



THE EMERGENCY ARBITRATOR UNDER THE REVISED SWISS RULES

A useful tool or a fashionable gimmick?

Domitille Baizeau

ASA-Gruppe Espace-Mittelland

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INTRODUCTION (1)

- 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

INTRODUCTION (2)

- **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



- 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 *functus 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 v 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

AAA-ICDR	SCC
21 (since 2006)	6 (since 2010)
10 partially or fully granted 7 denied 3 settled 1 withdrawn (challenges in 4 cases)	4 known 1 approved 3 were rejected
Decision: w/in 20 days	Decision: w/in 7 days (1 w/in 24 hours)
<ul style="list-style-type: none"> • Prohibition to disclose information • Surrender of equipment on work site • Prohibition to dissolve legal entity • [Anti-suit injunction] 	<ul style="list-style-type: none"> • Prohibition to dispose of shares • [Prohibition to call a bank guarantee] • [Delivery of goods]

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

CONCLUSION

- 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
- VOSER N / BOOG C, **ICC Emergency Arbitrator** Proceedings: An Overview, In: Interim, Conservatory and Emergency Measures in ICC Arbitration, ICC International Court of Arbitration Bulletin, Vol. 22, Special Supplement (2011), 81
- SHAUGHNESSY P, The new **SCC Emergency Arbitrator** Rules, In: Hobér K / Magnusson A / Öhrström M (Eds.), *Between East and West: Essays in Honour of Ulf Franke*, Juris (2010), 459
- LEMENEZ G / QUIGLEY P, The **ICDR's Emergency Arbitrator** Procedure in Action: Part I: A Look at the Empirical Data, 63 Disp. Resol. J, 3/2008

SWISS RULES (SR)	ICC RULES (ICC R)
Art. 43	Art. 29 & Appendix V
Applicable to arbitrations commencing on or after 1 June 2012 , unless the parties have agreed otherwise (Art. 1.3)	Applicable if arbitration agreement entered into on or after 1 January 2012 – date of entry into force of rules (Art. 29.6.a)
Opt out (Art. 43.1)	Opt out or choice of another pre-arbitral procedure (Arts. 29.6.b and 29.6.c)
Application prior to constitution of the arbitral tribunal (Art. 43.1)	Application prior to transmission of the file to the arbitral tribunal (Art. 29.1)
No requirement to file NoA first (Art. 43.1)	No requirement to file RfA first (Art. 29.1)
Jurisdiction Prima facie test by the Arbitration Court ; transmission of file to EA unless : <ul style="list-style-type: none"> • “manifestly no agreement to arbitrate” or • “appears more appropriate to proceed with the constitution of the arbitral tribunal” (Art. 43.2) 	Jurisdiction Prima facie test by President of the Court: <ol style="list-style-type: none"> 1. Parties signatories to the arbitration agreement (or successors) 2. Arbitration agreement concluded after 1 Jan 2012 3. No agreement to opt out 4. No agreement to other pre-arbitral procedure (Appendix V, Art. 1.5; Art. 29.5 and Art 29.6) EA to establish: <ol style="list-style-type: none"> 1. Application admissible (Art. 29.1) 2. Has jurisdiction to order Emergency Measures (Appendix V, Art. 6.2)
EA fee: CHF 20,000 (Appendix B) 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.g) Parties’ costs determined and decided in separate award by the EA if no arbitral tribunal is constituted (Art. 43.9; 38.d & e)	EA Fee: USD 30,000 (App. V, Art 7.1) The President may increase the EA’s fees. (App. V, Art. 7.2.) Allocation fixed by EA subject to the Arbitral Tribunal’s final decision (Art. 29.4)
Non-refundable Registration Fee of CHF 4,500 (Appendix B)	USD 10,000 for the ICC’s administrative expenses (App. V, Art 7.1). May be increased by the President
Seat : that of the arbitral proceedings In the absence of agreement, or if designation of the seat is unclear or incomplete, fixed by the Court (Art. 43.5)	Seat : that of the arbitral proceedings. In the absence of agreement, fixed by the President (App. V, Art. 4.1)
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)	
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	The President normally appoints an EA within 2 days from the Secretariat’s receipt of the application (App. V, Art. 2.1)

Challenge of EA within 3 days (Art. 43.4 and 11.1 SR) / (App. V, Art. 3.1 ICC R) Decision on challenge by the Court (Art. 43.4 and 11.2 SR) / (App. V, Art. 3.2 ICC R)	
EA proceedings terminated if no NoA submitted within 10 days from receipt of the Application Can be extended by the Court (Art. 43.3)	EA proceedings terminated if no RfA submitted within 10 days from receipt of the Application Can be extended by the EA (App. V, Art. 1.6)
No procedural timetable ; urgency / reasonable opportunity to be heard (Art. 43.6)	EA must establish a procedural timetable , normally within 2 days of transmitting the file to the EA (App. V, Art. 5.1)
Decision rendered within 15 days of transmission of file (Art. 43.7 SR) / (App. V, Art. 6.4 ICC R)	
EA may grant urgent interim measures pursuant to Art. 26 (Art. 43.1) Ex parte preliminary order permitted but EA must ensure that each party has a reasonable opportunity to be heard on the Application (Art. 43.6)	EA may grant urgent interim or conservatory measures which cannot await the constitution of the Arbitral Tribunal (Art 29.1) The request must be notified to the parties, which excludes ex parte decision (App. V, Art. 1.2)
EA may grant order or award (Art. 43.8 & Art. 26.2: award or order)	EA may grant order only (Art. 29.2).
EA can include conditions , including security (Art. 43.1 and Art. 26.2 SR) / (App. V, Art. 6.7 ICC R)	
Unless the parties agree to no reasons given, EA entitled to state the reasons in summary form only (Art. 42.1.e by analogy)	EA must provide reasons (App. V, Art. 6.3)
EA decision binding on parties (Art. 15.7 SR) and not on subsequent AT (Art. 43.8)	The parties undertake to comply with any order by the EA. (Art. 29.2) Not binding on subsequent AT (Art. 29.3)
EA measure ceases to have effect if: <ul style="list-style-type: none"> • NoA not filed within 10 days (Art. 43.3. & 10) • Arbitral proceedings are terminated (Art. 43.10) • AT renders a final award, unless the arbitral tribunal decides otherwise in the award 	EA ceases to have effect if: <ul style="list-style-type: none"> • RfA not filed within 10 days • Court accepts the challenge against the EA • AT renders a final award unless it expressly decides otherwise • All claims are withdrawn or the arbitration terminates before the rendering of a final award (App. V, Art 1.6 & Art. 6.6)
EA may not serve as arbitrator in subsequent AT, unless otherwise agreed by the parties (Art. 43.11)	EA may not serve as arbitrator in subsequent AT (App. V, Art. 2.6)

THANK YOU

Domitille Baizeau

LALIVE

dbaizeau@lalive.ch