

# Emergency Arbitration in Stockholm

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## **1 Introduction**

Interim relief in international arbitration has grown significantly in importance in recent years, as parties often need to seek interim measures of protection to safeguard their substantive rights, prior to the final resolution of their dispute. An arbitral tribunal cannot properly function before it has been constituted, which would require a party to seek urgent interim relief from a State court. However, courts are not always available, or do not have the necessary means to provide for effective protection in cross-border disputes. In such cases, parties would therefore not be able to seek efficient protection prior to the constitution of an arbitral tribunal, despite the fact that they have chosen to resolve their dispute by arbitration. To fill this gap, and in cases where the requested measure cannot wait for the constitution of the arbitral tribunal, emergency arbitration procedures have flourished in arbitral institutional rules during the last 7-8 years. In short, such procedures mean that a decision maker, a so-called emergency arbitrator, is appointed and vested with powers to render an emergency decision, providing for different kinds of interim measures, on a very short notice and within a very short period of time.

In this contribution, an overview of certain key aspects of emergency arbitration proceedings will be provided, focusing especially on the practice under the SCC Rules. The first section will address the meaning of and the need for emergency arbitration proceedings in an international context. The SCC emergency arbitration procedure will be explained in the following section. The third section will discuss the functioning of emergency arbitration, including the requirements that a claimant must fulfill in order for an interim measure to be granted. An overview of the emergency cases rendered under the SCC Rules since the introduction of the procedure in 2010 will then be discussed, including emergency decisions in investment treaty cases dealt with so far. In a final section, the enforcement of interim measures and emergency decisions will be addressed.

## **2 What is Emergency Arbitration and why is it Necessary?**

National courts were originally the only authorities empowered to grant interim measures in international arbitration. Gradually, several jurisdictions started to modify their national arbitration laws, granting the same powers to arbitrators. Indeed, similarly to national proceedings, parties to arbitral proceedings have the need to seek such measures in order to safeguard their rights awaiting the final resolution of their dispute. Arbitration is the preferred method to settle international commercial and investment treaty disputes today. Although it is a very efficient dispute settlement method, there is room for improvement. Interim security measures, for example, were largely unregulated until the amendment of the UNCITRAL Model Law in 2006, with the introduction of its Article 17H. As of today, many arbitration institutions have introduced rules allowing arbitral tribunals to issue interim measures.

One evident drawback with respect to arbitral interim measures is that the tribunal cannot order them before it has been constituted. In international arbitration, the appointment of arbitrators can take weeks or even months, for example when the arbitration clause provides for a three person tribunal and one of the parties is uncooperative. This situation can have severe consequences for a party, in cases where the other party takes steps to avoid its obligations, *e.g.* by destroying evidence or disposing of the disputed object<sup>1</sup>. The overall ability of the arbitral tribunal to provide an effective award is also at risk if the disputed object is finally dissipated by the other party.

The question of the need for interim security relief, also in cases of *ex parte* proceedings, was primarily raised during the drafting on the 2006 UNCITRAL Model Law, creating a heated debate among practitioners as well as among legal scholars<sup>2</sup>. Some commentators were of the opinion that there was no need for interim security measures in international arbitration, as parties could still seek emergency relief before a national court<sup>3</sup>. Without emergency arbitration proceedings, seeking emergency measures from a national court is indeed the only way for a party to obtain protection. However, in many countries of the world, courts would simply not be available. Sometimes, national law might treat an arbitration agreement as a bar to the jurisdiction of a national court. On the other hand, where a national court would be available, there may be strong reasons for a party to avoid national court proceedings and rather seek relief from an arbitral tribunal. One reason could be that courts may not always be impartial; some of them are simply corrupt. Speed may also be an argument with respect to some jurisdictions where even proceedings for interim measures may take a long time<sup>4</sup>. The expertise of an arbitrator (in comparison to some local State courts), as well as the confidentiality of arbitration proceedings in general, are other reasons why parties may want to seek interim relief in an arbitration procedure. Moreover, it is not to forget that both parties have chosen arbitration rather than court litigation as their dispute settlement mechanism.

Against this background, it has become widely accepted that some form of emergency arbitration is essential to safeguard the parties' rights before the start of the actual arbitration proceedings, and to ensure a fair and effective functioning of arbitration in general. Emergency arbitration procedures offer a choice to the parties: they can either go to an emergency arbitrator, to a national court, or, in some situations, even to both.

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1 Born, *International Commercial Arbitration* (2nd Edition), 2014, 2451.

2 See, *e.g.*, Hobér, *The Trailblazers v. the Conservative Crusaders, Or Why Arbitrators Should Have the Power to Order Ex Parte Interim Relief*, in Van Den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series No 12, 2005.

3 See, *e.g.*, Van Houtte, *Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration*, *Arbitration International*, 2004.

4 See Lundstedt, *SCC Practice: Emergency arbitrator decisions. 1 January 2010 – 31 December 2013*, The Arbitration Institute of the Stockholm Chamber of Commerce, 2013; Azelius/Olsson/Bergqvist, *Making Use of the New SCC Rules on Emergency Arbitration: Why the Emergency Arbitrator's decision cannot be enforced and how the new rules may be made useful nonetheless*, *Särtryck ur juridisk tidskrift*, 2009, 942.

For the reasons briefly outlined above, emergency arbitration procedures have been introduced in the rules of many arbitration institutions, following the amendment of the UNCITRAL Model Law in 2006. In short, emergency arbitration makes it possible to appoint an emergency arbitrator in cases where the matter is so urgent that a party needs to make an application for interim relief before the arbitral tribunal has been constituted. The need for an interim security measure often arises simultaneously with the beginning of the dispute, but before any arbitral tribunal has been constituted. Therefore, following the request of a party, an arbitral institution will appoint an emergency arbitrator who will have the same powers and responsibilities as an arbitral tribunal or sole arbitrator. However, the power of the emergency arbitrator does not extend to the merits of the case, but is limited to decisions relating to interim measures. The power of the emergency arbitrator will also cease as soon as the arbitral tribunal is appointed, which will not be bound by any of the emergency arbitrator's decisions.

On 1 January 2010, the emergency arbitration rules of the SCC entered into force in the form of Appendix II to the SCC Rules. The very first institution which adopted a so-called emergency arbitrator procedure was the ICDR in 2006. Since then, a number of arbitral institutions have adopted specific emergency arbitration rules, and other institutions will likely follow. For example, SIAC (2010), ACICA (2011), ICC (2012), Swiss (2012), HKIAC (2013), WIPO (2014) and LCIA (2014) are all institutions which have introduced separate provisions on emergency arbitration.

The possibility to obtain a decision before the constitution of an arbitral tribunal is not entirely new, as it was already possible in 1990 under the ICC Rules. The ICC had issued rules for a "Pre-Arbitral referee" mechanism, which allowed the parties to have recourse to a neutral referee, who was empowered to provide provisional relief before the constitution of an ICC tribunal. However, as of 2014, only 14 pre-arbitral referee decisions had been filed with the ICC. This is probably explained by the opt-in system on which the ICC pre-arbitral referee rules were based: the parties had specifically to agree to their application, either before or after a dispute arose<sup>5</sup>. Generally, opt-in systems in international arbitration seem to have been underutilized<sup>6</sup>. When adopting emergency arbitration procedures, most arbitral institutions have embraced an opt-out approach<sup>7</sup>. Those emergency arbitrator procedures are thus automatically applicable unless the parties have explicitly agreed to exclude them.

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5 The ICC amended its Rules in 2012, introducing an opt-out system of emergency arbitration in Article 29 ICC Rules and its Appendix V.

6 See Carlevaris/Feris, *Running in the ICC Emergency Rules: The First Ten Cases*, ICC International Court of Arbitration Bulletin, Volume 25, 2014, 27; Bühler, *ICC Pre-Arbitral Referee and Emergency Arbitrator Proceedings Compared*, ICC International Arbitration Bulletin, Volume 22, 2011, 93-98.

7 For example, the ICDR/AAA introduced an emergency arbitration procedure in May 2006 in Article 37 ICDR/AAA Rules. On the other hand, the SIAC IA Rules on emergency arbitration are opt-in, meaning that they will only apply if parties have expressly agreed to their application (Article 26(4) SIAC IA Rules).

In this context, it is worthwhile noting that the SCC Rules on emergency arbitration not only set up an opt-out system, but also provide for the application of its provisions as per their entry into force. Parties who refer to arbitration under the SCC Rules are deemed to have agreed to the SCC Rules as a whole. They are entitled to use the SCC emergency arbitrator procedure, also if such procedure was not yet in place at the time of the conclusion of the arbitration agreement. The SCC emergency arbitration provisions thus apply to all arbitrations commenced after 1 January 2010, regardless of when the arbitration agreement was concluded. Although this consequence has been criticized by some commentators, this approach has been consistently followed and confirmed by SCC emergency arbitrators, for example in a recent emergency arbitration under the SCC<sup>8</sup>.

### 3 Emergency Arbitration Procedure under the SCC Rules

Most emergency arbitration procedures are in many respect similar. The party seeking emergency relief must file a request with the chosen arbitral institution, which will appoint an arbitrator on a very short notice, as long as the request passes the *prima facie* jurisdictional test. The emergency arbitrator will have the power to order any type of interim measure he/she deems appropriate, provided that the relevant requirements are fulfilled and that the arbitral tribunal has not yet been constituted. Most institutions empower the emergency arbitrator to provide for interim measures of protection either in the form of an award or an order. Two exceptions are the ICC and the FAI Rules, which only allow the emergency arbitrator to render an order, not an award.

Appendix II to the SCC Rules, which was slightly revised on 1 January 2017, sets out the procedure to be followed.

A party can only apply for an emergency arbitration as long as the case has not been referred to an arbitral tribunal<sup>9</sup>. In accordance with Article 2 of Appendix II to the SCC Rules, an application for the appointment of an emergency arbitrator must include the names and addresses of the parties, a summary of the dispute and a statement of the interim measure sought. The requesting party must add a copy or a description of the arbitration agreement as well as comments on the jurisdiction of the emergency arbitrator. The application must also set forth comments on the seat, applicable law and language of the proceedings. It must be accompanied by proof of payment of the costs<sup>10</sup>. Documentation evidencing a bank transfer is usually attached to the application as such proof<sup>11</sup>. Contrary to a request for arbitration, all relevant issues of the dispute should be included in a request for an emergency arbitrator, as the

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8 *Griffin Group v Poland* (SCC EA No 2014/183).

9 Article 1(1) SCC Rules.

10 Article 2(5)-(6) Appendix II SCC Rules.

11 See Knapp, *SCC Practice: Emergency arbitrator decisions rendered 2014*, The Arbitration Institute of the Stockholm Chamber of Commerce, 2015, 1.

deadlines are very short. The requesting party must send its application for emergency arbitration by e-mail to the 24/7 monitored mailbox of the SCC.

The SCC Secretariat will send the application directly to the respondent, by express courier or by e-mail<sup>12</sup>. The SCC Board will appoint an emergency arbitrator within 24 hours after receiving the application, as long as the SCC does not manifestly lack jurisdiction over the dispute<sup>13</sup>. When drafting Appendix II, a 24-hour rule was preferred over other options such as “*promptly*” or “*within a business day*”, in order to avoid any ambiguity in an international context, where definitions of terms such as “*business day*” varies between countries<sup>14</sup>. The wording “*will seek to appoint*” was however added in the SCC Rules to allow some flexibility to the strict 24-hour approach, in the event of complex cases or when an emergency arbitrator is difficult to find<sup>15</sup>. As of the end of 2016, out of the 27 applications for emergency arbitration filed, only one appointment was not made within 24 hours, as it had been sent to the regular SCC Secretariat e-mail box on a Friday evening<sup>16</sup>.

The appointment of the emergency arbitrator by the SCC Board depends on the nature and circumstances of the dispute, as well as on the applicable law, the language of the proceedings and the nationality of the parties<sup>17</sup>. More practical considerations are also taken into account, such as time-zones and the possibility to conduct a quick conflict check, given the urgency of the procedure. Once the Board has decided on a list of possible emergency arbitrators, the Secretariat starts to contact them by phone and by e-mail. When the emergency arbitrator is appointed, the Secretariat promptly refers the application to him/her, which is usually done within an hour<sup>18</sup>. Each party can challenge the appointment of an emergency arbitrator within 24 hours of when the circumstances giving rise to the challenge became known, following the procedure set out in Article 19 SCC Rules<sup>19</sup>.

The appointed emergency arbitrator can then conduct the arbitration in the manner he deems appropriate<sup>20</sup>. Most of the time, the emergency arbitrator

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12 Article 3 Appendix II SCC Rules. Regarding the use of e-mail transmission in Swedish arbitration, see Englund, *Använde av e-post vid underrättelser enligt lagen om skiljeförfarande*, *Juridisk Tidskrift* 133, No 1, 2009.

13 Article 4(1)-(2) Appendix II SCC Rules. In comparison with other arbitration institutions, the SCC is the only one to provide for the 24-hour strict rule. The ICDR/AAA Rules and the SIAC Rules provide for the appointment of an emergency arbitrator within a business day from the receipt of the application (Article 6(2) ICDR/AAA Rules and Article 2, Schedule 1 to SIAC IA Rules). Other institutions usually provide for a less detailed time frame, such as the ICC Rules (“*as short a time as possible*”) and the Swiss Rules (“*as soon as possible*”).

14 Shaughnessy, *Pre-arbitral urgent relief: the new SCC emergency arbitration rules*, *Kluwer Journal of International Arbitration*, Volume 27(4), 2010, 341.

15 Shaughnessy, *op. cit.*, 341.

16 Knapp, *op. cit.*, 2.

17 Article 4 Appendix II SCC Rules.

18 Article 6 Appendix II SCC Rules.

19 Article 4(4) Appendix II SCC Rules.

20 Article 7 Appendix II SCC Rules.

invites the parties to a telephone conference immediately after the referral to discuss and agree on a time plan for the proceedings. This is the respondent's first opportunity to comment on claimant's request. The respondent will then usually be given a day formally to answer the claimant's request for interim measures.

One important feature of emergency arbitration proceedings is that it cannot be made on an *ex parte* basis<sup>21</sup>. The respondent must thus be in receipt of the application for interim relief and be given the opportunity to be heard. The emergency arbitrator has the discretion to assess whether or not the respondent has been sufficiently notified<sup>22</sup>. In practice, it may be difficult for respondents to react and answer within such short time limits, especially if the respondent is in a State where the delivery of the notice can take time. Therefore, the emergency arbitrator must consider the particular circumstances of the case and seek an extension of the time limit when it is necessary to ensure fairness in the proceedings. Each party must be given an equal and reasonable opportunity to present its case, due account taken of the urgency in emergency proceedings<sup>23</sup>. Under the SCC Rules, some emergency proceedings have taken place and resulted in emergency decisions, also when the respondent party failed to participate. This was the case, for example, in three emergency arbitrations against Moldova based on investment protection treaties, where the respondent State failed to participate in the proceedings<sup>24</sup>.

Following the parties' written submissions, a final conference call is usually held. The emergency arbitrator will have only five days from the day of the referral of the application to render its decision, which can take the form of an order or an award<sup>25</sup>. The Board can however extend this time limit, if requested by the emergency arbitrator, or if it is deemed necessary by the Board<sup>26</sup>. Pursuant to Article 1 of Appendix II to the SCC Rules, an emergency arbitrator has the same powers as an arbitral tribunal under Article 32(1)-(3) SCC Rules. At the request of a party, the emergency arbitrator can thus grant any interim measures it deems appropriate, and can also order the requesting party to provide security in connection with the measure<sup>27</sup>.

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21 Article 32(4) SCC Rules, Article 8(1) Appendix II SCC Rules.

22 Knapp, *op. cit.*, 3.

23 Lundstedt, *op. cit.*, 2.

24 *TSIKInvest LLC v Moldova* (SCC EA No 2014/053), *Evrobalt LLC v Moldova* (SCC EA No 2016/82), *Kompozit LLC v Moldova* (SCC EA No 2016.95).

25 In contrast, emergency arbitration under the SIAC Rules provide for a longer timeline: the emergency arbitrator has 14 business days from the date of the appointment to render a decision (Article 8, Schedule 1 SIAC IA Rules). Under the ICC Rules, the Swiss Rules and the HKIAC Rules, an emergency decision shall not be rendered more than 15 days from the appointment of the emergency arbitrator (Article 6(4) Appendix V ICC Rules, Article 43(7) Swiss Rules and Schedule 4(12) HKIAC Rules). The ICDR Rules, on the other hand, do not mention a time limit to render an emergency decision.

26 Article 8(1) Appendix II SCC Rules.

27 To the contrary, under the SIAC IA Rules, a party applying for an emergency proceeding prior to the constitution of the tribunal may only do so concurrent with or following the filing

The decision rendered by the emergency arbitrator is binding on the parties, in accordance with Article 9 of Appendix II to the SCC Rules. The emergency arbitrator can also revoke or amend its decisions, if requested by a party<sup>28</sup>. However, as soon as the case has been referred to an arbitral tribunal, the powers of the emergency arbitrator cease<sup>29</sup>. Under some other arbitral institution rules, such as in the SIAC Rules and the ICDR/AAA Rules for example, the emergency arbitrator will still be competent to render its decision even though the arbitral tribunal has been constituted in the meantime<sup>30</sup>. The subsequently constituted arbitral tribunal is not bound by the emergency arbitrator's decision, and the emergency arbitrator will not be able to serve as arbitrator in any later proceedings related to the same dispute<sup>31</sup>.

Regarding the costs of emergency proceedings, the 2017 amendments of the SCC Rules state that the emergency arbitrator shall apportion the costs of the emergency proceedings between the parties, applying the principles of Article 49 of the SCC Rules<sup>32</sup>. The new Articles 49 and 50 stipulate that the tribunal shall apportion the costs of the arbitration as well as party costs between the parties, having regard to each party's contribution to the efficiency and expeditiousness of the arbitration<sup>33</sup>. The costs of commencing emergency proceedings have increased with the 2017 amendments<sup>34</sup>.

#### **4 When should a Request for Interim Relief be Granted by an Emergency Arbitrator?**

Most national acts and institutional rules, such as Article 32 of the SCC Rules, are silent on the standards for granting interim measures in general. When interim measures are requested in arbitration proceedings, broad discretion is given to arbitrators. Most rules usually only state that an interim measure must be "appropriate" and "necessary" without giving further details. This provides for maximum flexibility and adaptability in the arbitral process: each dispute is different, and must be resolved on its own facts.

The 2010 UNCITRAL Rules are the only arbitration rules with explicitly identified requirements for the granting of interim measures, set out in Article

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of a notice for arbitration (Article 1, Schedule 1 SIAC IA Rules). A very similar rule applies under the HKIAC Rules (Schedule 4.1 HKIAC Rules).

28 Article 9(2) Appendix II SCC Rules.

29 Article 9(4) Appendix II SCC Rules.

30 Schedule 1 Paragraph 10 SIAC Rules (2016); Article 6(5) ICDR/AAA Rules (2014).

31 Article 9(5) and Article 4(4) Appendix II SCC Rules.

32 Article 10(6) Appendix II SCC Rules.

33 Article 49 and Article 50 SCC Rules. For further information on the changes brought by the new 2017 SCC Rules, see The Arbitration Institute of the Stockholm Chamber of Commerce, *SCC new Arbitration Rules – Main changes*, published 1 December 2016 on "www.sccinstitute.com".

34 Article 10(2) Appendix II SCC Rules.



26(3)-(4). They are based on Article 17 of the UNCITRAL Model law, which was revised in 2006 in an attempt to harmonize the rules relating to interim measures ordered by an arbitrator<sup>35</sup>. Article 17A of the Model Law sets out these requirements. It reads as follows:

- (1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:
  - (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
  - (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
- (2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Generally speaking, the requirements laid down in the Model Law seem to be widely accepted by arbitration practitioners and scholarly commentators. They are often referred to in SCC emergency arbitrations. In order to grant an interim measure, a party must demonstrate that (i) it has an arguable case on the merits, (ii) there is a risk of irreparable or serious harm, and (iii) there must be no prejudging on the merits<sup>36</sup>. Similar requirements have been applied by emergency arbitrators under the SCC Rules. The practice is to apply those same conditions to interim measures requested in emergency arbitration proceedings, with the additional requirement of urgency. In addition, the emergency arbitrator must have jurisdiction to rule on the request.

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35 Article 17 of the UNCITRAL Model Law also expressly defines an interim measure, contrary to many rules: “An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to: (a) Maintain or restore the status quo pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute”.

36 See Born, *op. cit.*, 2465; Poudret/Besson, *Comparative Law of International Arbitration*, Second edition, 2007, 402; Loong, *Provisional Measures*, in Van Den Berg (ed.), *International Council for Commercial Arbitration Congress series No 14: 50 years of the New York Convention*, 2009, 608-609.

#### 4.1 *Jurisdiction*

First and foremost, an emergency arbitrator under the SCC Rules must make a *prima facie* assessment of its jurisdiction. A final jurisdictional ruling will not be made by the emergency arbitrator, who will only analyze if there is a reasonable argument in support of jurisdiction. The fact that the tribunal may ultimately lack jurisdiction over the dispute does not prevent the emergency arbitrator from issuing interim measures<sup>37</sup>. In one case under the SCC Rules, for example, the emergency arbitrator considered that he was only to conduct a *prima facie* assessment of its jurisdiction, as it is up to the subsequently constituted arbitral tribunal to make a more detailed analysis of the jurisdictional issue<sup>38</sup>.

In cases where an arbitration clause is defective, SCC emergency arbitrators tend to interpret such a clause on its “*only rational and readily available interpretation*”<sup>39</sup>. To illustrate, the emergency arbitrator in this case found that the clause “*all disputes are to be resolved exclusively by the International Arbitration Court in Stockholm, Sweden*” was defective. However, the reference was clearly indicating an institution, with capital initial letters and the designation of ‘Court’, which supposes a permanent institutional framework. Since the SCC Arbitration Institute is the only institution providing services for international arbitration in Stockholm (Sweden), the emergency arbitrator concluded that he had jurisdiction with respect to emergency proceedings, even though the clause was defective<sup>40</sup>. In another SCC case, the respondent submitted that the claimant’s request was beyond the powers of the emergency arbitrator, as the requested measure would result in a material amendment of the parties’ contractual relationship. The emergency arbitrator dismissed the respondent’s argument, finding that the question whether the specific request was suitable or not was to be assessed separately from the one of jurisdiction<sup>41</sup>.

#### 4.2 *Prima facie Case, or Probability of Success on the Merits*

In order for an interim relief to be granted, the requesting party must establish that it has an arguable case on the merits, meaning that it must show that the possibility to succeed in later proceedings is likely<sup>42</sup>. Assessing the existence of a *prima facie* case on the merits is essential to make rational and commercially sensible decisions regarding interim measures<sup>43</sup>. Under the SCC Rules, the

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37 Born, *op. cit.*, 2482.

38 SCC Case 139/2010 *in* Lundstedt, *op. cit.*

39 SCC Case 070/2011 *in* Lundstedt, *op. cit.*

40 SCC Case 070/2011 *in* Lundstedt, *op. cit.*

41 SCC Case 138/2014 *in* Knapp, *op. cit.*

42 Hobér, *Interim Measures by Arbitrators*, ICCA Congress series No 13, *International Arbitration 2006: Back to Basics?*, 734.

43 Born, *op. cit.*, 2478.

claimant is deemed to have established a *prima facie* case when it brings a serious claim under both the arbitration agreement and the applicable substantive law to the dispute<sup>44</sup>. The claimant must show that there is a reasonable possibility that it might succeed on the merits of the claim, for example by substantiating, *prima facie*, that it has reasonable objections to the respondent's termination of a contract<sup>45</sup>. It is indeed appropriate for the emergency arbitrator to consider the possible outcomes of a final award when rendering an emergency decision.<sup>46</sup> In SCC practice, at the end of 2015, emergency arbitrators found that the claimants had established a *prima facie* case in half of the ten unsuccessful requests for emergency relief, as well as in all the successful requests.

### 4.3 *Irreparable Harm*

A further requirement is that there must be a risk of irreparable or serious harm, which cannot be adequately compensated by an award of damages. The underlying theory of this requirement is that if the harm were to be compensable in monetary damages, granting an interim measure would not be appropriate, as the harm would not be irreparable. In commercial cases, it can thus be challenging to prove irreparable harm, which can have the undesirable effect of limiting the grant of interim measures only to cases where one party is insolvent, or where the enforcement of the final award would be impossible for some other reason<sup>47</sup>.

In SCC practice, irreparable harm is defined as harm which is not capable of being fully compensated by damages, interest and costs by an SCC tribunal, under the arbitration agreement and the applicable substantive law<sup>48</sup>. For example, one emergency arbitrator did not consider that there was irreparable harm in a case where a final award in favor of the claimant, even in a substantial amount, would most likely be honored by the respondent (given its size and reputation). Had that respondent not honored the arbitral award, the claimant could still, in the view of the emergency arbitrator, successfully enforce it against the respondent before a state court<sup>49</sup>. In another case, an emergency arbitrator considered that there was no irreparable harm where the claimant would later be able to recover any damages suffered<sup>50</sup>.

Cases under the SCC Rules also show that it is up to the claimant to prove that the harm might be irreparable, and that it would be the result of respondent's

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44 SCC Case 010/2012 in Lundstedt, *op. cit.*

45 SCC Case 139/2010 in Lundstedt, *op. cit.*

46 See Born, *op. cit.*, 2480.

47 Waincymer, *Procedure and Evidence in International Arbitration*, Kluwer Law International, 2012, 626; Savola, *Interim measures and emergency arbitrator proceedings*, Croatian Arbitration Yearbook, Volume 23, 2016, 83; Born, *op. cit.*, 2469-2471.

48 SCC Case 010/2012 in Lundstedt, *op. cit.*

49 SCC Case 010/2012 in Lundstedt, *op. cit.*

50 SCC Case 139/2010 in Lundstedt, *op. cit.*

actions<sup>51</sup>. Indeed, one emergency arbitrator found that there was no irreparable harm in a case where the claimant failed to show that the respondent was in the process of stripping the companies of assets by illegitimate means. The emergency arbitrator rather emphasized that legitimate measures to improve the respondent's financial situation could not be assumed to cause harm as such<sup>52</sup>. In general, the claimant must also show that the harm it will suffer substantially outweighs the harm that will result to the party against whom the measure is directed, if the measure is granted.

#### **4.4 *No Prejudging of the Merits***

The grant of an interim measure must not involve prejudging the merits of the dispute<sup>53</sup>. The exact meaning of this requirement is not crystal clear. It means at any rate that granting a provisional measure must not preclude the later arbitral tribunal from ultimately rendering an award on the merits which is different from emergency arbitration decision. It also means that interim measures do not have a *res judicata* effect regarding the final decision on the merits<sup>54</sup>. Although this requirement is generally recognized among commentators, it has not yet been referred to in any emergency case rendered under the SCC Rules.

#### **4.5 *Urgency***

In order for the arbitrator to grant an interim measure in emergency proceedings, the requested measure must be so urgent, that it cannot wait for the constitution of the arbitral tribunal. It is indeed the urgency of the requested measure that necessitates the interim protection. Otherwise, a party could simply wait for the final award on the merits. In SCC practice, emergency arbitrators tend to analyze the issue of urgency based on considerations of the requirement for irreparable harm. Those two criteria are frequently interconnected, particularly in situations where the respondent is actively undertaking measures to dissipate assets, or otherwise to make assets unavailable for enforcement<sup>55</sup>. The urgency requirement was found to have been met in a case where the claimant had a deadline for the delivery of goods in an agreement with a third party, and had no other alternative supply than the ones held by the respondent<sup>56</sup>. The emergency arbitrator found this case to be a text-book example of a when a request for

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51 SCC Cases 064/2010 *in* Lundstedt and 171/2014 *in* Knapp, *op. cit.*

52 SCC Case 171/2014 *in* Knapp, *op. cit.*

53 Born, *op. cit.*, 2476; Poudret/Besson, *op. cit.*, 535; Redfern Alan, *Interim Measures*, in Newman/Hill (eds.), *Leading Arbitrators' Guide to International Arbitration* (3rd Edition), 2014, 402.

54 Born, *op. cit.*, 2477.

55 SCC Case 070/2011 *in* Lundstedt, *op. cit.*

56 SCC Case 010/2012 *in* Lundstedt, *op. cit.*

interim relief is justified<sup>57</sup>. Urgency was also recognized in a case where the claimant asserted that it was in a position where it depended urgently on using certain equipment held by the respondent, in order to avoid breaching its own contracts with its customers and to avoid significant liability for damages. As the use of the equipment represented a limited burden for the respondent, the emergency arbitrator ruled that the requirement of urgency was fulfilled<sup>58</sup>. In another case, the emergency arbitrator did not consider that a measure was urgent where the claimant did not succeed to show that it was possible that the respondent was currently removing or planning to remove assets<sup>59</sup>.

Arbitrators are nevertheless not bound by the requirements discussed above. They enjoy a large margin of appreciation, when deciding if an interim measure should be granted. They can, for example, take into account whether interim measures would be proportionate, when balancing the possible injury caused by the requested measure with the advantages the applicant hopes to get from it. In one case under the SCC Rules for example, the emergency arbitrator concluded that if the requested interim measure was to be ordered, it could expose the respondent, its parent company and its officers to risks of severe civil and criminal sanctions in the home States of the parties. Therefore, since an interim measure should not place a respondent under conflicting legal obligations, particularly with the risk of criminal liability, the emergency arbitrator refused to grant the interim measure<sup>60</sup>. Arbitrators may also consider the requesting party's *clean hands* or bad faith<sup>61</sup>. For example, one emergency arbitrator placed particular weight on the respondent's conduct in good faith of its economic affairs, and on the way it had expressed no intention to frustrate the enforcement of any future award favorable to the claimant<sup>62</sup>. In another case, the emergency arbitrator took into account the respondent's express undertaking not to dissipate or diminish the value of the products in its possession until the appointed arbitral tribunal had issued a final award on the merits of the claim. In this particular case, the claimant's request for interim relief was sufficient to preserve the rights of both parties, before a final award on the merits would be rendered<sup>63</sup>.

Emergency arbitrators acting under the SCC Rules have broad authority to grant interim measures following an emergency request, as there are no standards laid down in the Rules. SCC practice shows, however, that all emergency arbitrators have required that the requesting party establish a *prima facie* case on

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57 SCC Case 057/2013 in Lundstedt, *op. cit.*

58 SCC Case 144/2010 in Lundstedt, *op. cit.* In this case however, as the respondent voluntarily complied to give the equipment to the claimant, no interim measure was ordered by the emergency arbitrator.

59 SCC Case 171/2014 in Knapp, *op. cit.*

60 SCC Case 010/2012 in Lundstedt, *op. cit.*

61 Poudret/Besson, *op. cit.*, 537 ; Yesilirmak, *Provisional Measures in International Commercial Arbitration*, Kluwer Law International, 2005, 183-190.

62 SCC Case 070/2011 in Lundstedt, *op. cit.*

63 SCC Case 010/2012 in Lundstedt, *op. cit.*

the merits and that the majority of them has applied a rather strict test of urgency and irreparable harm.

## 5 Brief Overview of Emergency Decisions under the SCC Rules

As per the end of 2016, a total of twenty-seven applications for emergency arbitration had been made under the SCC Rules, including five that were based on investment protection treaties<sup>64</sup>. In 2016 only, thirteen emergency arbitrator cases were decided<sup>65</sup>. As of the end of 2015, there was a total of fourteen requests for emergency decisions, of which two were fully granted, two were partly granted and ten were denied. The most common ground for rejecting a request was lack of urgency (eight cases) and lack of imminent harm (seven cases)<sup>66</sup>. In two emergency arbitrations, the respondents made undertakings partially accepting the relief sought by the claimants<sup>67</sup>.

The types of emergency measures sought by claimants have been wide-ranging. Contrary to Article 17A of the 2006 Model Law, the drafters of the SCC Rules rejected the idea of elaborating a list of the kind of interim measures which could be ordered by an arbitrator. It was decided instead to give considerable discretion to an arbitrator to grant the interim measures he/she deemed appropriate. As a matter of fact, in Sweden, arbitrators have more flexibility to order interim measures under both the SCC Rules and the Swedish Arbitration Act than Swedish courts<sup>68</sup>. The same rule applies with respect to emergency decisions. As mentioned above, there are no requirements set out in the SCC Rules for granting interim measures. This makes it possible for the arbitrator to apply the requirements in a differentiated manner with respect to the various measures sought in emergency proceedings, to the extent that this is warranted.

In SCC cases, claimants have sought orders prohibiting the respondent from collecting an amount under a guarantee<sup>69</sup>, from alienating or otherwise disposing of the shares of a company<sup>70</sup>, and from continuing parallel proceedings in a State court<sup>71</sup>. Claimants have also requested orders directing a respondent to deliver

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64 See the following articles published by The Arbitration Institute of the Stockholm Chamber of Commerce, available on “www.sccinstitute.com”: *2016 Statistics* (published on 6 March 2017); *New report on investment arbitration* (15 February 2017) and *Record number of requests for SCC emergency arbitrator* (7 July 2016).

65 The Arbitration Institute of the Stockholm Chamber of Commerce, *2016 Statistics*, published on 6 March 2017, available on “www.sccinstitute.com”.

66 Knapp, *op. cit.*, 9.

67 SCC Case 144/2010 and 010/2012 in Lundstedt, *op. cit.*

68 Shaughnessy, *op. cit.*, 344.

69 SCC Case 139/2010 in Lundstedt, *op. cit.*

70 SCC Case 064/2010 and 187/2010 in Lundstedt, SCC Case 171/2014 in Knapp, *op. cit.*

71 SCC Case 091/2011 in Lundstedt, *op. cit.*

certain products at a “fair market value”<sup>72</sup>, or to grant the applicant certain services or objects<sup>73</sup>. In addition, claimants have sought orders declaring that it is the lawful owner of property<sup>74</sup>, or that the applicant has the right to postpone completion of work under a construction contract<sup>75</sup>.

Not surprisingly, emergency arbitrators have declined to accept jurisdiction in cases where the claimant sought relief against a third party, not bound by the arbitration agreement. An emergency arbitrator has jurisdiction only over parties who have consented to arbitration, usually in the form of an arbitration clause included in the contract between the parties. Accordingly, in a case where the claimant sought relief in relation to other entities than the respondent, the emergency arbitrator declared that he had no jurisdiction to issue such orders<sup>76</sup>. In another case, claimant requested interim relief prohibiting not only the respondent to take certain actions, but also prohibiting companies, state authorities and corporate agents. Since none of these other entities was a party to the arbitration agreement, the emergency arbitrator denied jurisdiction and refused to grant interim measures with respect to them<sup>77</sup>.

Recent years have been marked by the rise of new issues in emergency arbitration: the first known emergency arbitration in an investment treaty case was decided in 2014<sup>78</sup>. Unlike commercial contractual disputes, investment treaty disputes are based on a treaty between two or more states. Arbitration is usually the chosen dispute resolution mechanism in most investment treaty disputes, usually referring to the ICSID, UNCITRAL, ICC or the SCC Rules<sup>79</sup>. Neither the ICSID, nor the UNCITRAL Rules have provisions for emergency arbitration. The ICC Rules expressly exclude the application of its emergency arbitration rules to investment treaty disputes<sup>80</sup>.

The SCC Rules, however, allow the parties to seek interim relief prior to the constitution of a tribunal in an investment treaty dispute<sup>81</sup>. The 2017 SCC Rules include special provisions regarding arbitration in investment treaty disputes in

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72 SCC Case 144/2010 in Lundstedt, *op. cit.*

73 SCC Case 057/2013 in Lundstedt, *op. cit.*

74 SCC Case 087/2012 in Lundstedt, *op. cit.*

75 SCC Case 138/2014 in Knapp, *op. cit.*

76 SCC Case 087/2012 in Lundstedt, *op. cit.*

77 SCC Case 064/2010 in Lundstedt, *op. cit.*

78 *TSIKInvest LLC v Moldova*, *op. cit.* For comments, see Dahlquist, *The first known investment treaty emergency arbitration : TSIKInvest LLC v The Republic of Moldova*, *SCC Emergency Arbitration No EA 2014/053*, 29 April 2014 (Hobér), *The Journal of World Investment & Trade*, Volume 17, 2016 and Dahlquist, *Emergency Arbitrators in Investment Treaty Disputes*, *Kluwer Arbitration Blog*, 10 March 2015.

79 See UNCTAD, *Investor-State dispute settlement: Review on developments Latest Developments in 2015*, No 2, June 2016, available on “[www.unctad.org](http://www.unctad.org)”.

80 Article 29(5) ICC Rules.

81 The 2016 SIAC Investment Arbitration Rules also provide for emergency arbitration rules applicable to investment treaty cases. However, there has not yet been a known emergency case under these rules.

its new Appendix IV, confirming such a possibility<sup>82</sup>. As per the end of 2016, there are five known investment treaty disputes where emergency arbitration had been requested. Emergency arbitration in investment treaty cases was invoked twice in 2014<sup>83</sup>, once in 2015<sup>84</sup> and twice in 2016<sup>85</sup>. Each of these cases raises new legal issues.

For example, in three Moldovan cases<sup>86</sup>, the question of the applicability of cooling-off periods in investment protection treaties was the main objection raised by the respondents. Many investment protection treaties contain provisions pursuant to which arbitration cannot be requested prior to the expiry of a specified period of time, thereby intending to encourage the parties first to attempt to solve their dispute by an amicable settlement.

*TSIKInvest v Moldova* is the first known investment treaty case where the SCC emergency arbitration provisions have been applied. A six-month cooling-off period was set out in the Russia-Moldova BIT. The claimant, TSIK, is a Russian entity which acquired a shareholding in a Moldovan bank in 2012. On 5 February 2014, the Administrative Council of the National Bank of Moldova issued a decision in which the claimant was said to have breached the laws of Moldova on the ownership of banks, and therefore its voting rights were suspended. In addition, the claimant was to dispose of its shareholding within three months (by 5 May 2014)<sup>87</sup>. TSIK applied to the national bank of Moldova to annul this decision, and as it failed, challenged it in the Moldovan courts, which dismissed the claim at the beginning of March 2014. On 31 March 2014, TSIK sent a notice of dispute to Moldova based on the Russia-Moldova BIT. Contrary to what was requested by the claimant, Moldova did not respond by 14 April 2014. As the deadline for its divestment was approaching, the claimant applied for an SCC emergency arbitration on 23 April 2014, requesting a stay of the disputed decision until an arbitral award would be rendered in the dispute. The emergency arbitrator was appointed the next day, and gave Moldova a day to respond, which it failed to do. An emergency decision granting the interim measure was rendered on 29 April 2014, in the absence of any response from Moldova. The emergency arbitrator found that the claimant had established a

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82 The Appendix IV was introduced in the 2017 SCC Rules primarily to allow greater transparency, including the intervention of actors who are not party to the investment agreement, but whose perspective could be important in the decision making of the tribunal. See The Arbitration Institute of the Stockholm Chamber of Commerce, *SCC new Arbitration Rules – Main changes*, Part 8, published on 1 December 2016 on “www.sccinstitute.com”. See also Brower/Meyerstein/Schill, *The Power and Effectiveness of Pre-arbitral Provisional Relief: The SCC Emergency Arbitrator in Investor-State Disputes*, in Hobér/Magnusson/Öhrström (eds.), *Between East and West: Essays in Honour of Ulf Franke*, Juris Publishing, 2010.

83 *TSIKInvest LLC v Moldova*, *op. cit.*; *Griffin Group v Poland*, *op. cit.*

84 *JKX Oil & Gas, Poltava Gas, Poltava Petroleum Company v Ukraine* (SCC EA 2015, unpublished).

85 *Evrobalt LLC v Moldova*, *op. cit.*; *Kompozit LLC v Moldova*, *op. cit.*

86 *TSIKInvest LLC v Moldova*, *op. cit.*; *Evrobalt LLC v Moldova*, *op. cit.*; *Kompozit LLC v Moldova*, *op. cit.*

87 *TSIKInvest LLC v Moldova*, *op. cit.*, paragraphs 17-19.



*prima facie* case on the merits, and that an urgent and imminent harm was likely to result unless the measure was ordered<sup>88</sup>. The emergency interim measure was granted notwithstanding the fact that TSIK did not await the expiry of the 6-month cooling-off period, as stipulated by the BIT. The emergency arbitrator, accepting the claimant's argumentation, held that awaiting the expiry of the cooling-off period would be procedurally unfair and contrary to the purpose of emergency arbitration, as there was a risk that the claimant would suffer irreparable harm before the expiry of the period if no measures were granted<sup>89</sup>.

The emergency arbitrators in *Evrobalt v Moldova*<sup>90</sup>, *Komposit v Moldova*<sup>91</sup> and *JKX v Ukraine*<sup>92</sup> reached similar conclusions regarding the cooling-off periods in the relevant treaties. The question at the heart of this issue is one of treaty interpretation, which must be done on the basis of Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Condensed and simplified, the ultimate question is:

When a State has agreed to arbitrate under rules that include the possibility of emergency arbitration, and when the investment treaty in question has an arbitration clause which provides for a cooling-off period, which provision trumps the other?

None of the arbitrators in the SCC cases referred to above has interpreted the treaties in question such that the cooling-off period has been deemed to constitute an impediment to emergency arbitration under the SCC Rules.

The temporal application of the SCC Rules is another issue that was raised in one investment treaty case before an emergency arbitrator, *viz.*, in *Griffin Group v Poland*<sup>93</sup>. Unlike in the Moldovan cases, the respondent State participated in the emergency proceedings, and contested the jurisdiction of the emergency arbitrator. The State argued that it had accepted a previous version of the SCC Rules, which did not include any emergency arbitration proceedings at the time of the signing of the BIT. Moreover, it was argued, as adjudicative functions were given to someone other than the tribunal, the emergency arbitrator represented an extraordinary, qualitative change of the SCC Rules. Respondent could thus not be regarded as having given consent to such a procedure<sup>94</sup>.

The majority of investment treaties were concluded at a time when emergency arbitration did not exist. However, both under the UNCITRAL and ICC Rules, for example, a reference to their respective arbitration rules (without specifying which edition) is generally interpreted as a reference to the rules in force at the

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88 *TSIKInvest LLC v Moldova*, *op. cit.*, paragraphs 62-65.

89 *TSIKInvest LLC v Moldova*, *op. cit.*, paragraph 66.

90 *Evrobalt LLC v Moldova*, *op. cit.*

91 *Komposit LLC v Moldova*, *op. cit.*

92 *JKX Oil & Gas, Poltava Gas, Poltava Petroleum Company v Ukraine*, *op. cit.*, as reported by "www.iareporter.com", *Investor takes emergency arbitrator award under energy charter treaty to a Ukraine court and obtains enforcement of tax-freeze holdings*, published on 29 June 2015.

93 *Griffin Group v Poland*, *op. cit.*

94 Knapp, *op. cit.*, 8.

time of the request for arbitration. The preamble to the 2010 SCC Rules, in which emergency arbitration was introduced, follows the same logic: the rules in force at the time of the commencement of the arbitration are to be applied<sup>95</sup>.

Referring to Article 31 of the Vienna Convention of the Law of Treaties, the emergency arbitrator in *Griffin Group v Poland* stated that the relevant provision was to be interpreted, *inter alia*, in accordance with its meaning, context and in light of its object and purpose. Therefore, in the words of the emergency arbitrator, “when a treaty is formulated in terms whose content is susceptible of evolving over time, it is fair to presume that the contracting states intended their treaty content to evolve accordingly, unless of course there is evidence of contrary intention<sup>96</sup>”.

A similar conclusion was reached in *Kompozit v Moldova*<sup>97</sup>, *Evrobalt v Moldova*<sup>98</sup> and *JKX v Ukraine*<sup>99</sup>, where the emergency arbitrators also chose an evolutive interpretation of the respondent’s consent to SCC emergency arbitration.

The cases discussed in the foregoing illustrate that emergency arbitration is becoming of ever increasing importance to parties who have agreed to arbitration under the SCC Rules.

## 6 Enforcement of the Emergency Arbitrator’s Decision

### 6.1 Different Views on the Enforceability of Arbitral Interim Measures

One of the disadvantages of interim measures ordered by an arbitrator is the perceived lack of enforceability of such measures, in contrast to interim measures ordered by a State court. There seem to be three different approaches with respect to the enforceability of interim measures.

In many States, if not most, arbitral interim measures are not enforceable in the national courts. This is, for example, generally held to be the case in Sweden. Although Article 25 of the Arbitration Act empowers arbitrators to grant interim measures to secure claims before an arbitral tribunal, such orders are not enforceable in Sweden; neither under the Swedish Arbitration Act, nor under the

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95 The opening paragraph of the preamble states that “Under any arbitration agreement referring to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the ‘Arbitration Rules’), the parties shall be deemed to have agreed that the following rules, or such amended rules, in force on the date of the commencement of the arbitration, or the filing of an application for the appointment of an Emergency Arbitrator, shall be applied unless otherwise agreed by the parties.”

96 Knapp, *op. cit.*, 8.

97 *Kompozit v Moldova*, *op. cit.*, paragraphs 38-45.

98 *Evrobalt LLC v Moldova*, *op. cit.*, paragraphs 28-30.

99 *JKX Oil & Gas, Poltava Gas, Poltava Petroleum Company v Ukraine*, *op. cit.*

Swedish Execution Code<sup>100</sup>. The reason usually given is that such orders are not final, and therefore cannot be enforced.

Other approaches have been taken, however, by other jurisdictions. In England, Germany and Switzerland for example, municipal legislation authorizes judicial enforcement of arbitral interim measures<sup>101</sup>. Pursuant to those laws, national courts *at the seat of the arbitration* may enforce arbitral interim measures, which enhances the enforceability of interim measures ordered by an emergency arbitrator. The Swiss Private International Law Act explicitly provides, in its Article 183(3), that an arbitral tribunal can request the assistance of the competent national court if a party does not voluntarily comply with tribunal-ordered interim measures.

A third approach regarding the enforceability of arbitral interim measures is that such measures are internationally enforceable in a State court, that is, also if they have not been ordered by an arbitral tribunal or emergency arbitrator at the seat where enforcement of the measure is sought. Section 22B(1) of the Hong Kong Arbitration Ordinance states that “*any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable [...]*”. This approach seems to have been modelled on the 2006 amendments to the UNCITRAL Model Law with the introduction of Article 17H, pursuant to which arbitral interim measures may be enforced in national courts, irrespective of the country where the arbitral tribunal has its seat<sup>102</sup>.

## 6.2 *Why are Arbitral Interim Measures Deemed not to be Enforceable?*

Despite the exceptions mentioned above, the prevailing view in most jurisdictions remains that interim measures ordered by an arbitral tribunal are not enforceable by a national court. Arbitral interim measures are usually considered not to be enforceable under the New York Convention, as they do not satisfy the requirements of its Article V(1)(e). This view is based on the idea that to be qualified as an “award” under the New York Convention, the decision must finally resolve a dispute. Interim measures are, by nature and by definition, temporary. It is thus generally considered that such measures can neither be enforced, nor recognized under the New York Convention<sup>103</sup>.

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100 Hobér, *Interim Measures by Arbitrators*, ICCA Congress series No 13, *International Arbitration 2006: Back to Basics?*, 5; Azelius/Olsson/Bergqvist, *op. cit.*, 940.

101 English Arbitration Act, Paragraph 42; German Civil Code of Procedure (Zivilprozessordnung), Article 1041; Swiss Private International Law Act, Article 183(3).

102 Hong Kong indeed broadened the scope of the Model Law, providing that interim measures issued by an arbitral tribunal are enforceable “*in the same manner as an order or direction of the Court, that has the same effect but only with the leave of the Court*” (Hong Kong Arbitration Ordinance, Section 61).

103 Voser, *Interim Relief in International Arbitration: The Tendency Towards a More Business-Oriented Approach*, *Dispute Resolution International*, Volume 1, December 2007, 184.

Nevertheless, in contrast to the prevailing view, there are commentators who are of the opinion that interim awards should be enforced under the New York Convention: an interim measure is final, in the sense that it resolves the issue whether the request for a provisional measure should be granted or not<sup>104</sup>. This view is shared by some commentators<sup>105</sup>, including in Sweden<sup>106</sup>. Also, there are several decisions from U.S. Courts which have taken the approach that provisional awards are to be treated as final, and as such, could be recognized and enforced<sup>107</sup>. However, the enforceability of interim measures under the New York Convention still remains the minority view.

Regarding emergency interim measures specifically, most national laws are silent on their enforceability. Hong Kong and Singapore are two exceptions: the respective national laws have provisions regarding the enforceability of emergency arbitrator decisions<sup>108</sup>. Uncertainties do, however, persist where no such steps have been taken to clarify the position of an emergency arbitrator. Can an emergency interim decision be characterized as an “award” under the New York Convention? The question is relevant, among other things because decisions issued by an emergency arbitrator are temporary, and binding only as long as the arbitral tribunal does not decide otherwise. Also, can the mere

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104 Kojovic, *Court Enforcement of Arbitral Decisions – How Final is Provisional?*, Journal of International Arbitration, Volume 18, 2001, p. 523 ; Born, *op. cit.*, 2514.

105 See, e.g., Van den Berg, *The Application of the New York Convention by the Courts, in Improving the Efficiency of Arbitration Agreements and Awards*, ICCA Congress Series No 9, 29: “An arbitral award providing for interim relief can be enforced under the Convention, provided that an arbitral decision providing for interim relief constitutes an arbitral award at the place of arbitration. As a matter of policy, enforceability of awards for interim relief under the Convention could greatly enhance the effectiveness of international arbitration.”

106 See Heuman, *Arbitration Law in Sweden: Practice and Procedure*, Juris Publishing, 2003, 333: “Certain determinations of interim measures can be enforceable if they are designated as provisional awards with regard to the content [...]. If the determination refers to a specific issue severable and independent from the substantive issue to be decided later, then such a determination should presumably be enforceable under the New York Convention [...]. An issue which is resolved for a limited time, e.g., until the final award is issued, can be decided in a final and binding manner for that period of time, albeit that the final award may settle the dispute in a way which is not in accordance with the provisional award.”

107 Born, *op. cit.*, 2514-2515.

108 An emergency arbitrator is defined in sections 22A and 22B, Part 3A of Hong Kong’s Arbitration Ordinance, revised in 2013, which stipulates that emergency decisions are enforceable in the same manner as interim orders awarded by the courts. Moreover, the Arbitration Ordinance provides that whether an emergency decision is rendered in or outside Hong Kong, it can still be enforced in Hong Kong. In Singapore, the International Arbitration Act amended in 2012 its section 2(1), clarifying that an emergency arbitrator falls within the definition of “arbitral tribunal”, regarding enforcement. Emergency arbitrators thus have the same legal status as an arbitral tribunal, and emergency arbitrator orders benefit from the same enforcement regime set out in the convention. However, contrary to Hong Kong’s Arbitration Ordinance, it is not clear whether an emergency relief sought outside Singapore is enforceable in Singapore. Nevertheless, it is likely to be the case, as section 12(6) of the Singapore International Arbitration Act allows the enforcement of all orders and directions made by arbitral tribunals, including the ones seated outside Singapore (ICSID Review – Foreign Investment Law Journal, Volume 31, 547).

designation of “award” convert a decision having the character of an order into an award? It could be argued that decisions taken by an emergency arbitrator should be treated differently than an arbitral award. For example, in the ICC Pre-Arbitral Referee Rules, a decision rendered by a referee is not considered as an award.

### 6.3 *The Importance of the 2006 Amendments to the UNCITRAL Model Law*

In order to fill the gap with respect to the enforceability of interim measures, the UNCITRAL Model Law was amended in 2006<sup>109</sup>. It now provides for the enforcement of interim measures in Articles 17H and 17I, regardless of the country where the measure was issued and of the form in which the measure was taken. This must be considered as a major improvement of the Model Law. It has been welcomed by the practitioners, who consider that Articles 17H and 17I could become as important as the New York Convention is for arbitral awards<sup>110</sup>. Needless to say, in order to reach that level of importance, and to be truly effective, Articles 17H and 17I must be implemented by a significant number of states. For example, even if interim measures are enforceable at the seat of the arbitration, it may still not be enough if the parties have voluntarily chosen a “neutral” seat. The neutral seat is usually not in the country of the respondent’s domicile, nor where it has its assets, and thus enforcement could remain a problem<sup>111</sup>.

As per the end of 2016, out of the 74 States which have based their legislation on the UNCITRAL Model Law, 18 States have revised their legislation in accordance with the 2006 amendments<sup>112</sup>. For example, New Zealand, Mauritius, the Commonwealth of Australia, as well as Ireland, Florida and Belgium have adopted the wording and/or the spirit of Articles 17H and 17I of the 2006 Amendments<sup>113</sup>.

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109 See UNCITRAL General Assembly, Resolution 61/33, *Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 18 December 2006.

110 See, e.g., Madsen, *Interim Measures: The Frontier of International Arbitration*, in Kleineman et al. (eds.), *Festschrift till Lars Heuman*, 2008, 349.

111 Kojovic, *op. cit.*, 520.

112 UNCITRAL, *Status of the UNCITRAL Model Law on International Commercial Arbitration (1985)*, with amendments as adopted in 2006, available on “[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)”.

113 New Zealand’s Arbitration Act 1996, Schedule 1, Articles 17H–17K; Mauritius’ International Arbitration Act 2008, Section 21(5)–(8); Commonwealth of Australia’s International Arbitration Act 1974, Schedule 2, Articles 17D–17G; Ireland’s Arbitration Act 2010, Schedule 1, Articles 17D–17G; Florida’s Chapter 684 International Commercial Arbitration, Section 684.0022–684.0025; Belgium’s Judicial Code, Articles 1692–1695. Source by Kennedy-Grant, *Interim Measures under the UNCITRAL Model Law on*

Some commentators take the view that Articles 17H and 17I enable the enforcement also of emergency decisions in States where those provisions have been implemented in the national law<sup>114</sup>. In the light of the wording of Article 17H(1), this view has been questioned by other commentators. Article 17H(1) states that “*An 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 (...)*”. This raises the question whether an emergency arbitrator can be put on an equal footing with an arbitral tribunal. Both the Model Law and the New York Convention fail to give guidance on the definition of an arbitral tribunal<sup>115</sup>. The question of the status of an emergency arbitrator could perhaps, on this view, be perceived as a potential impediment to enforcement of emergency interim measures, since an emergency arbitrator renders procedural and temporary decisions, awaiting the formation of the tribunal<sup>116</sup>. In practice, however, this particular aspect does not seem to have caused any problems.

#### **6.4 Enforceability of Emergency Decisions in Investment Treaty Arbitration**

In *JKX v Ukraine*<sup>117</sup>, the claimants sought an emergency interim measure against Ukraine in SCC emergency proceedings in January 2015. By doubling the gas production taxes in 2014, Ukraine was alleged to have breached certain provisions of the Energy Charter Treaty. The emergency arbitrator issued a decision six days after his appointment, on 15 January 2015. Ukraine did not participate in the emergency proceedings<sup>118</sup>. The emergency arbitrator rendered an award which restrained Ukraine from imposing excessive royalties on the claimants’ production of gas<sup>119</sup>.

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*International Commercial Arbitration: The Impact of the 2006 Amendments*, Asian International Arbitration Journal, Volume 10, 2014, 30-31.

114 Fry/Greenberg/Mazza, *The Secretariat’s Guide to ICC Arbitration*, ICC, 2012, 304 (fn. 62); Voser/Boog, *ICC Emergency Arbitrator Proceedings: An Overview*, ICC International Court of Arbitration Bulletin, Volume 22, 2011, 86.

115 Article 2(b) of the Model Law defines an arbitral tribunal as “*a sole arbitrator or a panel of arbitrators*”. The New York Convention is silent on the concept of arbitrator.

116 Azelius/Olsson/Bergqvist, *op. cit.*, 937.

117 *JKX Oil & Gas, Poltava Gas, Poltava Petroleum Company v Ukraine*, *op. cit.*

118 The facts of this case are reported by Perepelynska, *Enforceability of Emergency Arbitrator Awards in Ukraine* (7 December 2015), available on “[www.cisarbitration.com/2015/12/07/enforceability-of-emergency-arbitrator-awards-in-ukraine/](http://www.cisarbitration.com/2015/12/07/enforceability-of-emergency-arbitrator-awards-in-ukraine/)” and Peterson, *Investor takes emergency arbitrator award under Energy Charter Treaty to a Ukraine Court and obtains enforcement of tax-freeze holdings* (29 June 2015), available on “[www.iareporter.com/articles/investor-takes-emergency-arbitrator-award-under-energy-charter-treaty-to-ukraine-court-and-obtains-enforcement-of-tax-freeze-holdings/](http://www.iareporter.com/articles/investor-takes-emergency-arbitrator-award-under-energy-charter-treaty-to-ukraine-court-and-obtains-enforcement-of-tax-freeze-holdings/)”.

119 Press Release issued by the claimants on 16 February 2015, available on “[www.londonstockexchange.com/exchange/news/market-news/market-news-detail/JKX/12249847.html](http://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/JKX/12249847.html)”.

Ukraine did not comply with the emergency arbitrator's decision, which seems to have been rendered in the form of an award. In order to enforce the arbitral emergency decision, the claimants turned to the Pecherskyi District Court, in Kiev. In those proceedings, Ukraine raised several objections against the enforceability of the emergency arbitrator's decision: (i) the claimants had not respected the 3-month cooling-off period prescribed by Article 26(2) of the ECT; (ii) Ukraine had not been duly notified of the emergency proceedings, and was thus unable to present its case as required by Article V(1)(b) of the New York Convention; (iii) since emergency arbitration under the SCC Rules did not exist when Ukraine ratified the ECT in 1998, such rules could not apply; and (iv) enforcement of the emergency arbitrator's decision would violate the public policy of Ukraine, as it would infringe Ukraine's authority to raise royalty taxes and would breach fundamental principles of Ukraine's tax system.

All of Ukraine's objections were dismissed by the District Court, which granted enforcement of the emergency decision under the New York Convention, on 8 June 2015. The District Court found that (i) the 3-month period was not established by the Arbitration Agreement but by the ECT, which in its view excluded the application of Article V(1)(b) of the New York Convention, (ii) Ukraine had had the opportunity to properly present its case, (iii) the emergency decision was rendered in compliance with the SCC Rules applicable at the time of the request of the emergency arbitration, and (iv) Ukraine's public policy was not breached, as the emergency decision aimed at preventing a breach of the claimants' interests and only concerned the claimants. Moreover, the court stated that the emergency decision did not prescribe any other rules than the ones in force in Ukraine.

Ukraine successfully appealed against this ruling to the Kiev Court of Appeal with the same arguments, in September 2015. Although the Court of Appeal agreed with the District Court on grounds (i) to (iii), it found that the enforcement of the emergency decision in Ukraine violated the public policy of Ukraine, as it involved a change of the tax rate applicable to the claimants, and that such issue was to be solely determined in accordance with the Tax Code of Ukraine<sup>120</sup>.

In reaction to the Court of Appeal's decision, the claimants filed a cassation appeal to the High Specialized Court of Ukraine for Civil and Criminal Cases. The claimants argued that the emergency decision did not introduce changes to the Ukraine general system of taxation, but was only ordering Ukraine provisionally to apply a tax rate to one particular company. The High Court agreed with the claimants' arguments and declared that the emergency decision did not impact the taxation system as a whole. In the view of the High Court, the public policy of Ukraine had remained untouched. Since public policy was only

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120 The Arbitration Institute of the Stockholm Chamber of Commerce, *Ukrainian recognition and enforcement of SCC emergency arbitration award*, available at "[www.sccinstitute.com/about-the-scc/news/2016/ukrainian-recognition-and-enforcement-of-scc-emergency-arbitration-award-translation-now-available/](http://www.sccinstitute.com/about-the-scc/news/2016/ukrainian-recognition-and-enforcement-of-scc-emergency-arbitration-award-translation-now-available/)"

ground which was before the High Court, the enforcement of the emergency award was granted<sup>121</sup>.

Subsequent to *JKX v Ukraine*, an award for interim measures award under the UNCITRAL Rules has been enforced in Ukraine granting the same relief as the SCC emergency award<sup>122</sup>.

The enforcement of interim measures and emergency decisions however remains uncertain in countries where no specific provisions exist in the national laws, and where the 2006 revisions of the UNCITRAL Model Law have not been implemented. In order for interim measures and emergency decisions to be enforced without complications, a proper mechanism for their enforcement must be introduced in municipal legislation.

### **6.5 Unenforceable Interim Measures Remain Meaningful**

The lack of enforceability of arbitral interim measures does not mean that they are ineffective in practice. There are usually good reasons for parties to comply with them voluntarily.

As a matter of fact, there is a high percentage of voluntary compliance with interim measures ordered by an arbitral tribunal<sup>123</sup>. For example, decisions rendered by ICC pre-arbitral referees were almost always respected by the concerned parties<sup>124</sup>. It would indeed be “*brave (or even foolish)*”<sup>125</sup> of a party to ignore interim measures ordered by an arbitral tribunal. Such conduct would be likely to have a negative impact on the party’s position in the subsequent arbitral proceedings<sup>126</sup>. Therefore, parties who seek to demonstrate good faith before the arbitrators will typically not want to defy an interim order while a decision on the merits is pending, as the mistrust of an arbitrator in a party could perhaps have consequences for the final award<sup>127</sup>. Nevertheless, the parties’ voluntary compliance should not be overestimated: in some cases, a party may

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121 ICSID Review – Foreign Investment Law Journal, Volume 31, 546 ; The Arbitration Institute of the Stockholm Chamber of Commerce, *Ukrainian recognition and enforcement of SCC emergency arbitration award*, *op. cit.*

122 *Poltava Gas BV and Poltava Petroleum Company v Ukraine*, ICSID Case No ARB/15/9.

123 See Hobér, *Interim Measures by Arbitrators*, ICCA Congress series No 13, *International Arbitration 2006: Back to Basics?*, 739.

124 Craig/Park/Paulsson, *International Chamber of Commerce Arbitration* (3rd edition), Oceana Publications, 2000, 460; Savola, *op. cit.*, 87.

125 Blackaby/Partasides/Redfern/Hunter, *Redfern and Hunter on International Arbitration* (5th Edition), Oxford, 2009, 450.

126 Derains/Schwartz, *A Guide to the new ICC Rules of Arbitration*, Kluwer Law International, 1998, 276.

127 Schwartz, *The Practices and Experience of the ICC Court*, ICC International Court of Arbitration Bulletin: Conservatory and Provisional Measures in International Arbitration, 1993, 59; Carlevaris /Feris, *Running in the ICC Emergency Rules: The First Ten Cases*, ICC International Court of Arbitration Bulletin, Volume 25, 2014, 37.



still find it worth it to sacrifice its “*good citizen*” appearance if it can benefit from its non-compliance<sup>128</sup>.

Interim measures ordered by an arbitrator can still remain effective, even if not complied with and even if they are not enforceable. The power of an arbitral tribunal to draw adverse inferences is one way to make arbitral interim decisions effective, despite the lack of enforceability. Adverse inferences is a generally accepted procedural tool to evaluate evidence in international arbitral proceedings<sup>129</sup>. It is built on the idea that a non-compliant party “*has something to conceal and is conscious of guilt*”<sup>130</sup>. To that effect, if an interim measure relates to the preservation or production of evidence, the potential use of adverse inferences in later proceedings may serve as an incentive for a party to comply with it. It must, however, be kept in mind that in practice, it will often be difficult, if not impossible, for an arbitral tribunal to draw specific negative inferences from a document which the tribunal has not seen. In other fields than disclosure, the possibilities of an arbitral tribunal to draw negative inferences are probably even more limited.

Many institutional rules stipulate that a decision rendered by an emergency arbitrator is binding on the parties<sup>131</sup>. In the SCC Rules specifically, Article 9 of Appendix II states that when the parties agree on arbitration under the SCC Rules, they also agree to comply with an emergency decision without delay. The SCC Rules do not provide for any sanctions for the failure to comply with such decisions. Article 30(3) SCC Rules does however stipulate that an arbitral tribunal may draw adverse inferences from a failure to comply without good cause with any procedural order given by the arbitral tribunal. A failure to comply with an emergency decision is thus considered as a failure to comply with the SCC Rules. This enables the emergency arbitrator and the subsequent arbitral tribunal to draw adverse inferences from a failure to comply with a decision rendered by the emergency arbitrator<sup>132</sup>. Also, under the SCC Rules, which form part of the arbitration agreement, the parties are contractually bound by an emergency decision. Failure to comply with such a decision could perhaps be characterized as a breach of contract. The desire to avoid the potential consequences of a breach of contract might serve as an additional incentive for a party to comply with the emergency decision.

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128 See, e.g., Born, *op. cit.*, 2448.

129 This is explicitly addressed in Article 9.5 of the IBA Rules on the Taking of Evidence in International Arbitration, which states that “if a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party”.

130 “When a party is once found to be fabricating, or suppressing, documents, the natural, indeed the inevitable, conclusion is that he has something to conceal, and is conscious of guilt”; Judge Hand in *Warner Barnes & Co. v Kokosai Kisen Kabushiti Kaisha*, 2nd Circle, 1939, paragraphs 450-453.

131 See Schedule 4(16) HKIAC Rules, Article 29(2) ICC Rules, Article 6(4) ICDR Rules and Schedule 1(9) SIAC Rules.

132 Shaughnessy, *op. cit.*, 347.

It is generally accepted that arbitral tribunals may take the conduct of parties into account when the tribunal allocates arbitration costs. Failure by a party to comply with a decision of an emergency decision constitutes conduct which could be taken into account in this respect, in particular with respect to costs arising out of the non-compliance with the decision in question. The possibility of arbitral tribunals to allocate arbitration costs may serve as a further incentive for parties to comply with emergency decisions.

With respect to SCC cases, a further aspect is noteworthy. It seems that in several cases, the emergency decision has led to settlement of the dispute, or it being resolved otherwise prior to the commencement of the actual arbitration proceedings. Depending on the circumstances of the individual cases, this could perhaps be explained by the nature of the interim order requested and granted, or the *prima facie* assessment of the merits of the case that the emergency arbitrator must perform in order to rule on the request for interim relief. This effect of emergency decisions illustrates that they may be meaningful and efficient, even though they may not be enforceable in State courts.

Although an emergency decision is binding on the parties, it does not bind the subsequent tribunal. In accordance with Article 9(4) of Appendix II to the SCC Rules, an emergency decision will cease to bind the parties in the following situations: (i) if the emergency arbitrator decides otherwise; (ii) if a request for arbitration is not filed in the 30 days after the day the emergency decision was made; (iii) if the case is not referred to an arbitral tribunal within 90 days; and (iv) when a final award is made<sup>133</sup>.

## **7 Concluding Remarks**

The SCC Rules on emergency arbitration establish a regime providing for speedy interim relief prior to the constitution of an arbitral tribunal. By adopting this new procedure in 2010, the SCC confirmed its position as a modern arbitration institution, which seeks to provide its users with measures designated to improve the efficiency of arbitral proceedings. By virtue of the SCC Rules on emergency arbitration, parties are given an alternative to seeking interim relief from a national court. Emergency decisions rendered so far show that, in addition to providing interim relief proper, emergency arbitration under the SCC Rules may contribute to a quick and early resolution of the entire dispute. Even though emergency decisions may not be enforceable in national courts, users of the SCC Rules seem to appreciate and value the availability of emergency arbitration. Whilst this is admittedly a new trend in international arbitration, it is submitted that this is lasting trend which is here to stay.

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133 Article 9(4) Appendix II SCC Rules.