European Branch of CIArb in Tremezzo, Italy, on 19 April 2013.

⁶⁹ *Ibid.*

⁷⁰ BOSE/MEREDITH, pp. 188-190.

(iii) to permit the sale of goods at risk of deterioration and to cooperate in allowing cargo to leave the port; and (iv) to prevent termination of an agreement.

D. ICC

Since the entry into force of the new ICC Rules of Arbitration on 1 January 2012, four applications under the emergency arbitrator provisions have been filed (two per year). The ICC Court has appointed three emergency arbitrators. One application was deemed not to be admissible under Art. 29(6) of the ICC Rules.⁷¹

In the first reported case in 2012, the emergency arbitrator was appointed within one day and the proceeding involved two parties from the United Kingdom. The place of the emergency procedure and of the subsequent arbitration was in London.

E. Swiss Rules and Others

As of 30 August 2013, there have been no applications for emergency relief under the emergency arbitration provisions contained in the Swiss Rules (in force since 1 June 2012). The same appears to be the case with respect to the provisions of the ACICA Rules (in force since 1 August 2011) and the Rules of the Lewiatan Court of Arbitration (in force since 1 March 2012). However, it is only a matter of time before parties start taking advantage of the new opportunities to obtain emergency interim relief under these rules.

⁷¹ The information was provided by the ICC Secretariat upon request.

V. Strategic Considerations

In order for its application to be successful, the party seeking urgent interim relief must be careful to show that the conditions required for an emergency arbitrator to grant the requested relief are met. In particular, the applicant should provide convincing reasons why the requested measure is truly urgent and cannot wait until the arbitral tribunal has been constituted. As shown in the above statistics (Section IV. B. and C.), several applications have been denied for lack of urgency or irreparable harm.

In addition, the applicant must pay the required advance payment immediately in order to ensure a swift administration of its request. Where a request for arbitration may still need to be filed to validate the application for pre-arbitral relief (i.e. under the ICC, SCC and Swiss Rules), the applicable time limit should be complied with to avoid the institution terminating the proceedings.

Finally, in some cases a claimant may be well advised to offer and provide appropriate security spontaneously in order to facilitate an emergency arbitrator's decision in its favour.

Obtaining a favourable emergency arbitrator decision can be effective as it may put considerable pressure on the respondent and provide leverage, which can help negotiate a favourable settlement or help to obtain interim measures against third parties from the courts.⁷²

For the respondent, the situation can be delicate as it only has very little time, at best a couple of days, to analyse the claimant's case, detect the weaknesses and develop a defence. The lack of short-term availability of key employees or counsel familiar with the matter in dispute can turn out to

⁷² PALAY/LANDON, pp. 2, 5.

be a significant challenge to overcome. Ideally, the respondent should have a defence policy in place (e.g. prepare legal counsel, be ready to supply information and take decisions) such that the defence against applications for emergency relief does not become a «mission impossible». If interim or conservatory measures are frequently ordered against it, the party may even consider opting-out of the application of the emergency arbitrator provisions when negotiating the arbitration agreement.

The respondent is protected insofar as it does not need to respond within a pre-determined short time limit. The emergency arbitrator, an experienced practitioner, will fix a time limit and the respondent can use the interim time to organise itself. In addition, the respondent is not required to pay its share of the costs of the procedure in advance;⁷³ it is the claimant who must advance the entire cost of the proceedings. As demonstrated above (Section III. B.), the emergency arbitrator provisions contain certain safeguards against abusive applications, in particular that the claimant must at the same time or shortly thereafter file a request for arbitration.⁷⁴

When faced with an application for emergency relief, a respondent has several options. In the event it decides not to pursue an amicable solution of the dispute but to defend itself, it should analyse whether the application can be attacked for instance on the ground that the emergency arbitrator lacks jurisdiction or that the standard for emergency interim or conservatory relief is not met under the applicable law. There may also be grounds on which the emergency arbitrator can be challenged.

The respondent can request security and claim damages for any loss incurred as a result of the requested measure.

⁷³ BOSE/MEREDITH, p. 187.

⁷⁴ VOSER/BOOG, p. 84; VOSER, pp. 817, 818.

The respondent may carry out a risk analysis and come to the conclusion that non-compliance with an unfavourable order or interim award and opposing enforcement are viable options.

Finally, the respondent can apply to the emergency arbitrator and to the subsequent arbitral tribunal for the decision to be vacated or modified.

VI. Conclusions

Over the last seven years, various leading arbitration institutions around the world have followed the trend of adopting emergency arbitration provisions and today provide for pre-arbitral relief in urgent situations. Experience and the track record of applications and proceedings for emergency relief (sixty eight cases in total) indicate that these procedures work well and respond to the practical need of international business to obtain emergency relief in certain circumstances: parties have begun to embrace this new opportunity and both the arbitral institutions and the emergency arbitrators operate the procedures in an efficient manner, despite the tight time limits. The success of the emergency arbitrator provisions is also owed to the fact that they apply automatically and that parties rarely decide to opt out of them.

Some questions remain open, such as the application of emergency relief to third parties and the exact standard to be applied in determining the urgency and the need for protection. The increasing application of the emergency arbitrator procedures will undoubtedly give rise to new practical problems.

The often criticised lack of certainty regarding the possibility of enforcing an urgent interim measure does not seem to be a major obstacle in practice. Other sanctions against a non-

compliant party (such as costs, damages and adverse inferences in the subsequent arbitration proceedings) appear to be sufficiently strong incentives to ensure compliance with the emergency arbitrator's decision. Nonetheless, an international treaty on the recognition and enforcement of interim and conservatory measures would greatly help to promote the emergency arbitration procedures.

The emergency arbitrator procedures help render the arbitration process fully effective, without recourse to state courts, and thereby further the attractiveness of arbitration in general. Even though the emergency arbitrator procedures have yet to become fully established, their growing popularity indicates that they may soon evolve from being just a «nice-to-have» alternative to recourse to a competent court⁷⁵ into the standard method of seeking pre-arbitral relief.⁷⁶

⁷⁵ BOSE/MEREDITH, p. 186.

⁷⁶ CASTINEIRA, p. 97; D'AGOSTINO, p. 3.

