

EMERGENCY MEASURES OF PROTECTION: CREEPING CONSENSUS OR A PASSING FANCY?

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I. INTRODUCTION

In the last few years, arbitral institutions have been scrambling to revise their rules to increase the attractiveness of arbitration and, as part of the never-ending quest, to distinguish themselves from each other. Of these revisions, one of the more innovative developments has been the introduction of rules providing for interim or conservatory relief through the arbitral institution before the tribunal is constituted.

All arbitration rules permit the tribunal to order interim or conservatory relief but this is of little use when there is not yet a tribunal in place. While an application for such relief typically may be made to the courts, those court proceedings can be time-consuming and unpredictable in some jurisdictions. In addition, parties often chose arbitration precisely to avoid being left at the mercy of one party's judiciary.

This note gives an overview of the four major institutions that to date have adopted some form of pre-appointment emergency relief and the extent to which these mechanisms have been embraced by users (Section II). It also provides an overview of the more conservative approaches previously adopted by three other leading institutions (Section III). Finally, the authors pose some questions about what challenges still lie ahead (Section IV).

II. OVERVIEW OF RULES ADOPTING EMERGENCY PROCEDURES

A. INTERNATIONAL CENTER FOR DISPUTE RESOLUTION (ICDR)¹

Emergency Measures of Protection (Article 37)

Effective: May 1, 2006

Scope: Article 37 permits expedited emergency relief before an arbitral panel has been appointed. On application, an emergency arbitrator is appointed to consider the requests. The emergency arbitrator has the power to order interim awards and emergency relief, including injunctive relief and measures for the protection or

¹ See generally M Gusy, J Hosking and F Schwarz, *A Guide to the ICDR International Arbitration Rules* (OUP, 2011), Chapter 37; G Lemenez and P Quigley, "The ICDR's Emergency Arbitrator Procedure in Action Part I: A Look at the Empirical Data," *Disp Res J* 60 (Aug/Oct 2008); G Lemenez and P Quigley, "The ICDR's Emergency Arbitrator Procedure in Action Part II: Enforcing Emergency Arbitrator Decisions," *Disp Res J* (Nov 2008/Jan 2009).

conservation of property. Article 37 applies automatically to all parties who entered into an agreement covered by ICDR Rules on or after May 1, 2006.

Process:

- The application for emergency relief must come *after* the demand for arbitration has been filed but before the panel is appointed.
- The application must set out the nature of, and reasons for, the requested relief. There is no set format for the applications—submissions have ranged from a 2-page letter to a 60-page formal application with 500 pages of supporting documentation.
- On receipt of an Article 37 application, the ICDR administrator shall appoint an emergency arbitrator within one business day of the request. The emergency arbitrator is selected from a confidential panel that is made up of senior members of the global arbitration community with at least 15 years of experience.
- Any challenge to the emergency arbitrator must be made within one business day. The ICDR has the sole authority to consider and rule on challenges. To date, there have been four challenges, resulting in one case of removal.
- Within two business days of appointment, the arbitrator must establish a schedule for considering the merits. No formal hearing is necessary so long as the parties have a reasonable opportunity to be heard.
- The emergency arbitrator has the power to order interim awards and emergency relief. The emergency arbitrator retains the power to modify or vacate the interim award for good cause shown.
- The emergency arbitrator becomes *functus officio* once the tribunal is constituted. The tribunal may reconsider, modify, or vacate the interim award.

Points of Interest:

- A party may still choose to go to a court of competent jurisdiction to obtain emergency relief, such as a preliminary injunction, a temporary restraining order, or an order to preserve evidence.
- Article 37 specifically states that decisions rendered by the emergency arbitrator are “*arbitral awards*” subject to immediate enforcement.
- To date, Article 37 procedures have been formally invoked on fourteen occasions, resulting in eleven interim awards (of the other cases, one was withdrawn, one settled, and one was pending at the time of inquiry). The average time from filing to issue of the interim order was three weeks.

B. STOCKHOLM CHAMBER OF COMMERCE (SCC)

Emergency Arbitrator (Appendix II)

Effective: January 1, 2010

Scope: The SCC modified its Arbitration Rules to incorporate procedures for the appointment of an emergency arbitrator with powers to issue interim awards before an arbitration panel is appointed. Upon application for relief, and within 24 hours of that application, a single emergency arbitrator is appointed by the SCC

Board.² The arbitrator may conduct proceedings as he or she sees fit, but must issue a written and reasoned decision in five days absent an extension from the SCC Board. That award is binding and enforceable, but subject to review by the emergency arbitrator and the tribunal, once constituted.

Points of Interest:

- The SCC Rules do not require a request for arbitration prior to the request for emergency relief. The SCC considered this unnecessary, “*as it limits the usefulness of the provisions without providing any advantages.*”³ The decision ceases to be binding if arbitration is not commenced within 30 days of the decision or if the dispute is not submitted to a tribunal within 90 days.
- The rules state that an emergency arbitrator will not be appointed “*if the SCC manifestly lacks jurisdiction over the dispute.*”⁴ Thus, the SCC Board is responsible for making a preliminary determination that jurisdiction exists.
- To date, there have been four applications—relief was denied in all but one. In all cases, the emergency arbitrator was appointed within 24 hours. In half, the emergency arbitrator has issued a decision within the required five days, in the other half, the Board granted an extension.⁵
- The SCC has released abstracts of the four decisions.⁶

C. SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC)

The July 2010 version of the SIAC Rules contains two mechanisms relevant to the need for emergency relief: expedited procedures (Rule 5) and a pre-appointment process for designation of an “*emergency arbitrator*” empowered to give emergency relief (Rule 26 and Schedule 1). Only the latter is discussed here.⁷

² The SCC rejected the use of the ‘one business day’ standard because of the ‘uncertainty inherent in such a definition considering national holiday variations’. SCC, Draft New Rules with Notes, Appx II, Art 4, available online at <http://www.sccinstitute.com/filearchive/2/25690/Rules_on_an_Emergency_Arbitrator_on-Interim_Measures_NOTES.pdf>. See also J Berenholtz and JLeach, "The expedited and emergency arbitrator procedures under the SIAC Rules - Six months on, how have they fared?" International Litigation and Arbitration Alert, Hogan Lovells, available at <http://www.siac.org.sg/cms/index.php?option=com_content&view=article&id=248:expedited-emergency&catid=56:articles&Itemid=122>

³ SCC, Draft New Rules with Notes, Appx II, Art 1, available online at <http://www.sccinstitute.com/filearchive/2/25690/Rules_on_an_Emergency_Arbitrator_on-Interim_Measures_NOTES.pdf>

⁴ Schedule II, Art. 4.

⁵ See “One Year with Emergency Arbitrators” (Jan 2011), available at <http://www.sccinstitute.com/?id=&newsid=38812>.

⁶ See J Lundstedt, “SCC Practice: Emergency Arbitrator – Decisions Released 2010”; (Mar 2011), available at <http://www.sccinstitute.com/?id=23696&newsid=39213>.

⁷ While the Rule 5 “expedited procedure” is potentially relevant in that it applies not only to disputes of less than \$5 million but also to cases of “*exceptional urgency*”, this latter criterion has yet to be explained by the Chairman or applied.

Emergency Arbitrator (Rule 26.2 and Schedule 1)

Effective: July 1, 2010

Scope: Schedule 1 provides a mechanism for emergency interim relief, prior to the formation of an arbitral tribunal, through appointment of an emergency arbitrator with the power to award any interim relief deemed necessary. Within one business day of a party's application for emergency relief, the SIAC Chairman must appoint an emergency arbitrator⁸ and within two business days of that appointment, the emergency arbitrator must set a schedule to consider the application.⁹ As long as the tribunal is constituted within 90 days of the interim award, the award is binding, but subject to review by the tribunal.¹⁰

Points of Interest:

- The mechanism is closely modeled on Article 37 of the ICDR Rules.
- As of February 2011, three applications had been received and accepted.¹¹
- In the first case, the application was received by SIAC at 9:30 pm, Singapore time. The Chairman appointed an emergency arbitrator the following day. Within one day, the emergency arbitrator had established a schedule for consideration of the merits. Within one week the parties submitted written submissions and a telephonic hearing was conducted. The following day, the emergency arbitrator issued his award.¹²

D. NETHERLANDS ARBITRATION INSTITUTE (NAI)

Summary Arbitral Procedures (Section Four A (Arts 42a-o))

Effective: January 1, 2010

Scope: Where an "*immediate provisional measure*" is requested, the Administrator has the power to appoint a sole arbitrator who has the discretion to grant such relief prior to the permanent panel being constituted. Rather than setting a concrete timeline for appointment, the Administrator is charged with appointing the arbitrator "*as soon as possible.*" The Procedures require a hearing in summary arbitral proceedings with written memorials to be filed only if the arbitrator determines that they are necessary. If the arbitrator determines that the case is not sufficiently urgent or is too complicated to be decided in the summary hearing, she may reject the claim or refer it to the "*arbitration on the merits.*"

Points of Interest:

- While the Rule refers to an expedited "*summary procedure*" this is different from the fast-track arbitrations provided in the SIAC Rules and others. The focus is still on the need for emergency provisional measures.

⁸ SIAC Rules, Sch 1(2).

⁹ Ibid, (5).

¹⁰ Ibid, (7)–(9).

¹¹ J Leach and J Berenholtz, *supra* note 2.

¹² Ibid.

- While the “*provisional decision*” is specifically subject to immediate enforcement, it is not binding on any tribunal constituted in the “*arbitration on the merits*”.

III. OVERVIEW OF RULES ADOPTING ALTERNATIVE APPROACHES TO EMERGENCY MEASURES

A. INTERNATIONAL CHAMBER OF COMMERCE (ICC)¹³

Pre-Arbitral Referee Procedure¹⁴

Effective: January 1, 1990

Scope: The Pre-Arbitral Referee Procedure permits the parties to have a dispute submitted to a referee for, amongst other things, emergency orders. The referee, unless otherwise agreed, has the power to order conservatory measures; order a party to make a payment; order a party to abide by their contractual obligations; and order the preservation of evidence.¹⁵

Points of Interest:

- The parties must have expressly incorporated the Procedures into the arbitration clause or some other written agreement.
- While the referee’s orders are ‘binding’ on the parties until the referee or the tribunal decides otherwise,¹⁶ questions remain about enforceability. At least one court has held that the referee’s orders are *not enforceable*, because they are not ‘arbitral awards’ under the New York Convention.¹⁷
- As of 2005, there had been only 5 pre-arbitral referee procedures conducted. The ICC sought to raise awareness of the procedure by incorporating it into its standard dispute resolution materials from 2005.

B. LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA)

Expedited Formation (Article 9)

Effective: January 1, 1998

Scope: The LCIA has attempted to address the issue within its Rules themselves by allowing a party to apply for ‘expedited formation’ of a tribunal.¹⁸ The LCIA may, in its complete discretion, abridge any time limit under the LCIA Rules for

¹³ See generally M Kantor, “The ICC Pre-Arbitral Referee Procedure: Momentum for Expanded Use,” 20(9) *Mealey’s Int Arb Rep* 3 (2005).

¹⁴ Available online at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_pre_arbitral_english.pdf

¹⁵ ICC Rules for a Pre-Arbitral Referee Procedure, Art 2.1.

¹⁶ ICC Rules for a Pre-Arbitral Referee Procedure, Art 6.3.

¹⁷ See M Kantor, ‘Arbitration Rules Update: Expedited Emergency Relief Under the AAA/ICDR, ICC and LCIA Rules’, 20(9) *Mealey’s Int Arb Rep* 3, 7 (2005); I Meredith and M Birch, The ICC’s Pre-arbitral Referee Procedure: How Valuable is It?, *Cross-border Quarterly* 49 (Jan/Mar 2008) (referring to *Republic of Congo v. Société Total Fina Elf E&P Congo*, Paris Court of Appeals, 1ere chambre, section C (2003)).

¹⁸ See generally P Turner and R Mohtashami, *A Guide to the LCIA Rules* (2010), Article 9.

formation of the tribunal. The parties must then rely on the tribunal's powers to make interim awards.

Points of Interest: While the effect is to permit the LCIA to shorten the process of constituting the tribunal, there is still potential for considerable delay as the LCIA is not authorized to override the right of the parties to nominate party-appointed arbitrators. The LCIA typically shortens the time limit within which the respondent must reply to the arbitration demand, but only rarely is the process significantly expedited.¹⁹ Requests for expedited formation have become increasingly common, with 20 in 2010.²⁰

C. INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID)²¹

Washington Convention (Article 47)

Arbitration Rules: Provisional Measures (Rule 39)

Effective: April 10, 2006

Scope: Rather than permitting appointment of a pre-tribunal referee (as with the ICC) or expediting appointment of the tribunal (as with the LCIA), ICSID has sought to address the emergency relief problem by permitting pre-appointment *briefing* of the application for provisional measures. An application for provisional measures can be brought as early as the registration of the Request for Arbitration. Absent agreement by the parties, the Secretary-General is empowered to fix a timetable for briefing the application. The Tribunal, once constituted, must then address the application ahead of any other business (e.g., jurisdictional objections).

Points of Interest: The end effect is to allow briefing of the application to run in parallel with the appointment process (the latter of which typically takes several months). As a practical matter, it also provides a record of the applicant's concern so that the respondent might feel less inclined to continue the conduct that is the subject of the application. Given the fact that in sovereign disputes, recourse to the State courts may be impractical, the procedure has been employed several times. A general practice for the procedural aspects and factors affecting likelihood of relief, is gradually developing.

IV. WHAT DOES THE FUTURE HOLD?

It is too early to know whether procedures for appointment of emergency arbitrators are here to stay, but those procedures have gained a considerable degree of acceptance in a relatively short period of time. Indeed, other arbitral institutions currently reviewing their

¹⁹ The JAMS International Rules provide similar authority to "*abridge or curtail any time-limit under these Rules to enable the expedited formation of the Tribunal so as to enable the Tribunal to deal with urgent circumstances that may have arisen*" Art. 21.4.

²⁰ See J Leach and J Berenholtz, *supra* note 2.

²¹ See generally JA Rueda-Garcia, "Provisional Measures in Investment Arbitration: Recent Experiences in Oil Arbitrations Against the Republic of Ecuador," 6(4) *Transnational Disp Mgt* (2009); S Finizio, E Shenkman and J Mortenson, "Recent Developments in Investor-State Arbitration: Effective Use of Provisional Measures," *European Arb Rev* 15 (2007).

rules – including the ICC and LCIA – are considering whether to implement analogous provisions.

There are, however, several issues that remain unresolved. These include:

- Appointment of the emergency arbitrator: Given the diminished degree of party involvement and the expedited timeframes, what degree of transparency is required? How can institutions ensure there are no conflicts? Who should serve as an emergency arbitrator?
- Enforcement of the emergency measures: There has yet to be serious testing of whether such orders are enforceable under the New York Convention or the UNCITRAL Model Law.
- Standards for granting emergency measures: Analogizing to the growing consensus in the international law world of ICSID preliminary measures, are there similar transnational norms in the context of commercial arbitration?
- Procedural safeguards: Analogizing to civil procedure in courts, how should emergency arbitrators deal with issues like provision of security, notice requirements (including the possibility of *ex parte* applications) and costs awards?

Ultimately, parties may prefer to obtain pre-appointment emergency provisional measures through courts of competent jurisdiction, depending on the circumstances of an individual case. Nevertheless, new rules allowing the parties to obtain such measures through the arbitral process provide a useful additional tool to consider.