THE EMERGENCY ARBITRATOR
UNDER THE REVISED SWISS RULES
A useful tool or a fashionable gimmick?

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Emergency relief (ER) under Art. 43 SR: what are we talking about?

Temporary measure to protect a party or the arbitral process pending the resolution of the dispute in the arbitration on an urgent basis

Alternative to relief from AT or from state courts

Wide range of measures (Art. 17 UML / Art. 26 UR):

- To maintain status quo
- To prevent current or imminent harm or prejudice to arbitral process
- To preserve assets
- To preserve evidence
Recent trend:
- ICDR 2007
- SCC, SIAC 2010
- ICC, Swiss Rules 2012
- HKIAC 2013

Two main issues in practice (for parties and arbitrator):
- What do you need to establish to obtain interim relief?
- What is the effect of the EA’s decision?

Answers not in the rules but in applicable laws
TOPICS COVERED

1. Basic features of Art. 43 ER procedure
2. Application under Art. 43
3. Jurisdiction
4. Merits: urgency and other criteria
5. Procedure
6. Form and effects of ER

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- Some figures
- Pros and cons of ER procedure
- Conclusion
1. BASIC FEATURES OF ART. 43 ER PROCEDURE

- Available since 1 June 2012 – regardless of date of the arbitration agreement
- Application for “emergency relief proceedings” under Art. 43 =
  - Application for “urgent interim measures pursuant to Article 26”
  - Before AT constituted and even before NoA filed
- Appointment of EA “as soon as possible” (Art. 43.2)
- EA may be challenged (Art. 11 but 3 days) (Art. 43.4)
- NoA to be filed within 10 days but Arbitration Court may extend (Art. 43.3)
1. BASIC FEATURES OF ART. 43 ER PROCEDURE

- ER decision within 15 days
- Reasons in summary form (Art. 42.1.e)
- Decision on fees and costs of EA only (Art 43.9)
- Decision binding on Parties but not on subsequent AT
- Once decision rendered (Art. 43.7), EA *fuctus officio* only once AT constituted
- EA cannot act as arbitrator on subsequent AT unless agreed (Art. 43.11)
2. APPLICATION UNDER ART. 43

What the application **must** contain (Art. 43.1):

- Basic particulars: contact details of parties; arbitration clause; contract; general nature of claim; amount
- Statement of interim measure and reason for urgency
- Language, seat, applicable law (even if agreed)
- Confirmation of payment of Registration Fee (CHF4’500) and EA Fee (CHF20’000)

Should **address fully**:

- Expertise of EA if required
- Jurisdiction: of AT and of EA under Art. 43
- Details on applicable law / urgency and other criteria for interim measure sought
3. JURISDICTION

- **Court** decision (Art. 43.2): appointment of EA unless:
  - “manifestly no agreement to arbitrate” (Art. 3.12) – issue of non-signatories
  - “appears more appropriate to proceed with the constitution of the arbitral tribunal” (cf Art. 2.3 option to reduce time limits)

- **EA** decision on jurisdiction:
  - **Underlying dispute**: if objection by Respondent; if Respondent defaults; if application for preliminary order, but **summary** review
  - **Jurisdiction re Art. 43 ER application** (opt out? Law of the seat? Measure covered by arbitration clause?)

- Parallel jurisdiction of **state courts**
4. MERITS: URGENCY AND OTHER CRITERIA

- Urgency
  - justifies not waiting for constitution of AT
- Art. 26: “necessary or appropriate”
- Other criteria? Art. 17A UML, Art. 26.3 UR:
  - Risk of harm not adequately reparable by award of damages and outweighs harm to other party if measure granted
  - Reasonable possibility will succeed on the merits
- Important factor: EA can order security (Art. 26.2)
5. PROCEDURE

- **15 days** maximum (+ or -)

- **Flexible procedure:**
  - Urgency vs Parties’ reasonable opportunity to be heard (Art. 43.6)
  - No obligation to hold hearing or full submissions (Art. 15)

- **Preliminary (ex parte) orders** (Art. 26.3)
  - “Exceptional circumstances”: risk of frustration of purpose of measure (Art. 17B-C UML) and extreme urgency
  - Notification of application with preliminary order and Respondent to be heard then
  - Unique feature of Swiss Rules
6. FORM AND EFFECT OF EMERGENCY RELIEF

- Art. 43.8: EA decision has “the same effects as a decision pursuant to Art. 26”
  
  => “Interim measures may be granted in the form of an interim award” (Art. 26.2 ≠ Art. 29.2 ICC R)

- Art. 15.7: EA decision binds parties

- Art. 43.8: EA may modify, suspend or terminate and EA decision does not bind the AT

  ➔ No order against third parties
  ➔ Not final: order or award? (Question of substance)
  ➔ Challenge?
  ➔ Enforcement?
6. FORM AND EFFECT OF EMERGENCY RELIEF

- Enforcement of interim measure (if required)
  - Not under NYC (not “final” award)
  - Depends on law of place of enforcement
  - Art. 17-17J UNCITRAL ML: interim measures enforceable unless granted ex parte

- In Switzerland: efficacy and limits of Art. 183.2 PIL Act

- Alternative:
  - Monetary sanctions (*astreinte*)?
  - Psychological pressure / adverse inference
  - Damages
## SOME FIGURES

<table>
<thead>
<tr>
<th>AAA-ICDR</th>
<th>SCC</th>
</tr>
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<tbody>
<tr>
<td>21 (since 2006)</td>
<td>6 (since 2010)</td>
</tr>
<tr>
<td>10 partially or fully granted</td>
<td>4 known</td>
</tr>
<tr>
<td>7 denied</td>
<td>1 approved</td>
</tr>
<tr>
<td>3 settled</td>
<td>3 were rejected</td>
</tr>
<tr>
<td>1 withdrawn (challenges in 4 cases)</td>
<td></td>
</tr>
<tr>
<td>Decision: w/in 20 days</td>
<td>Decision: w/in 7 days (1 w/in 24 hours)</td>
</tr>
<tr>
<td>• Prohibition to disclose information</td>
<td>• Prohibition to dispose of shares</td>
</tr>
<tr>
<td>• Surrender of equipment on work site</td>
<td>• [Prohibition to call a bank guarantee]</td>
</tr>
<tr>
<td>• Prohibition to dissolve legal entity</td>
<td>• [Delivery of goods]</td>
</tr>
<tr>
<td>• [Anti-suit injunction]</td>
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PROS AND CONS OF EMERGENCY RELIEF

Pros
- Speed
- Confidentiality
- Neutrality
- Certainty?

=> Cost effective “one forum” approach?

Legitimate tool OR

Cons
- Not directly enforceable
- No order against third parties
- Limits of adverse inference

=> Really effective?

Risk of abuse?
(Despite fee, 10 day limit for NoA, clear jurisdiction required)

It depends
Only limited evidence available, but appears:

- More and more interim measures applications
- More and more interim measures granted
- Number of ER applications not insignificant, even if
  - No data on compliance and enforcement
  - No comparison with state courts applications or other tools – expedited formation of AT

Experience shows it is not a gimmick

Can be a useful tool in exceptional circumstances

As such, can only be welcome by parties, counsel and arbitrators (strengthen “culture” of granting interim measures)
Some sources

- HABEGGER P, The Revised **Swiss Rules** of International Arbitration – An Overview of the Major Changes, 30 ASA Bull. 2/2012, 269


### Emergency Relief Proceedings (Swiss Rules) / Emergency Arbitrator (ICC Rules) – Oct 2012

<table>
<thead>
<tr>
<th>SWISS RULES (SR)</th>
<th>ICC RULES (ICC R)</th>
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<tbody>
<tr>
<td>Art. 43</td>
<td>Art. 26 &amp; Appendix V</td>
</tr>
<tr>
<td>Applicable to arbitrations commencing on or after 1 June 2012, unless the parties have agreed otherwise (Art. 1.3)</td>
<td>Applicable if arbitration agreement entered into on or after 1 January 2012 – date of entry into force of rules (Art. 29.6.a)</td>
</tr>
<tr>
<td>Opt out (Art. 43.1)</td>
<td>Opt out or choice of another pre-arbitral procedure (Art. 29.6.b and 29.6.c)</td>
</tr>
<tr>
<td>Application prior to constitution of the arbitral tribunal (Art. 43.1)</td>
<td>Application prior to transmission of the file to the arbitral tribunal (Art. 29.1)</td>
</tr>
<tr>
<td>No requirement to file NoA first (Art. 43.1)</td>
<td>No requirement to file RfA first (Art. 29.1)</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Jurisdiction</td>
</tr>
<tr>
<td>Prima facie test by the Arbitration Court, transmission of file to EA unless:</td>
<td>Prima facie test by President of the Court:</td>
</tr>
<tr>
<td>• “manifestly no agreement to arbitrate” or</td>
<td>1. Parties signatories to the arbitration agreement (or successors)</td>
</tr>
<tr>
<td>• “appears more appropriate to proceed with the constitution of the arbitral tribunal” (Art. 43.2)</td>
<td>2. Arbitration agreement concluded after 1 Jan 2012</td>
</tr>
<tr>
<td>EA to determine his/her jurisdiction</td>
<td>3. No agreement to opt out</td>
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<tr>
<td></td>
<td>4. No agreement to other pre-arbitral procedure (Appendix V, Art. 1.5; Art. 29.5 and Art 29.6)</td>
</tr>
<tr>
<td>EA fee: CHF 20,000 (Appendix B)</td>
<td>EA Fee: USD 30,000 (App. V. Art. 7.1)</td>
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<tr>
<td>EA’s fees and costs determined by the EA in EA’s decision on Application; subject to approval or adjustment by the Court (Art. 43.9; Art. 38.2)</td>
<td>The President may increase the EA’s fees. (App. V. Art. 7.2)</td>
</tr>
<tr>
<td>Parties’ costs determined and decided in separate award by the EA if no arbitral tribunal is constituted (Art. 43.8; Art. 38.8)</td>
<td>Allocation fixed by EA subject to the Arbitral Tribunal’s final decision (Art. 29.4)</td>
</tr>
<tr>
<td>Non-refundable Registration Fee of CHF 4,500 (Appendix B)</td>
<td>USD 10,000 for the ICC’s administrative expenses (App. V. Art. 7.1)</td>
</tr>
<tr>
<td>Seat: that of the arbitral proceedings</td>
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<tr>
<td>In the absence of agreement, or if designation of the seat is unclear or incomplete, fixed by the Court (Art. 43.5)</td>
<td>In the absence of agreement, fixed by the President (App. V, Art. 4.1)</td>
</tr>
<tr>
<td>Simultaneous proceedings before judicial authorities: Compatible and not deemed to constitute a waiver of the arbitration (Art. 43.1 to Art. 26.5 SR) / (Art. 29.7 ICC Rules)</td>
<td>The Court appoints the EA and transmits the file to the EA as soon as possible after receipt of the application (Art. 43.2) – Unless ex parte</td>
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<td>The Court appoints the EA and transmits the file to the EA as soon as possible after receipt of the application (Art. 43.2) – Unless ex parte</td>
<td>The President normally appoints an EA within 2 days from the Secretariat’s receipt of the application (App. V, Art. 2.1)</td>
</tr>
</tbody>
</table>

### Challenge of EA within 3 days

Ex parte preliminary order permitted but EA must ensure that each party has a reasonable opportunity to be heard on the Application (Art. 29.6). The request must be notified to the parties, which excludes ex parte decision (App. V, Art. 1.2)
THANK YOU

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