



# ICLG

The International Comparative Legal Guide to:

## International Arbitration 2012

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## Preface:

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## General Chapters:

|   |  |    |
|---|--|----|
| 1 | <b>A Comparative Review of Emergency Arbitrator Provisions: Opportunities and Risks</b> – Marc S. Palay & Tanya Landon, Sidley Austin LLP  | 1  |
| 2 | <b>I Know I am Going to Win, but What About my Money? Ensuring that Arbitration is Worth the Effort</b> – Tom Sprange & Tom Childs, King & Spalding International LLP  | 8  |
| 3 | <b>Mandatory Arbitration and Consumer Class Actions in Canada and the United States</b> – Lawrence Thacker, Lenczner Slaght  | 15 |
| 4 | <b>When is an Arbitration International and What Are the Implications? A Traditional Perspective on the Enforcement of Annulled Awards</b> – Gustavo Fernandes de Andrade & André Chateaubriand Martins, Sergio Bermudes Advogados | 21 |

## Asia Pacific:

|    |  |     |
|----|--|-----|
| 5  | <b>Overview</b> Dr. Colin Ong Legal Services: Dr. Colin Ong  | 27  |
| 6  | <b>Australia</b> Clayton Utz: Doug Jones AO  | 37  |
| 7  | <b>Brunei</b> Dr. Colin Ong Legal Services: Dr. Colin Ong  | 47  |
| 8  | <b>China</b> Boss & Young: Dr. Xu Guojian  | 56  |
| 9  | <b>Hong Kong</b> Clayton Utz in association with Hayley & Co: Glenn Haley & Patrick Daley  | 67  |
| 10 | <b>India</b> Kachwaha & Partners: Sumeet Kachwaha & Dharmendra Rautray   | 79  |
| 11 | <b>Indonesia</b> Ali Budiardjo, Nugroho, Reksodiputro: Sahat A.M. Siahaan & Windri Marieta Ayuningtyas                                   | 88  |
| 12 | <b>Japan</b> Anderson Mori & Tomotsune: Aoi Inoue  | 98  |
| 13 | <b>Philippines</b> Quisumbing Torres, member firm of Baker & McKenzie International: Donemark J.L. Calimon & Camille Khristine I. Aromas | 106 |
| 14 | <b>Singapore</b> K&L Gates LLP: Ian Fisher & Andrea Utasy  | 114 |
| 15 | <b>Taiwan</b> Lee and Li, Attorneys-at-Law: Angela Y. Lin & Jeffrey Li   | 122 |
| 16 | <b>Vietnam</b> Tilleke & Gibbins: Michael K. Lee & Doan Ngoc Tran  | 130 |

## Central and Eastern Europe:

|    |   |     |
|----|---|-----|
| 17 | <b>Overview</b> GESSEL Attorneys at law: Dr Beata Gessel-Kalinowska vel Kalisz, FCI Arb | 138 |
| 18 | <b>Albania</b> Tonucci & Partners: Neritan Kallfa & Majlinda Sulstarova                 | 142 |
| 19 | <b>Bulgaria</b> Georgiev, Todorov & Co.: Alexander Katzarsky & Georgi Georgiev          | 150 |
| 20 | <b>Cyprus</b> Dr. K. Chrysostomides & Co LLC: George Mountis & Victoria-Zoi Papagiannis | 160 |
| 21 | <b>Estonia</b> Aivar Pilv Law Office: Pirkka-Marja Pöldvere & Ilmar-Erik Aavakivi       | 169 |
| 22 | <b>Hungary</b> Lendvai & Szörényi: András Lendvai & Gábor Baranyai LL.M                 | 177 |
| 23 | <b>Lithuania</b> Motieka & Audzevičius: Ramūnas Audzevičius & Rimantas Daujotas         | 184 |
| 24 | <b>Poland</b> Sołtyński Kawecki & Szlęzak: Dr. Marcin Olechowski & Sławomir Uss         | 192 |
| 25 | <b>Romania</b> CMS Cameron McKenna SCA: Horia Draghici & Bogdan Vetriici-Soimu          | 200 |
| 26 | <b>Russia</b> Clifford Chance CIS Limited: Timur Aitkulov & Julia Popelysheva           | 210 |
| 27 | <b>Ukraine</b> Vasil Kisel & Partners: Oleksiy Filatov & Pavlo Byelousov                | 221 |

## Western Europe:

|    |  |     |
|----|--|-----|
| 28 | <b>Overview</b> Gleiss Lutz: Stefan Rützel & Stephan Wilske  | 230 |
| 29 | <b>Austria</b> WEBER & CO.: Stefan Weber & Ewald Oberhammer  | 234 |
| 30 | <b>Belgium</b> Linklaters LLP: Joost Verlinden & Stijn Sabbe | 242 |

Continued Overleaf →

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|    |                            |  |     |
|----|----------------------------|--|-----|
| 31 | <b>England &amp; Wales</b> | Wilmer Cutler Pickering Hale and Dorr LLP: Wendy Miles & Kate Davies           | 252 |
| 32 | <b>France</b>              | Lazareff Le Bars: Benoit Le Bars & William Kirtley                             | 269 |
| 33 | <b>Ireland</b>             | Matheson Ormsby Prentice: Nicola Dunleavy & Gearóid Carey                      | 278 |
| 34 | <b>Italy</b>               | Nunziante Magrone Studio Legale Associato: Prof. Dr. Gabriele Crespi Reghizzi  | 287 |
| 35 | <b>Liechtenstein</b>       | Advokaturbüro Dr Dr Batliner & Dr Gasser: Dr. Johannes Gasser & Benedikt König | 296 |
| 36 | <b>Netherlands</b>         | De Brauw Blackstone Westbroek: Eelco Meerdink & Edward van Geuns               | 304 |
| 37 | <b>Portugal</b>            | Abreu Advogados: José Maria Corrêa de Sampaio & Pedro Sousa Uva                | 313 |
| 38 | <b>Sweden</b>              | G Grönberg Advokatbyrå AB: Einar Wanhainen & Johannes Lundblad                 | 325 |
| 39 | <b>Switzerland</b>         | Homburger: Felix Dasser & Balz Gross   | 332 |

## Latin America:

|    |                           |  |     |
|----|---------------------------|--|-----|
| 40 | <b>Overview</b>           | Akerman Senterfitt: Luis M. O'Naghten  | 341 |
| 41 | <b>Brazil</b>             | Wald e Associados Advogados: Arnaldo Wald & Rodrigo Garcia da Fonseca                        | 349 |
| 42 | <b>Dominican Republic</b> | Jiménez Cruz Peña: Marcos Peña Rodríguez & Laura Medina Acosta                               | 356 |
| 43 | <b>Mexico</b>             | Barrera, Siqueiros y Torres Landa, S.C.: Omar Guerrero Rodríguez & Mariana Fernández Salazar | 365 |

## Middle East / Africa:

|    |                     |   |     |
|----|---------------------|---|-----|
| 44 | <b>Overview</b>     | Habib Al Mulla & Co.: Gordon Blanke & Soraya Corm-Bakhos                                    | 374 |
| 45 | <b>OHADA</b>        | Geni & Kebe: Mouhamed Kebe & Fakha Toure  | 380 |
| 46 | <b>Angola</b>       | Miranda Correia Amendoeira & Associados RL: Agostinho Pereira de Miranda & Cláudia Leonardo | 387 |
| 47 | <b>Israel</b>       | Sherby & Co., Advs.: Eric S. Sherby & Sami Sabzerou   | 395 |
| 48 | <b>Morocco</b>      | Hajji & Associés – Avocats: Amin Hajji  | 405 |
| 49 | <b>Mozambique</b>   | Ferreira Rocha & Associados in association with Abreu Advogados: Paula Duarte F. Rocha      | 411 |
| 50 | <b>Nigeria</b>      | PUNUKA Attorneys & Solicitors: Anthony Idigbe & Omone Tiku                                  | 419 |
| 51 | <b>South Africa</b> | Werksmans: Des Williams   | 434 |
| 52 | <b>UAE</b>          | Habib Al Mulla & Co.: Gordon Blanke & Soraya Corm-Bakhos                                    | 445 |

## North America:

|    |                       |  |     |
|----|-----------------------|--|-----|
| 53 | <b>Overview</b>       | Orrick, Herrington & Sutcliffe LLP: Ian Johnson & Matt Prewitt | 455 |
| 54 | <b>Bermuda</b>        | Sedgwick Chudleigh: Mark Chudleigh & Chen Foley                | 461 |
| 55 | <b>BVI</b>            | Maples and Calder: Arabella di Iorio & Victoria Lord           | 470 |
| 56 | <b>Canada</b>         | Borden Ladner Gervais LLP: Daniel Urbas & Robert J.C. Deane    | 480 |
| 57 | <b>Cayman Islands</b> | Maples and Calder: Mac Imrie & Luke Stockdale                  | 489 |
| 58 | <b>USA</b>            | K&L Gates LLP: Peter J. Kalis & Roberta D. Anderson            | 500 |

# A Comparative Review of Emergency Arbitrator Provisions: Opportunities and Risks

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### Introduction

International arbitration is rapidly becoming the premiere method for the resolution of international business disputes. Until recently, however, international arbitration has been ill-equipped to deal with pre-arbitral interim relief. Parties often need some form of interim relief or protective measures at the very beginning of a dispute, before an arbitral tribunal can be constituted, and where the only option is thus to resort to a competent state court. As set out below, however, there are circumstances where a party may be unwilling or unable to seek interim relief from judicial authorities. While arbitration is often touted as a rapid and efficient method of dispute resolution, the constitution of an arbitral tribunal can often take weeks, if not months, especially where a party is uncooperative or challenges an arbitrator appointment. In the meantime, a party may engage in obstruction or even the deliberate dissipation of assets to essentially render itself “judgment-proof”.<sup>1</sup>

Recently, the major arbitral institutions have attempted to fill this void by adopting new procedures which provide for the appointment of emergency arbitrators with the power to issue interim measures before an arbitral tribunal has been constituted. While the rules of a number of arbitral institutions now contain provisions allowing for the appointment of an emergency arbitrator (see below), we will focus in this chapter on the solutions adopted in the revised rules of the ICC (2012), SCC (2010) and Swiss Chambers of Commerce (2012).

As will be discussed, one of the major challenges facing the emergency arbitrator provisions is the degree of uncertainty concerning the enforceability of emergency arbitrators’ decisions. Going the emergency arbitrator route first should not preclude a party from subsequently approaching a competent judicial authority if a respondent fails to comply with an emergency arbitrator’s order. In fact, where the parties have contractually agreed to institutional arbitration rules containing emergency arbitrator provisions, the emergency arbitrator’s order could be of assistance in obtaining subsequent interim relief from a court.

Since irreparable injury is the touchstone for most requests for interim relief, we also discuss the speed at which a party may obtain emergency relief under the revised ICC, SCC and Swiss Rules. The Swiss Rules have a unique advantage in that they provide for the possibility of *ex parte* applications for emergency interim relief. This may allow for the most expeditious decision from an emergency arbitrator, and at least preserve the *status quo* while the respondent is subsequently provided an opportunity to respond to the application.

### Interim Relief

An “interim”, “conservatory”, or “provisional” measure is typically aimed at safeguarding the rights of parties to a dispute pending its final resolution.<sup>2</sup> It is by its very nature a temporary protection, granted until final protection is awarded. Applications for interim measures often involve requests for injunctions to preserve the *status quo* or prevent the disappearance of assets, or the preservation of property or evidence.<sup>3</sup>

Arbitral tribunals generally have the power to grant interim relief, and institutional rules typically include provisions setting out the scope of the tribunal’s powers in this respect.<sup>4</sup> Those same rules also typically recognise the right of a party to apply to a competent judicial authority for interim measures, which is not deemed incompatible with or a waiver of the arbitration agreement.<sup>5</sup> Of course, an arbitral tribunal may only exercise its powers to grant interim relief once it has been constituted, and in the case of ICC arbitration, only once the arbitration file has been transmitted. Until recently, therefore, parties embarking on an arbitration proceeding and requiring urgent relief have either been forced to apply to a competent judicial authority or to wait it out until the arbitral tribunal has been constituted.

For some parties, this may be unsatisfactory on a number of levels. A party who has chosen to deal with a dispute through arbitration may be loathe to refer to a forum which it elected to avoid. Indeed, parties may be unwilling to apply to state courts for provisional measures for many of the same reasons they chose international arbitration for the resolution of their disputes in the first place. These include, among others: (a) a party’s desire for the perceived neutrality of an arbitral tribunal; (b) a party’s intention to have its dispute resolved in a confidential forum, and not in public court proceedings; (c) an unwillingness to go before the judicial authorities in the respondent’s jurisdiction; (d) an inability to obtain certain types of interim relief in certain jurisdictions; or (e) a preference for an arbitral tribunal with special expertise to adjudicate disputes as opposed to generalist state courts.<sup>6</sup> Moreover, in some cases, applying to a state court may not be a viable option at all, where for instance, the parties have deliberately excluded recourse to state court jurisdiction.

### Modern Emergency Arbitrator Provisions

To fill this vacuum, a growing number of arbitral institutions have adopted emergency arbitrator provisions. The precursor for these modern rules was the ICC Pre-Arbitral Referee Procedure, implemented in 1990. Unlike the wave of new emergency arbitrator rules, the ICC Pre-Arbitral Referee rules were not

included in the main body of the ICC Rules and thus required the parties to opt-in. Commentators suggest that it is for this reason, and because the procedure was relatively unknown, even to experienced arbitration practitioners, that this mechanism has been used so sparingly – reportedly only in 12 cases between 1990 and 2012.<sup>7</sup>

Modern emergency arbitrator rules have taken a different approach, and have been incorporated directly into the body of institutional arbitration rules, often with specific opt-out procedures. With a recent wave of revision of institutional rules, the trend has decisively been reversed, with most major institutional rules now containing emergency arbitrator provisions, including:

- 2012 Rules of Arbitration of the International Chamber of Commerce (“ICC Rules”) – Article 29 and Appendix V.
- 2010 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC Rules”) – Article 32 and Appendix II.
- 2012 Swiss Rules of International Arbitration (“Swiss Rules”) – Article 43.
- 2009 Rules on International Dispute Resolution Procedures of the ICDR (“ICDR Rules”) – Article 37.
- 2010 Arbitration Rules of the Nederlands Arbitrage Instituut (“NAI Rules”) – Section Four A (Articles 42a–42o).
- 2010 Rules of the Singapore International Arbitration Centre (“SIAC Rules”) – Rule 26 and Schedule 1.
- 2007 CPR Rules for Non-Administered Arbitration (“CPR Rules”) – Rule 14.
- 2011 Rules of the Australian Center for International Commercial Arbitration (“ACICA Rules”) – Article 28.
- 1996 Draft Emergency Relief Rules of WIPO.

A notable exception is the 1998 LCIA Rules, which do not contain special emergency arbitrator procedures; although Article 9 does provide for “expedited formation” of the arbitral tribunal in cases of “exceptional urgency”. An application for the expedited formation of the tribunal, combined with an Article 25 application for interim measures might, therefore, go some way towards parties obtaining emergency relief within the context of their LCIA arbitration. Expedited formation of an LCIA tribunal may only take place, however, on or after the commencement of the arbitration, which may delay the process since the claimant will have had to prepare and file its Request for Arbitration. Further, Article 9 does not contain a time limit within which such expedited formation of the tribunal should be completed. A revised version of the LCIA Rules are reportedly due to come into force during the course of 2013. While discussions on the revisions are apparently still open, as of this date it appears that the LCIA is not likely to adopt a full-blown emergency arbitrator procedure on the basis that the Article 9 mechanism functions reasonably well, and that it may be preferable to appoint a final arbitral tribunal more expeditiously than to appoint a temporary emergency arbitrator, with uncertain status.

Parties and arbitration practitioners now have available to them a wide variety of institutional arbitration rules offering mechanisms for pre-arbitral interim relief. Whether they will embrace these new procedures and, perhaps more importantly, whether these mechanisms will meet the needs of international businesses, remains to be seen. Given that most of these rules have only been developed during the last few years, there is little experience as to how they will be used in practice. In light of the uncertainties regarding the enforcement of emergency arbitrator decisions, the incentive to use these provisions may be limited to cases where the applicant believes that the respondent will comply voluntarily with an emergency arbitrator’s decision, or where court-ordered interim relief is not considered a viable option.

In the following section, we will describe the salient features and issues which emerge from the emergency arbitrator procedures adopted in three commonly-used sets of institutional rules: the ICC Rules; SCC Rules; and Swiss Rules.

### Emergency Arbitrator Rules - Practice and Procedure

There are a great deal of similarities in the emergency arbitrator rules adopted by the ICC, SCC and Swiss Chambers, albeit with some important differences, including with respect to the form of the emergency arbitrator’s decision, which may have an impact on enforcement. The Swiss Rules also offer the unique possibility for a party, in exceptional circumstances, to obtain emergency relief on an *ex parte* basis.

### Applicability

The revised ICC Rules make a clean break from the opt-in nature of the ICC Pre-Arbitral Referee Procedure, providing instead for the automatic application of the new emergency arbitrator provisions, but the possibility to opt-out (Article 29(6)(b)).<sup>8</sup> While the ICC Rules apply generally to all arbitrations commenced after 1 January 2012, the emergency arbitrator rules are only applicable to arbitration agreements agreed upon after entry into force of the revised rules, *i.e.*, 1 January 2012 (Article 29(6)(a)).

The revised SCC Rules have similarly provided that their new emergency arbitrator rules will apply automatically unless the parties have specifically agreed to opt-out. This approach becomes more controversial, however, when combined with the decision by the SCC to make the revised SCC Rules, including the emergency arbitrator provisions, applicable to all SCC arbitrations commenced after 1 January 2010, regardless of when the arbitration agreement was signed. This means that parties agreeing to SCC arbitration are considered to have given their implied consent to emergency arbitrator provisions even though, at the time of entering into the contract, those parties may not have reasonably anticipated that this kind of procedure could be available. For one of the members of the SCC committee responsible for drafting the new emergency arbitrator rules, this retroactive application to arbitration agreements entered into prior to the existence of the new rules may “test the limits of consent”.<sup>9</sup>

The Swiss Rules follow a similar approach as that taken in the SCC Rules. The emergency relief proceedings set out at Article 43 apply automatically to all arbitral proceedings commenced on or after the revised rules came into effect, *i.e.*, 1 June 2012,<sup>10</sup> unless the parties choose to opt-out.

In addition, the ICC Rules limit the applicability of the emergency arbitrator provisions to signatories of the arbitration agreement or their successors (Article 29(5)).<sup>11</sup> Similar explicit language is lacking in the SCC Rules and Swiss Rules, although both specify that emergency arbitrators should not be appointed where there is a lack of jurisdiction to arbitrate under the respective rules (Appendix II, Article 4(2) SCC Rules; Article 43(2)(a) Swiss Rules). These provisions could be invoked against a party attempting to bring an application for emergency interim measures against a non-signatory to the arbitration agreement.

### A truly pre-arbitral solution

The ICC Rules, SCC Rules and Swiss Rules all allow a party to make an application for the appointment of an emergency arbitrator before the arbitration has been commenced and an arbitral tribunal

constituted.<sup>12</sup> If, however, a Request for Arbitration (“Request”) or Notice of Arbitration (“Notice”) has not yet been filed at the time of the application, the rules all provide a limited time period within which the claimant must submit its Notice or Request. The ICC and Swiss Chambers both set a 10-day deadline from receipt of the application; although such time limit can be extended by the emergency arbitrator and court, respectively, where warranted (Appendix V, Article 1(6) ICC Rules; Article 43(3) Swiss Rules). The approach taken by the SCC is slightly different: an emergency decision by an emergency arbitrator ceases to be binding on the parties if an arbitration is not commenced within 30 days from the date of the emergency decision (Appendix II, Article 9(4)(iii) SCC Rules).

The requirement for officially commencing the arbitration by the submission of a Request or Notice within a relatively short time of the application for emergency measures constitutes a procedural safeguard for respondents.<sup>13</sup> Indeed, applicants may seek emergency measures in order to put pressure on the opposing side and obtain leverage in a dispute. Having to follow through with a proper Request or Notice should have the effect of protecting respondents from frivolous applications by parties who are uncertain about commencing an arbitration.

### Concurrent jurisdiction of emergency arbitrators and competent state courts

The revised arbitration rules maintain the concurrent jurisdiction of the arbitral tribunal, including emergency arbitrators, and competent state courts to grant interim measures (Article 29(7) ICC Rules; Article 32(5) SCC Rules; Article 26(5) Swiss Rules).<sup>14</sup>

The ICC Rules go a step further and allow, “in appropriate circumstances”, a party to seek interim measures from a judicial authority even after an application for the appointment of an emergency arbitrator is made. How “appropriate circumstances” will be interpreted by judicial authorities remains to be seen.

### Notification to respondent (*ex parte* applications)

Almost all emergency arbitrator provisions treat notification of the application to the respondent seriously. The norm is to provide for prompt notification to the respondent, especially since an application for emergency relief may come as a surprise to the respondent not yet served with a Notice or Request. Given the accelerated time-frame for resolving applications for emergency relief (more on this below), respondents must be notified as soon as possible so that they may be in a position to prepare and present their case. Under the ICC Rules, the Secretariat shall notify the parties “once the emergency arbitrator has been appointed” (Appendix V, Article 2(3)). The SCC Rules require even earlier notification to the respondent, *i.e.*, as soon as the application for the appointment of an emergency arbitrator has been received, and thus even before the appointment is completed (Appendix II, Article 3).

The notable exception to this general rule are the revised Swiss Rules, which in theory allow for *ex parte* applications, and where the emergency relief provision, Article 43, includes no notification requirement. Instead, Article 43(1) refers generally to the provision on interim measures of protection, Article 26, which allows an arbitral tribunal “in exceptional circumstances”, to rule on a request for interim measures “by way of a preliminary order before the request has been communicated to any other party” (Article 26(3)). Communication must be made at the latest with the preliminary order, and the other parties must be immediately granted an

opportunity to be heard (*id.*). Thus the respondent’s right to be heard (Article 43(6)) is maintained, albeit after the issuance of the preliminary order. We can only assume that arbitral tribunals and emergency arbitrators alike will be reluctant to grant interim measures on an *ex parte* basis, and that they will do so in only truly exceptional cases. In appropriate cases, however, the possibility to grant emergency measures on an *ex parte* basis may meet even the most urgent need for interim relief, while still allowing the respondent an opportunity to subsequently present its case, and in the meantime preserving the *status quo*.

### Appointment of and challenges to emergency arbitrators

The ICC, SCC and Swiss Chambers have all agreed that, in the interest of speed and efficiency, the appointment of an emergency arbitrator is best left in the hands of the respective institution, and not the parties. The three institutions, however, have differing views on the speed at which emergency arbitrators should be appointed. At least on the face of the rules, the SCC wins the race, since the Board is requested to seek to appoint an emergency arbitrator within 24 hours of receipt of the emergency arbitrator application (Appendix II, Article 4(1)). Given this extremely tight time-frame, the language, “will seek to appoint”, appears to offer some much-needed flexibility in cases where it is not possible to appoint a suitable emergency arbitrator within 24 hours.<sup>15</sup> Indeed, from a practical perspective, it may be difficult for prospective emergency arbitrators working in large law firms to complete conflict check procedures and thus confirm their independence to act this quickly.

Under the ICC Rules, emergency arbitrators are appointed by the President of the Court “within as short a time as possible” and “normally within two days” from the Secretariat’s receipt of the application (Appendix V, Article 2(1)). The revised Swiss Rules are even more flexible, stating that the Court shall appoint a sole emergency arbitrator “as soon as possible after receipt of the Application” (Article 43(2)). Given the speed required in the appointment process, arbitral institutions should consider developing a permanent roster of appropriate emergency arbitrator candidates who are generally willing and available to take on such appointments and can indicate periods of availability for such assignments.

All three sets of rules require that emergency arbitrators be impartial and independent of the parties, barring which they may be challenged by a party (Appendix V, Articles 2(4), 3 ICC Rules; Appendix II, Article 4(3) SCC Rules; Article 43(4) Swiss Rules). Once again, the SCC Rules require parties intending to challenge an emergency arbitrator to act quickly – 24 hours from knowledge of the circumstances giving rise to the challenge. The ICC and Swiss Rules impose a three-day time limit for challenges.

### Procedure

The ICC, SCC and Swiss Rules all grant substantial discretion to the emergency arbitrator to organise the procedure in a manner considered “appropriate”, taking into account the inherent urgency of the application (Appendix V, Article 5(2) ICC Rules; Article 19 and Appendix II, Article 7 SCC Rules; Article 43(6) Swiss Rules). The rules also emphasise parties’ due process rights, including the right to an impartial emergency arbitrator and the right to a reasonable opportunity to be heard.

Unique among these three rules, the ICC Rules specify that the emergency arbitrator shall establish a procedural timetable for the emergency arbitrator proceedings, “within as short a time as possible, normally within two days from the transmission of the file

to the emergency arbitrator” (Appendix V, Article 5(1) ICC Rules). Given the urgency at the heart of emergency relief, emergency arbitrator proceedings must be handled expeditiously, and the rules call for relatively short time limits for the issuance of a decision. The SCC has set an ambitious goal of a decision within five days from referral of the application to the emergency arbitrator, albeit with the possibility for extensions (Appendix II, Article 8(1)). While this very short deadline may go some way to address the need for truly *urgent* relief, in practice it may prove difficult to provide notice to the respondent and ensure the parties are afforded an adequate opportunity to present their case within such a tight schedule. It remains to be seen whether requests for extensions become the norm or the exception.

Under both the ICC and Swiss Rules, the decision should be made within 15 days from the date the file is transmitted to the emergency arbitrator (Appendix V, Article 6(4) ICC Rules; Article 43(7) Swiss Rules). This time limit can be extended by the institution in appropriate circumstances. While an extension may be necessary, for example, to ensure the parties have an opportunity to present their case, extensions may dilute the utility of the proceedings and in some urgent circumstances the resulting decision might be too little too late. Moreover, even if the emergency arbitrator renders a decision within 15 days, this may still be too late for a party to prevent the dissipation of an asset or preserve the *status quo*. Judicious use of the *ex parte* application under the Swiss Rules could, in theory, allow an applicant to obtain faster initial emergency relief than under other institutional rules, while subsequently providing the emergency arbitrator time to hear the respondent on the interim measures and either maintain or lift them.

### Types of emergency measures and required standard

The three sets of rules under consideration grant the emergency arbitrator broad discretion to order urgent interim relief, without specifying or limiting the type of relief which can be sought, or the requirements which parties must meet to show entitlement to relief.

Under the ICC Rules, the emergency arbitrator provisions are available when a party “needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal” (Article 29(1)). It is the emergency arbitrator who determines in his or her order whether the requirement for admissibility set out in Article 29(1) – urgency – is met (Appendix V, Article 6(2)).

Under the SCC Rules (Appendix II, Article 1(2)), the emergency arbitrator is granted the powers set out in Articles 32(1)-(3) of the Rules on interim measures, *i.e.*, to “grant any interim measures it deems appropriate”, which includes ordering a party to provide appropriate security in connection with the interim measure. The Swiss Rules likewise do not specify any requirements in assessing applications for emergency relief, simply stating that an application may be made by a party “requiring urgent interim measures”, with reference to the main provision on interim measures of protection (Article 43(1), Article 26).

The lack of detailed standards for assessing entitlement to emergency relief, and resulting broad discretion afforded to emergency arbitrators, stands in contrast to the approach adopted in the revised 2010 UNCITRAL Rules. Article 26 includes an (albeit) non-exhaustive list of the types of interim measures an arbitral tribunal may grant, and the requirement that a requesting party must show that the alleged harm is not adequately reparable by an award of damages if the order is not granted. One commentator on the revised SCC Rules notes that despite the broad discretion granted to emergency arbitrators, they should apply some standards when

assessing a request for interim measures based on an “international approach” and suggests that such approach may be found in Article 26 of the UNCITRAL Rules, which arguably represents international consensus.<sup>16</sup>

### Costs of emergency arbitrator procedures

Emergency arbitrator proceedings come at a cost which, depending on the arbitration rules selected and whether the relevant jurisdiction imposes a substantial court or filing fee, may prove to be substantially higher than the cost of recourse to competent state courts. Of the three institutional rules under review here, the ICC solution is the most expensive, at least in terms of the up-front fees to be paid with the application.

Under the ICC Rules, the applicant must pay US \$40,000, consisting of US \$10,000 in ICC administrative fees, and US \$30,000 as an advance for the emergency arbitrator’s fees and expenses (Appendix V, Article 7). The President of the ICC Court may increase or reduce the advance for the emergency arbitrator’s fees or the ICC administrative expenses depending on the nature of the proceeding. The emergency arbitrator shall fix the costs of the emergency arbitrator proceedings in the decision and has discretion on how the costs should be allocated as between the parties. This is notably different from the costs rules governing the arbitration itself, since the ICC Rules call for the ICC Court to fix the fees and expenses of the arbitrators and the ICC administrative expenses (Appendix III, Article 2 ICC Rules).

Under the SCC Rules, the applicant must pay a total of €15,000 (€3,000 for the application fee and €12,000 for the fees and costs of the emergency arbitrator) (Appendix II, Article 10). As with the ICC Rules, the SCC Board of Directors may increase or reduce the costs given the nature of the proceeding. Unlike the ICC Rules, however, the power to apportion costs between the parties is not granted to the emergency arbitrator, but rather to the subsequent arbitral tribunal, which, at the request of a party, may make a costs award relating to the emergency arbitrator proceedings in a final award.

As for the Swiss Rules, applicants must pay a non-refundable registration fee of CHF 4,500 and a deposit as an advance for the costs of the emergency relief proceedings of CHF 20,000 (Article 43(1)(c) and Appendix B, Section 1.6). As for determination and allocation of costs, the Swiss Rules have adopted a compromise between the ICC and SCC solutions. In his or her decision, the emergency arbitrator must decide on the final costs of the emergency arbitrator proceedings, and submit a draft to the Secretariat in advance for approval or adjustment by the SCC Arbitration Court (Article 43(9)). Allocation of costs between the parties, however, falls within the mandate of the ultimate arbitral tribunal, unless no such tribunal is constituted, in which case the emergency arbitrator decides on the apportionment of costs in a separate award.

### Form of decision of emergency arbitrators and enforcement

Under the ICC Rules, the emergency arbitrator’s decision takes the form of an “order” as opposed to an “award” issued by the arbitral tribunal (Article 29(2) vs. Articles 30-35 ICC Rules). Article 29(2) further specifies that parties “undertake to comply with any order made by the emergency arbitrator”. Orders issued by emergency arbitrators cease to be binding on the parties in a number of circumstances: (a) if the emergency arbitrator proceedings are terminated by virtue of the applicant’s failure to timely submit a Request for Arbitration; (b) if the ICC Court of Arbitration accepts a challenge to the emergency arbitrator; (c) upon the final award

from the arbitral tribunal, unless the tribunal decides otherwise; and (d) in the case of termination of the arbitration prior to the rendering of a final award (Appendix V, Article 6(6) ICC Rules).

The form of the decision of an emergency arbitrator is more flexible under the SCC Rules. The emergency arbitrator provisions in Appendix II do not specify the form of the decision, and the emergency arbitrator is granted the same powers as those set out in Article 32(1-3) on interim measures, including the power to issue an interim measure in the form of an order or an award (Appendix II, Article 1(2) SCC Rules). The emergency decision is binding on the parties when rendered, and by agreeing to the SCC Rules, the parties “undertake to comply with any emergency decision without delay” (Appendix II, Article 9(1), (3)). The decision is not binding, however, on the subsequent arbitral tribunal, and like with the ICC Rules, the emergency arbitrator’s decision ceases to be binding in a number of specified circumstances, including when the subsequent arbitral tribunal makes a final award, and when the arbitration is not commenced or the case is not referred to the arbitral tribunal within a given period of time (Appendix II, Article 9(4)).

As for the Swiss Rules, the decision of the emergency arbitrator takes the form of an “interim award”, or of a “preliminary order” in the case of an *ex parte* request for emergency interim measures (Articles 43(8), 26(2), (3)). Any interim measure granted by the emergency arbitrator may be modified, suspended or terminated by the emergency arbitrator or by the subsequent arbitral tribunal (Article 43(8)). Further, like the ICC and SCC Rules, emergency interim measures cease to be binding if the emergency arbitrator proceedings are terminated for failure to submit a Notice, or upon the rendering of a final award by the arbitral tribunal, unless the tribunal decides otherwise (Article 43(10)).

Under all three institutional solutions, an emergency arbitrator’s decision is binding on the parties by virtue of the rules themselves. Parties are thus expected to comply voluntarily with such decisions, and the subsequent arbitral tribunal may draw adverse inferences, or even award damages for breach of contract in a final award,<sup>17</sup> against a non-conforming party. Under the SCC and Swiss Rules, where the arbitral tribunal addresses the allocation of costs related to the emergency arbitral proceedings in the final award, non-compliance may be sanctioned by an adverse costs award. Based on available anecdotal evidence, there appears to be a high level of compliance with these types of orders.<sup>18</sup>

In cases where a party chooses not to comply with an emergency arbitrator’s decision on interim relief, the thorny question is whether this decision can be recognised and enforced before a judicial authority. Enforcement may be attempted before a court with reference to its national law, or as a foreign award under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). As one leading arbitration specialist notes “[u]nfortunately, the law relating to the enforceability of tribunal-ordered provisional measures is unsettled”.<sup>19</sup> Such uncertainty is, if anything, more acute with respect to interim measures ordered by an emergency arbitrator. While there is no ready answer to the question of whether an emergency arbitrator’s decision will be enforceable, there are a number of key issues to consider.

First, at least in some jurisdictions, whether the emergency arbitrator is considered to be a full-fledged arbitrator is critical to the ultimate enforceability of the interim measure. In one of the few public decisions addressing the ICC Pre-Arbitral Referee Procedure, *Société Nationale des Pétroles du Congo v. République du Congo*, the Republic of Congo commenced annulment proceedings against an order issued by a pre-arbitral referee. The Paris Court of Appeal held that the action to set aside the order was not admissible because the

order could not be considered an arbitral award.<sup>20</sup> The court focused not on the characterisation of the referee’s decision as either an order or award, but rather on whether the referee had acted as an arbitrator, and thus whether the order was akin to an arbitral award. In conclusion, the court found that the referee had not acted in the capacity of an arbitrator and that his decisions did not constitute arbitral awards and only had contractual value.<sup>21</sup>

Another key issue concerns the “finality” of interim measures ordered by emergency arbitrators. Whether characterised as an “order” or “award” under the relevant institutional rules,<sup>22</sup> enforcement of pre-arbitral interim measures, as with interim measures ordered by an arbitral tribunal, are, in many jurisdictions, not considered enforceable under the New York Convention because they do not qualify as “awards” and do not satisfy the requirement of finality set out in Article 5(5) of the convention. Indeed, by their very nature, orders for interim measures are temporary in nature. Despite the substantial body of case law and commentary holding that arbitral provisional measures are not “final”, one commentator argues that the “better view is that provisional measures should be and are enforceable as arbitral awards under generally-applicable provisions for the recognition and enforcement of awards. Provisional measures are ‘final’ in the sense that they dispose of a request for relief pending the conclusion of the arbitration”.<sup>23</sup> However what are we to make of provisional measures awarded by an emergency arbitrator, whose decision can be terminated or modified by the subsequent arbitral tribunal. Can they reasonably be considered to be “final”?

One must also look to national arbitration legislation to determine whether orders granting emergency relief may be enforceable. While some national arbitration laws do not expressly address the issue of enforcement of provisional measures ordered by arbitral tribunals, other jurisdictions, including those based on the UNCITRAL Model Law, have enacted specialised legislation which provides for the enforcement of such measures by national courts located in the arbitral seat.<sup>24</sup> The 2006 revisions to the UNCITRAL Model Law adopted special enforcement provisions for tribunal-granted provisional measures, and 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”. Commentators note that jurisdictions which have adopted the revised UNCITRAL Model Law, including Articles 17H and 17I, are likely to also recognise and enforce orders by emergency arbitrators.<sup>25</sup>

### Practical Implications for Arbitration Users

Arbitration users are thus left with an important question: in their quest for interim measures, should they address the competent state court, or seek relief from an emergency arbitrator? There is, of course, no correct answer, but rather a multitude of possibilities depending on the interests and motivations of the parties, the nature of the dispute and provisional measure sought, and the degree of urgency required.

In cases where extreme urgency requires action in a matter of hours, there exist significant doubts about a respondent’s future compliance with an order on interim measures, and the court with jurisdiction poses no particular problems, the obvious choice will likely be to seek relief from the competent judicial authority. Where these factors are not present, however, a party now has at its disposal alternative remedies that can be requested from arbitral institutions to address a requirement for pre-arbitral urgent interim measures. Emergency arbitrator provisions may thus, in appropriate circumstances, be an attractive alternative to recourse to a competent court, and should in every case be considered carefully.



## Endnotes

1. V.V. Veeder, *Enforcing Arbitration Awards under the New York Convention – Experience and Prospects*, (United Nations Publications, 2009), p. 21.
2. Ali Yeşilirmak, *Provisional Measures in International Commercial Arbitration*, (Kluwer Law International, 2005), para. 1-6.
3. Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, *Law and Practice of International Commercial Arbitration*, 4th ed. (London: Sweet & Maxwell 2004), para. 7-18.
4. *See, for example*, Article 28(1) of the 2012 ICC Rules on “Conservatory and Interim Measures”: “[u]nless the parties have agreed otherwise, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate”. Similarly, the 2010 Arbitration Rules of the SCC provide, at Article 32 on “Interim Measures”, that “[t]he Arbitral Tribunal may, at the request of a party, grant any interim measures it deems appropriate”. Article 26 of the 2012 Swiss Rules also states that “[a]t the request of a party, the arbitral tribunal may grant any interim measures it seems necessary or appropriate”.
5. *See* Article 28(2) 2012 ICC Rules, Article 32(5) 2010 SCC Rules and Article 26(5) 2012 Swiss Rules.
6. Yeşilirmak, *supra* note 2, para. 4-2; Christopher Boog, “Swiss Rules of International Arbitration – Time to Introduce an Emergency Arbitrator Procedure?” in Matthias Scherer (ed.), *ASA Bulletin*, Vol. 28, Issue 3, pp. 462-464.
7. *See* Carlos de los Santos Lago/Victor Bonnin, “Emergency Proceedings Under the New ICC Rules”, in Miguel Angel Fernández-Ballesteros and David Arias (eds.), *Spain Arbitration Review (Wolters Kluwer España 2012)*, Vol. 2012, Issue 13, p. 5; *see also* Redfern/Hunter/Blackaby/Partasides, *supra* note 3, para. 7-14. For an in-depth discussion of two counsels’ practical experience with the ICC Pre-Arbitral Referee Procedure, and the outcome of annulment proceedings before the Paris Court of Appeal, *see* Emmanuel Gaillard/Philippe Pinsolle, “The ICC Pre-Arbitral Referee: First Practical Experiences”, in *Arbitration International (Kluwer Law International 2004)*, Vol. 20, Issue 1, pp. 1-19.
8. With the 2012 revised ICC Rules, the ICC includes an additional standard arbitration clause explicitly excluding the applicability of the emergency arbitrator provisions: “[a]ll disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The Emergency Arbitrator Provisions shall not apply”.
9. For an in-depth discussion of this issue, *see* Patricia Shaughnessy “Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules”, in Michael Moser/Dominique Hascher (eds.), *Journal of International Arbitration*, (Kluwer Law International 2010), Vol. 27, Issue 4, pp. 349-354.
10. *See* Article 1(3) 2012 Swiss Rules: “[t]his version of the Rules shall come into force on 1 June 2012 and, unless the parties have agreed otherwise, shall apply to all arbitral proceedings in which the Notice of Arbitration is submitted on or after that date”. Interestingly enough (and unlike the related provision in the SCC Rules), this provision does not specify that the new rules shall apply as from the date of filing of application for emergency relief, even though such an application can be brought even before a Notice of Arbitration is filed. We assume that this is an oversight on the part of the drafters of the revised rules.
11. The limitation of the applicability of the emergency arbitrator procedure to signatories of the arbitration agreement or their successors constitutes a procedural safeguard to ensure that only respondents who have agreed to an arbitration clause under the 2012 ICC Rules with the applicant will be forced to participate in an emergency arbitrator proceeding. She goes on to note, however, that a practice will have to be established to determine the scope and meaning of the terms “signatories” and “successors”. *See* Nathalie Voser, “Overview of the Most Important Changes in the Revised ICC Arbitration Rules”, in Matthias Scherer (ed.), *ASA Bulletin*, Vol. 29, No. 4, 2011, pp. 783-820 at pp. 816-817.
12. The ICC Rules specify that applications for emergency measures shall be accepted only if they are received by the ICC Secretariat “prior to the transmission of the file to the arbitral tribunal pursuant to Article 16” (Article 29 ICC Rules). Similarly, Appendix II, Article 1(1) of the SCC Rules allows applications for the appointment of an emergency arbitrator “until the case has been referred to an Arbitral Tribunal pursuant to Article 18 of the Arbitration Rules”. The provision on emergency relief in the Swiss Rules (Article 43) has no similar limitation, since, unlike the ICC and SCC Rules, the Swiss Rules contain no provision relating to the transfer or referral of the arbitration file to the arbitral tribunal.
13. Voser, *supra* note 11, pp. 817-818.
14. With respect to the ICC Rules, this concurrent jurisdiction is reported as addressing the concerns of members of the commission that the existence of emergency arbitrator provisions alone “could lead to the adverse consequence of some state courts deciding to deny their own jurisdiction to issue interim or conservative measures”. *See* Voser, *supra* note 11, p. 814.
15. Shaughnessy, *supra* note 9, p. 340.
16. The drafters of the revised SCC Rules considered and rejected providing a “laundry list” of types of interim measures which could be sought, preferring instead a less detailed approach; *see id.*, pp. 342-343 and fn. 49.
17. Commentators suggest that an applicant could bring a claim for breach of contract against a recalcitrant respondent for failure to comply with the order of an ICC emergency arbitrator, given its contractually binding nature: *see* de los Santos Lago/Bonnin, *supra* note 7, pp. 15-16.
18. *See* Justin D’Agostino, “First aid in arbitration: Emergency Arbitrators to the rescue”, in *Kluwer Arbitration Blog*, 15 November 2011; Gaillard/Pinsolle, *supra* note 7, p. 22; Boog, *supra* note 6, pp. 474-475.
19. Gary Born, *International Commercial Arbitration (Kluwer Law International, 2009)*, p. 2019.
20. Gaillard/Pinsolle, *supra* note 7, p. 20.
21. In commenting on this decision, Emmanuel Gaillard and Philippe Pinsolle argue that the Paris Court of Appeal should not have focused so heavily on the contractual nature of the referee’s powers and decision, but rather on the provisional nature of the referee’s decision, and its failure to meet the requirement of finality for arbitral awards applied by the French courts. *Id.*, pp. 21-22.
22. The term used for the emergency arbitrator’s decision in and of itself is not determinative of whether such decisions will be recognised and enforced in any particular jurisdiction. Rather, this will be a decision for the particular jurisdiction to take in light of its *lex arbitri* and international conventions. *See* Voser, *supra* note 11, pp. 818-819.
23. Born, *supra* note 19, p. 2023.
24. *Id.*, p. 2019; Swiss PILA, Article 183(2); English Arbitration Act, 1996, § 42(1); German ZPO, § 1041(2); Hong Kong Arbitration (Amendment) Ordinance No. 2 of 2000.
25. *See* Voser, *supra* note 11 p. 818; *see also* Boog, *supra* note 6, pp. 474-475.

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