

Emergency Arbitration Justice on the Run

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“Snap judgments are so often the best” Christopher Hitchens (“Joseph Hellner” Nation)

“That which can be asserted without evidence, can be dismissed without evidence.” (Hitchen’s Razor)

“Justice? -- You get justice in the next world. In this one you have the law.” William Gaddis, *A Frolic of His Own*.

1 Introduction

Emergency arbitration is designed to ensure that justice will not be delayed nor be denied when relief is sought in arbitration. The emergency arbitrator can provide justice on the run. Like Clark Kent instantly becoming Superman when an emergency arises, the ordinary lawyer can quickly cast off her usual lawyer role and almost instantaneously become a super-hero emergency arbitrator, flying into action, and making incisive snap decisions. This, as we will see, can be a pretty exhausting, but thrilling task. Before exploring the practice of emergency arbitration, this article will review the development of emergency arbitration and its role in the arbitration system. This article is an adaption of a keynote address and paper delivered at a conference themed: “When Justice Delayed Would be Justice Denied”, presented at the Institute of Transnational Arbitration 28th annual conference in Dallas in June 2016.

2 The Nature of Emergency Arbitration

The arrival and acceptance of emergency arbitration evidences the maturity and autonomy of international arbitration. Decades ago in many countries, and more recently in others, arbitration was the “little brother” in the dispute resolution family, looked down on as procedurally immature but tolerated, despite its lack of adjudicative muscle. As arbitration has matured, it increasingly mimics and competes with litigation as an autonomous system. Today arbitration has arguably reached its adulthood and can now boast that it can do just about everything that its “big brother” litigation, can do, at least as between the parties to an arbitration agreement. In fact, it claims it can do it faster, better, cheaper and more privately. Arbitration has gained procedural muscle, adding features which allows it to favorably compete with litigation. These features include arbitral power to order interim measures, consolidation, joinder, production of documents, appointment of “magistrates”, expedited procedures, and more recently, summary proceedings and ethical regulation of parties’ representatives.

As James Costello has eloquently described, in recent years, the arbitration community sought to enhance arbitration’s effectiveness and attractiveness by equipping arbitral tribunals with the ability to render interim measures and to facilitate court recognition and acceptance of such measures. A noteworthy example is the 2006 amendments to Article 17 of the UNCITRAL Model Law on International Commercial Arbitration, which articulates the power of the

arbitral tribunal to order interim measures and also provides for court enforcement of such orders.¹ The Swedish Arbitration Act allow the arbitrators wide discretion to order interim measures, unless the parties have agreed otherwise.² However, such orders are not enforceable in Sweden.³ The legislative reports to the Swedish Arbitration Act note that arbitrators are given broad authority to grant provisional measures because such decisions are not enforceable.⁴ The government committee that has proposed revisions to the Swedish Arbitration Act have recommended that an express provision be introduced that would allow arbitral tribunals to order interim measures in the form of an award, if this is allowed by the arbitration agreement.⁵ The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, (SCC Rules), provide that unless the parties agree otherwise, arbitral tribunals may make a decision on interim measures in the form of an order or an award.⁶

Today arbitral interim measures have been largely integrated into the procedural and tactical landscape of arbitration across the globe. However, a gap existed due to the time needed to constitute the arbitral tribunal, a gap that typically takes about three to four months. During this gap, there exists a risk that the purpose of the arbitration may be frustrated as the situation for the allegedly aggrieved party deteriorates. In some cases, and when measures are not sought against third-parties, national courts may not provide an attractive alternative for a number of factors. A party may not want to use the court that will have jurisdiction as it may be perceived as an “unfriendly” forum. Even if this is not the case, the courts will use national language and national civil procedures, which may require using local counsel. The national judges may not have the specialized legal or technical knowledge that is relevant to the dispute. The national court forum may have limited opportunities to ensure the privacy

1 Article 17, UNCITRAL Model Law on International Commercial Arbitration, sets out the power of the arbitral tribunal to order interim measures, Article 17 (A) sets out the conditions for granting such relief, and Article 17 (H) provides for the recognition and enforcement of such orders.

2 Article 24, para. 4, Swedish Arbitration Act, (SAA) SFS 1999:116, provides: “Unless the parties have agreed otherwise, the arbitrators may, at the request of a party, decide that, during the proceedings, the opposing party must undertake a certain interim measure to secure the claim which is to be adjudicated by the arbitrators. The arbitrators may prescribe that the party requesting the interim measure must provide reasonable security for the damage which may be incurred by the opposing party as a result of the interim measure.”

3 Patricia Shaughnessy, *Chapter 5, Interim Measures* in Ulf Franke, Annette Magnusson, et al. (eds), *International Arbitration in Sweden: A Practitioner's Guide*, (Kluwer Law International 2013) page 107.

4 Prop. 1998/99:35 pages 72–75. “The government considers, against the background noted above, that the current regulation giving courts exclusive competence to make enforceable decisions on interim measures should be retained.” (unofficial translation of the author). *See also*, Stefan Lindskog, *Skiljeförfarande, En kommentar*, pages 689–693 (Norstedts 2nd ed. 2012).

5 SOU 2015:37, *Översyn av lagen om skiljeförande*, English summary, pages 28–29.

6 Article 37 (3) SCC Rules.

of the proceedings. Emergency arbitration has been developed to allow parties to seek interim measures within the arbitral forum, but before the actual arbitral tribunal has been constituted.

Emergency arbitration first appeared about a decade ago as an innovation of the ICDR Rules.⁷ The SCC launched a more robust approach on January 1, 2010, which was followed by SIAC six months later, the ICC in 2012, and the LCIA in 2014. Emergency Arbitration procedures have now spread around the globe, appearing as part of the regulatory framework of arbitration institutes from Stockholm to Singapore, London to Kigali, Zurich to Beijing.

In the past few years, nearly every arbitral institution that has revised its rules has included provisions for emergency arbitration. There is some variance in the details of the rules. For example, whether the procedure may be obtained prior to filing a request for arbitration, the period for appointing the emergency arbitrator and time for the decision to be made,⁸ the form of the decision, and the fees and cost allocations. Notably, the ICC emergency arbitrator procedure is more restrictive than the SCC procedure.⁹ The ICC procedure is only available when the arbitration agreement was entered into after the effective date for the new rules, for parties that are signatories or successors to the arbitration agreement, and it excludes the procedure in treaty-based arbitration or when the parties have agreed to other pre-arbitral procedures. Despite the variance of approaches, emergency arbitration provisions have become a common feature of institutional arbitration, although lacking in ad hoc arbitration, such as when conducted pursuant to the UNCITRAL Rules.

Emergency arbitration significantly contributes to developing arbitration as a “stand-alone” dispute resolution system that can nimbly deliver results. However, there are questions regarding the status and nature of emergency arbitration and its relationship to the actual arbitration. Emergency arbitration can be viewed as a “tag-along” to an arbitration or as independent proceedings. Some critics question whether emergency arbitration is arbitration at all and whether an emergency arbitrator enjoys the legal status of an arbitrator. However, as emergency arbitration continues to grow in use and acceptance, these criticisms may have less practical significance.

But these issues persist, particularly relating to the principles, policies, and practices relating to emergency arbitration, which is in a state of development.

7 The ICDR introduced “Emergency Measures of Protection” in 2006. In 1990, the ICC introduced an opt-in Pre-Arbitral Referee Procedure, which was seldom used. The Netherlands Arbitration Institute (NAI) added Summary Arbitral Proceedings to its rules in 2001.

8 The SCC Rules provides a short period for the procedure; the Emergency Arbitrator shall make its decision not later than five days following appointment unless the Board grants an extension pursuant to a reasoned request by the Emergency Arbitration. SCC Rules (2017), Appendix II, Article 8 (1). The ICC Rules provide in Appendix V, Article 6 (4), for a period of 15 days from when the file was transmitted to the Emergency Arbitrator to make the decision, although the President may extend the time limit pursuant to a reasoned request or on the President’s own initiative when necessary

9 For a discussion of the SCC Emergency Arbitrator Rules, *see*, Patricia Shaughnessy, *Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rule*, *Journal of International Arbitration* 27(4): 337–360, 2010.

What exactly is an “emergency arbitration”? Is it a mini-arbitration before the “real” arbitration begins? When the parties include an arbitration agreement in a contract, they sign two agreements thanks to the separability doctrine: the main agreement and the arbitration agreement. Does an arbitration agreement referring to rules with emergency arbitration procedures actually create two separate arbitration agreements? Or is it like a two-stage rocket? Even its birthright can be debated: does it exist in the cradle of party autonomy or does it share the legislative cradle of arbitration? If Emergency Arbitration is part of arbitration and not a distinct process, then to what extent does it share the legal, contractual, and soft law regulatory framework of arbitration? To what extent do the general arbitration rules apply to emergency arbitration, such as consolidation rules? Could emergency arbitration become a truly stand-alone procedure that could be used in ad hoc arbitration? Could it be developed to provide a neutral forum for interim relief for the “regular” arbitration to alleviate the burden on the regular tribunal, much like a magistrate might be used to review and manage document production?

As the dispute resolution tool-box has expanded to include mediation, neutral evaluation, expert determination, dispute boards, and other procedures, the “fit” of emergency arbitration into the offering of such processes can become an issue. Notably, when the ICC introduced its emergency arbitrator provisions in 2012, it specifically excluded the application of the procedures in cases involving States, thus excluding investment disputes. It also specifically excluded the use of the emergency arbitration procedures when the parties have agreed to another “pre-arbitral” procedure. The first ICC emergency arbitrator proceedings encountered issues because of the use of a “Med-Arb” clause which provided for a longer period for commencing the arbitration than did the emergency arbitration rules, (the standard clause has now been modified to avoid this problem).¹⁰ However, the SCC emergency arbitrator rules have been successfully applied in investment cases despite “cooling-off period” clauses.

The nature and enforceability of the decisions of emergency arbitrators are unsettled. Perhaps the ultimate question in establishing the pedigree of emergency arbitration is whether the international arbitration community, and importantly, state courts, are willing to accept emergency arbitration as a procedure resulting in a final and binding decision that can be enforced as an arbitral award. Recently, a Ukrainian court answered this question affirmatively when finding a SCC emergency arbitration award in an investment case could be recognized and enforced. The first instance court had rejected the request for recognition and enforcement, however the appeals court found otherwise. The case is now pending before a higher appeals court.¹¹ This is particularly noteworthy because the SCC emergency arbitration rules, similar to some of the other regimes, provide that the emergency arbitrator’s decision does not have any binding effect on the subsequent tribunal and will cease to have any legal effect

10 Andrea Carlevaris and José Ricardo Feris, *Running in the ICC Emergency Arbitrator Rules: The First Ten Cases*, ICC International Court of Arbitration Bulletin Vol. 25 No. 1, (2014).

11 See, Yaroslav Petrov, *JKX vs. Ukraine: An Update on the Enforcement of Emergency Arbitrator’s Award*, Kluwer Arbitration Blogg, 12 August 2016.

upon certain events occurring (the constitution of the tribunal, the main arbitration not commenced within 30 days, the main tribunal not constituted within 90 days). Like Cinderella's coach instantly became a pumpkin when the clock struck midnight, the emergency arbitrator's decision will lose its legal character. Some observers opine that the Ukrainian appeals court may end up dismissing the appeal because the matter may become moot as the award may have now lost any legal effect.

Emergency arbitration is very fast regardless of the complexity of the case. The SCC EA Rules provide for one of the most robust systems with the appointment of the emergency arbitrator within 24 hours and the decision within 5 days, although this period can be extended by the Board upon a reasoned request from the emergency arbitrator. The ICC normally appoints the arbitrator within two days and SIAC within one day; both the ICC and SIAC provide for 14 days for the emergency arbitrator to make the decision. While the SCC provides that the decision may be made in the form of an order or an award, the ICC only allows for a decision in the form of an order. The idea of emergency arbitration is to allow parties to get relief about as fast as a party could get it from a court. And to enable the parties to get all the relief they need through the flexibility, privacy, neutrality, and party-driven procedures that arbitration offers. There is no need for local courts with local language, local procedures, and local counsel unless enforcement is sought. But reportedly, the parties often follow the decisions of the emergency arbitrators without court enforcement in order to avoid additional costs and to show their good faith cooperation with the arbitral process.

3 The Developing Practice of Emergency Arbitration

For the emergency arbitrator, the parties, and their counsel, the emergency proceedings demand full attention and intense effort in a very limited time period. In an attempt to capture some of the practice-oriented aspects of emergency arbitration, I conducted an unscientific anecdotal study of the impressions and experience of some emergency arbitrators acting under various rules. I also contacted some of the leading arbitration institutes to obtain insights into their experiences with emergency arbitration and to obtain statistics. These statistics were current as of June 17, 2016. As a general, but important comment it should be noted that the arbitral institution representatives that I spoke with all indicated that it is too early to speculate about trends in emergency arbitration based upon the statistics available in these early years of practice.

4 Arbitration Institutions Statistics

The ICDR has accepted to date 67 Emergency Arbitration cases (excluding cases not accepted and cases under the Optional Rules). Of these cases, 29 have been wholly or partially won, 17 have been lost, 13 have been settled, 5 have been withdrawn, and 3 are pending. So far this year, there have been 6 cases filed,

which would seem to indicate more cases will be filed this year than in 2015 where there was a total of 7 cases. These statistics indicate that more requests for relief have been granted to some extent than requests have been denied. There is a significant number of cases that have been settled or withdrawn.

The SIAC reports that it has received 50 emergency arbitration cases to date. In 21 cases the requested relief has been granted, in 4 cases the relief has been partially granted, in 4 cases relief was granted by consent, in 6 cases the request was withdrawn, in 14 cases the relief was rejected, and as of June 10, 2016 there is one case pending. Interestingly, the SIAC emergency arbitration case load is declining, (although the general case load is increasing), from 19 cases in 2013, 12 in 2014 and only 5 last year.

As of June 2016, the SCC received 9 requests for the Emergency Arbitration in 2016, bringing the total number of cases since it launched the procedure to 23 cases, including 5 treaty-based cases.¹² Of the total 23 cases, 8 have resulted in wholly or partially granted relief, in 14 cases the relief was denied, and one case was filed on June 9, 2016 and was pending as of June 17, 2016. In 4 cases, the decision was made in the form of an award, one of which was at the joint request of the parties for the decision to be made as an award. 2016 seems to be a good year for emergency arbitration at the SCC with 9 cases having been filed as of mid-June, 2016, compared to just one case in 2015. Reports on emergency arbitration proceedings from earlier years can be found on the SCC website. Statistically, it can be noted that relief is granted (wholly or partially) less often in SCC emergency arbitration than in ICC, ICDR and SIAC cases.

As noted, the ICC is a relative newcomer to emergency arbitration proceedings having launched the procedure in its 2012 Rules. As of June 17, 2016 it had received 34 requests for emergency arbitration, with the following break-down per year: in 2012 the ICC received 2 requests that were accepted, in 2013 and also in 2014 there were 6 requests accepted, in 2015 there were 10 accepted requests and already this year there have been 10 requests accepted. The ICC performs a preliminary review of emergency arbitration requests to ensure that the requests meet the ICC thresholds for acceptance and thus not all filed requests are reported in the statistics. Five cases were rejected and one case was accepted after it the applicant requested a reconsideration and provided proof of succession to the arbitration agreement. It should be recalled that the ICC requires that for an emergency arbitration request to be admissible the following requirements must be met: the arbitration agreement was entered into after the date of entry into force of the 2012 rules, the parties have not opted-out of the emergency arbitrator procedures, there is prima-facie jurisdiction, the parties are signatories to the arbitration agreement or are successors to it, and the emergency arbitration fees are paid. It is reported that in just under about half of the accepted cases, the emergency arbitrator has granted some relief, either in whole or in part.

¹² By the end of 2016, the number of Emergency Arbitrator requests totaled 13, bringing the number of cases to 27 cases. *See*: “sccinstitute.com/statistics/” (last visited 20/04/17).

The HKIAC is also a relatively newcomer to emergency arbitration and saw its first two cases in 2014, followed by two cases in 2015 and two cases by mid-June 2016. Two of these cases resulted in an emergency decision being issued. In the two other cases this year, one resulted in an agreement for the emergency arbitrator to execute a Consent Order, by which the emergency proceedings were discontinued. In these cases the emergency arbitrator was quickly appointed, in one case within six hours and the decisions were made within 3, 7 and 11 days in the cases resulting in a decision. The fourth case is currently pending determination by the emergency arbitrator. HKIAC did not proceed with the applications in two other applications, because in one case the applicant failed to pay the application deposit and in the other case, the emergency arbitrator procedures did not apply as the arbitration agreement was entered into before 1 November 2013.

The LCIA included emergency arbitrator provisions in its revised rules that came into effect in October 2014. As of June 2016, there had not been any requests for the appointment of an emergency arbitrator. For some time, the LCIA has offered a procedure for the expedited appointment of the arbitral tribunal, which is a different procedure than emergency arbitration. This procedure has seen an increase with 30 applications made in 2015, of which 12 applications were granted, 17 were denied, and 1 was withdrawn. This can be compared with 10 applications in 2014 and 17 applications in 2013. It remains to be seen if emergency arbitration gains popularity and hence use in LCIA arbitrations. Perhaps the availability of the expedited appointment of the tribunal affects the attractiveness of emergency arbitration.

5 Anecdotal Reports on Emergency Arbitration Practice

Emergency arbitrators are, like other arbitrators, typically a practicing lawyer and sometimes an academic, who is appointed for the particular case. Emergency arbitration requires an experienced arbitrator as it is akin to operating in the emergency room (to borrow a phrase from Mark Kantor). The emergency arbitrator must hit the ground running to set up and implement the procedure, and even in very complex cases, must make a decision in a very short time period while also ensuring the parties the right to be heard and treated equally. Despite the demands of the assignment, prominent arbitrators appear ready and willing to take on emergency arbitrations. This may be in part due to a sense of responsibility to the arbitration community and perhaps in part out of an interest to gain experience with this still relatively new procedure. The emergency arbitrators that I spoke to seemed to share a sense that it was challenging, stimulating and rewarding although it demanded their full attention during this intense period and based upon the number of hours spent, the compensation was significantly less than their typical hourly rates.

Parties requesting emergency arbitration (I will refer to them as Claimants) seem to spend some time preparing an application. Some Claimants contact the relevant arbitral institution's secretariat in advance to seek information and perhaps some guidance in preparing the filing. Most institutions have information regarding the emergency procedures on their websites. Institutions

seem to appreciate receiving a “heads-up” that a filing will soon be made in order to prepare for administering it efficiently. However, many Claimants file without any previous contact to the institution. The SCC has received a number of its requests just before the start of a week-end or holiday, yet the process is efficiently handled. Some of the applications for emergency relief reflect considerable preparation as the submissions may be quite detailed and contain evidentiary information, including witness statements. The application is sent to the responding party (Respondent) and a sole emergency arbitrator is appointed. The institutions seek to quickly appoint an experienced arbitrator whose background is appropriate for the nature of the case. In order to expedite the appointment, the institutes will often contact more than one potential emergency arbitrator to inquire about availability and conflicts. The potential arbitrators have been able to expedite conflict of interest checks and quickly determine and confirm their availability.

Once appointed, the emergency arbitrator typically immediately contacts the parties and requests that a conference call be held to discuss the proceedings and establish the schedule. One emergency arbitrator received a case on a Saturday while at the airport en route to a family celebration and managed to schedule the conference for Sunday morning. The parties’ counsels were both at respective family events but managed to have an effective planning telephone call in a very complex case. In order to meet the deadline for the decision, it is necessary to limit the number of submissions, the length of the submissions, and the evidence. Most emergency arbitrators that I spoke to reported that the Claimant’s application constituted the first submission, which the Respondent could respond to, followed by Claimant’s response and finally the Respondent was given the opportunity to make final comments. Issues to jurisdiction and admissibility of the claims may be raised, as well as the issues relating to the relief claimed.

Hearings have been held but in international cases where the emergency arbitrator and counsel are in different cities, the hearings have been by telephone. It seems that video-conferencing has not been used as frequently as telephone conferencing. In some cases, there is no hearing held and the decision is made on the basis of submissions. The emergency nature of the proceedings requires that all of the procedures be adapted to the short time frame.

Many of the emergency arbitration regimes on offer give the emergency arbitrator the same wide discretion that regular arbitrators enjoy when assessing a request for interim measures. Indeed, a request for an emergency measure is a type of interim measure. This wide discretion generally provides that the arbitrators may grant such relief that she deems appropriate in the circumstances. The conditions that an emergency arbitrator shall consider when assessing a request are typically not set-out in the rules. This often becomes a matter for the parties to plead and argue. Some emergency arbitrators seek guidance in the UNCITRAL Model Law and Rules detailed approach. Some apply “universally accepted criteria”. Others have looked to the procedural codes of the seat or the legal systems with which they are familiar (which I would argue is inappropriate in international arbitration). A few reviewed the earlier reported emergency arbitrator cases to distill some criteria that had been applied in earlier cases under the same rules. Some actually cited Gary Born as the legally authoritative source.

Some regimes, such as the ICC, imply that a threshold issue is the urgency of the requested measure is such that it cannot await the constitution of the arbitral tribunal. A few emergency arbitrators that I spoke with indicated that this was decisive in their decision-making and that they noted that an arbitral tribunal would not be able to effectively handle an interim measure request as soon as it was constituted. This means, according to them, that urgency should be assessed with a generous time estimate for the constitution of the tribunal. Some noted the distinction between procedural urgency and the urgency of the substantive measure. Some viewed the urgency assessment as a double-requirement, first as a threshold issue and later as one of the criteria to be assessed. Most considered the urgency requirement essential and strictly applied it. But a few considered that since the decision of the emergency arbitrator was not binding on the regular tribunal and would only exist for a limited time, the urgency requirement could be relaxed. As can be seen from the SCC reports on the emergency arbitrator proceedings, the urgency requirement has frequently been the basis for denying relief.

Nearly all of the emergency arbitrators I interviewed considered that the Claimant must show that it will suffer irreparable damages if the measure were not granted by the emergency arbitrator (rather than if not granted eventually by the regular arbitral tribunal). Most of the interviewees considered the proportionality of the potential harm to the respective parties. There was also consideration of the potential success on the merits, but the standard varied among those I spoke with. This may be due to linguistic forms of expression but in law the linguistic expression can lead to a significant difference in the burden of proof. Some of the emergency arbitrators noted that often these factors overlap but they nonetheless tried to evaluate each separately. The party seeking relief has a burden to prove that it is entitled to the relief and meeting a burden of proof requires some evidence. In the context of an emergency arbitration it can be a challenge to present evidence in favor and against the claims and defenses. As Christopher Hitchens famously has said: “That which can be asserted without evidence, can be dismissed without evidence.”

The general impression that I gained from my interviews is that emergency arbitrators take their role seriously and devote considerable time to establishing and implementing the procedures and adapting them to the needs of the case and parties. They clear their professional and personal schedules to give the cases their full attention and carefully study the submissions. Most prepare fully reasoned decisions. Although the ICC does not treat the decision as an Award and thus is not subject to scrutiny, the Secretariat helpfully will provide very quick review and comments on the proposed decision, usually within a day or two. The Secretariats of the arbitral institutions are prepared to provide assistance and to facilitate the expedited handling of the cases.

6 Conclusions

In conclusion, there are a number of questions about the nature of emergency arbitration that the arbitration community needs to examine and consider. Emergency arbitration is still in its adolescence and it is too early to make far-reaching conclusions about its practice and future. But we can conclude that it has become an effective and globally accepted measure to ensure justice will not be delayed nor denied in arbitration, but rather enhanced. It is the responsibility of the international arbitration community to ensure that this tool is used with skill and that the snap decisions are indeed delivering justice, although this justice is dispensed on the run. Despite the quick dispatch of such proceedings, it is imperative that the right to be heard and equal treatment of parties is ensured. To make the global arbitration system work effectively and efficiently, emergency arbitration offers needed access to quick arbitral relief. It is our responsibility to ensure that this relief delivers timely justice with regard to due process rights, even on the run.

