

SCC PRACTICE NOTE

Emergency Arbitrator Decisions Rendered 2015-2016

STOCKHOLM, June 2017



ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

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1. Introduction

SCC was one of the first arbitration institutions in the world to provide for emergency arbitrator proceedings. In 2010, the new Appendix II was added to the SCC Arbitration Rules and the Rules for Expedited Arbitrations (“SCC Rules”), allowing a party in need of prompt interim relief to receive a decision from an emergency arbitrator if no tribunal had yet been constituted.² In the seven years that have passed since the introduction of Appendix II, the SCC has seen a total of 27 applications for the appointment of an emergency arbitrator, with 13 of those received in 2016 alone. This article will summarize the decisions rendered in 2015 and 2016, and draw some conclusions based on all decisions rendered to date.³

2. The Emergency Arbitrator Procedure

Under Appendix II, a party may apply for the appointment of an emergency arbitrator at any point before the dispute has been referred to an arbitral tribunal. The application may thus be made *either* before the initiation of regular arbitral proceedings, *or* while the case is pending before the SCC Secretariat or the SCC Board – that is, after a request for arbitration has been submitted but before the tribunal has formally received the case. Once a dispute has been referred to the tribunal, the mandate to grant interim relief resides exclusively with the tribunal, in accordance with Article 37 of the SCC Rules. To date, most but not all applications for the appointment of an emergency arbitrator have been received *before* the initiation of regular arbitral proceedings.

The powers of an emergency arbitrator to grant interim relief are the same as those of the arbitral tribunal, as set out in Article 37 (1)-(3). This means that the emergency arbitrator may “grant any interim measures it deems appropriate” and order the party requesting the interim measure to provide appropriate security.

An application for the appointment of an emergency arbitrator must conform to Article 2 of Appendix II of the SCC Rules. It should include (i) the names, addresses, telephone numbers and e-mail addresses of the parties and their counsel; (ii) a summary of the dispute; (iii) a statement of the interim relief sought and the reasons therefor; (iv) a copy or description of the arbitration agreement or clause under which the dispute is to be settled; (v) comments on the seat of the emergency proceedings, the applicable law(s) and the language(s) of the proceedings. The applicant should also include proof of payment of the application fee; usually, evidence of a bank

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² Appendix II is also included in the SCC Rules for Expedited Arbitration. All applications for the appointment of an emergency arbitrator to date has been under the SCC Arbitration Rules, and all references to the Rules in this practice note are to the Arbitration Rules.

³ To review decisions rendered in earlier SCC emergency arbitrator proceedings, see the practice notes authored by Johan Lundstedt (decisions rendered 2010-2013) and Lotta Knapp (decisions rendered 2014). Available at <http://www.sccinstitute.com/about-the-scc/legal-resources/articles>.

transfer is attached to the application.⁴ In order for the SCC to immediately serve the respondent and appoint an emergency arbitrator, the party requesting emergency proceedings should ensure that its application is complete at the time of submission.

The SCC maintains a dedicated email address, emergencyarbitrator@chamber.se, to which applications for the appointment of an emergency arbitrator are sent. The inbox is monitored also outside of normal office hours. In most cases, the applicant contacts the SCC Secretariat shortly before submitting its application; this courtesy allows the SCC Secretariat to ensure adequate staffing and to alert the SCC Board of the imminent emergency appointment.

When an application for the appointment of an emergency arbitrator is received, the SCC reviews it to ascertain that it does not manifestly lack jurisdiction over the dispute. Thereafter, the application is sent to the respondent or its counsel by email and express courier at the addresses provided by the applicant. In most cases, the dispute is known to the respondent, and counsel has already been engaged. Where the respondent does not have counsel, or if respondent's counsel is unknown to the applicant, it is advisable for the claimant to include the name of a contact person for the respondent in the application. This is to ensure that the application is promptly received and processed by respondent, giving the respondent an adequate opportunity to participate in the emergency proceedings.

An application for interim measures cannot be granted *ex parte*, i.e. without the respondent being properly served. It is within the emergency arbitrator's mandate to determine whether the respondent has been duly notified of the emergency proceedings. The respondent has participated in the vast majority of the SCC emergency proceedings to date.

In accordance with Article 4(1) of Appendix II, the SCC seeks to appoint an emergency arbitrator within 24 hours of receiving the application. To date, the deadline has been met in all but one of the 27 emergency arbitrator appointments. In the case where the appointment was delayed, the application had been sent to an email address other than the dedicated emergency arbitrator address, outside of regular office hours.

As soon as an application is received, the SCC Secretariat starts compiling a list of possible emergency arbitrators. In doing so, the SCC considers the same factors as in the appointment of tribunal chairpersons: the nature and circumstances of the dispute, the applicable procedural and substantive law, the language of the proceedings, and the nationality of the parties. In light of the urgency of the emergency proceedings, the SCC also takes practical circumstances into consideration, such as time zones and the possibility to conduct a quick conflict check. In compiling the list of candidates, the Secretariat typically liaises with several members of the SCC Board.

Once the Board has approved the list, the Secretariat contacts the potential arbitrators by telephone and e-mail. Only after an arbitrator has confirmed availability for an emergency appointment is information regarding the parties and the dispute provided for the purpose of a conflict check. Several candidates are typically contacted simultaneously, to maximize the chances of a timely appointment. The time required for conflict checks, especially where candidates practice at large global law firms, has been one of the foremost challenges in appointing emergency arbitrators within the 24-hour deadline.

When an appointment has been made, and the arbitrator has signed a confirmation of impartiality and independence, the SCC promptly refers the application to the emergency arbitrator. Under Article 7 of Appendix II, the arbitrator may conduct the emergency arbitration as he or she considers appropriate, "taking into account the urgency inherent in such proceedings." Typically,

⁴ As of January 2017, the fee for the emergency proceedings amounts to EUR 20 000. Until 31 December 2016, the fee was EUR 15 000.

immediately upon referral, the emergency arbitrator invites the parties to participate in a telephone conference and to establish a timetable for the proceeding. The next step is usually for the respondent to file its comments on the application. Thereafter, the parties are often given an opportunity to file brief rejoinders. A second telephone conference is frequently held, sometimes followed by final comments from the parties, before the emergency arbitrator renders a decision or an award.

In accordance with Article 8(1) of Appendix II, the decision on interim measures shall be made no later than 5 days from the date when the application was referred to the emergency arbitrator. The SCC may extend this time limit upon a reasoned request from the emergency arbitrator, or if otherwise deemed necessary. Of the 27 emergency decisions rendered to date, many have met the 5-day deadline, and the vast majority have been rendered within 8 days. The emergency arbitrator may render the emergency decision in the form of an order or an award.

In the 2010 version of the SCC Rules, applicable in all emergency proceedings summarized herein, the costs of the emergency proceeding were borne by the applicant, but could be allocated in the final award. The 2017 revision of the SCC rules amended Article 8 of Appendix II, so that the emergency arbitrator may now apportion the costs of the emergency proceedings between the parties, applying the same principles as in ordinary arbitral proceedings.

3. Emergency Arbitrator Decisions Rendered 2015-2016⁵

3.1. Case No. EA 2015/002

Background

The three claimants were companies in the oil and gas industry. Respondent was a state entity. The dispute pertained to a legislative change that substantially increased fees on claimant's production and sale of natural gas. The claim was based on protections allegedly afforded claimants by the Energy Charter Treaty ("the ECT").

Procedure

The claimants filed an application for the appointment of an emergency arbitrator, along with a witness statement in support of that application. On the day of receipt, the SCC notified the respondent, appointed an emergency arbitrator, and determined that the seat would be Stockholm. The application was referred the next day. One day later, the emergency arbitrator informed the parties of the procedural timetable. The respondent did not participate in the proceeding, but had been duly notified. The emergency decision was rendered in the form of an award 5 days after referral.

Request for interim relief

The claimant requested the emergency arbitrator to (1) order the respondent to refrain from any further steps to restrict the claimants' ability to sell gas; (2) declare that the claimants were not liable to pay royalties on gas production in excess of the previously applicable legislation.

Analysis and decision

Referencing the provisions on interim relief and emergency proceedings in the SCC Rules, the emergency arbitrator considered that an emergency award in favor of claimants would be justified if the following conditions were met:

- (1) The existence a *prima facie* claim under the ECT, including jurisdiction;
- (2) urgency of the interim measure;

⁵ The emergency decisions are presented in chronological order. In keeping with the SCC's strict confidentiality undertaking, the decisions have been anonymized, and some facts have been modified.

- (3) irreparable harm in the absence of the interim measure; and
- (4) the interim measure was appropriate in view of the totality of circumstances.

Based on the claimants' submissions and evidence, the emergency arbitrator found that the claimants had established a *prima facie* case of unfair and inequitable treatment under Article 10 of the ECT, and an unreasonable impairment of the use and enjoyment of their investments.

With regard to the "urgency" and "irreparable harm" requirements, the emergency arbitrator reasoned:

Interim relief by an emergency arbitrator will be justified only under circumstances in which claimants cannot be reasonably expected to await an interim decision by the arbitral tribunal. Negative financial consequences for the period before such an interim decision may as a rule not suffice to establish irreparable harm. The situation is, however, different in case the financial consequences are accompanied by other aggravating circumstances.

The emergency arbitrator found that, in the case at hand, the requested interim relief was indeed urgent. In the absence of such relief, the claimants would suffer not only financial losses but also irreparable operational damage. The claimants stated that their cash reserves were exhausted, and if required to pay the fees required by the new legislation, the claimants would have to stop production. The requested interim relief would alleviate the claimants' cash flow issues by allowing them to sell gas as they had done before the enactment of the new legislation.

Considering the claimants' request in the totality of the circumstances, the emergency arbitrator further found the requested interim measure "appropriate". Although the new legislation amounted to a restructuring of the country's entire gas market, the claimants' request was limited to the narrow segment of the market that affected its own rights.

Having found that the requirements for interim relief were met, the emergency arbitrator ordered the respondent to refrain from imposing royalties on gas production by claimants in excess of those determined under the previously applicable legislation.

3.2. Case No. EA 2016/30, Case No. EA 2016/31 and Case No. EA 2016/32

Background

The claimants in these three parallel applications were importers and wholesalers of in the oil and gas sector. Respondent was a supplier. The dispute arose when respondent decreased its supply to claimants, demanding a price increase to resume normal supply.

Procedure

The claimants filed their applications separately but through the same legal counsel. The facts leading to the dispute, the underlying contract amendments, and the relief requested was identical in all three cases. For reasons of procedural economy, and to avoid conflicting decisions, the SCC considered it appropriate to appoint one emergency arbitrator to decide the three applications. The arbitrations were conducted in parallel, leading to three separate emergency decisions.

On the day when the application was received, the SCC appointed an emergency arbitrator to serve in all three proceedings. A day later, the respondent confirmed receipt of the claimants' applications and the emergency arbitrator communicated a proposed time plan for the proceedings. The respondent provided its response six days from the date of the claimant's application. Later that day, the claimant submitted a reply, followed by the respondent's rejoinder a few hours later. A further round of comments were submitted the next day. The emergency arbitrator rendered the three decisions 7 days after the applications were referred to him.

Request for interim relief

The claimants requested for the status quo to be restored, pending final resolution of the dispute. Specifically, they requested that the respondent be ordered to: (1) abstain from any unilateral action to enforce an increased contract price without adherence to the formal procedure for price

revision, and/or to reduce deliveries without justifiable cause; and (2) immediately resume deliveries in accordance with the contract.

Analysis and decision

The emergency arbitrator found it pertinent, in an international dispute such as this, “to refer to Article 17(2) of the UNCITRAL Model Law on International Commercial Arbitration rather than to rely entirely on domestic concepts developed in *lex arbitri*”. That said, the arbitrator recognized, that “the power of an emergency arbitrator should be exercised with due respect for . . . the limitations in the corresponding powers of the courts to grant interim relief under the *lex arbitri*”.⁶

The emergency arbitrator first analyzed whether the requested relief constituted an interim measure under Article 17(2) of the UNCITRAL Model Law. Under that provision, an interim measure is a temporary measure by which a party is ordered *inter alia* to maintain or restore the status quo pending determination of the dispute, *or* to take action that would prevent, or refrain from action likely to cause, current or imminent harm or prejudice to the arbitral process itself. Using this definition, the emergency arbitrator determined that the requested relief sought to restore the status quo, and therefore amounted to an interim measure.

The emergency arbitrator then applied the other conditions for granting interim measures, as set out in Article 17A of the UNCITRAL Model Law. For the interim measures to be granted, the applicants would need to satisfy the arbitrator that:

- (1) there was a reasonable possibility that the claimant would succeed on the merits of the claim; and
- (2) harm not adequately reparable by an award of damages was likely to result if the interim measure was not ordered, and such harm substantially outweighed the harm to the respondent likely to result if the interim measure was granted, and the respondent eventually prevailed.

Based on a review of the parties’ arguments, the emergency arbitrator found that the claimants had demonstrated a *prima facie* case on the merits.

The emergency arbitrator also found that the requested relief was necessary to prevent harm not adequately reparable by damages, calling the situation as described by claimants “a school-book example of the irreparable harm that access to interim measures aims to prevent”. The emergency arbitrator rejected the respondent’s argument that claimants could have mitigated the harm by paying the price requested by respondents.

The arbitrator rejected the existence of an independent “urgency test”, stating instead that “the very conclusion that there is an *imminent* risk of (further) harm not adequately reparable by an award of damages should be sufficient to meet the urgency test.”

Subsequently, the emergency arbitrator assessed whether the potential harm the claimants were likely to suffer if interim relief were *not* granted substantially outweighed the harm to the respondent that would result if the interim measures *were* granted and the respondent eventually prevailed. The arbitrator found that the balance tipped in favor of the claimants, citing a general rule that the greater the chance that claimants will prevail on the merits, the less the balance of harms needs to weigh in claimants’ favor.

The arbitrator rejected the claimants’ proposition that, because sales to claimants amounted only to a small fraction of the respondents’ total sales, any harm to the respondent would be negligible. The arbitrator stated that he “does not believe that the balancing of the risk of doing injustice should be done in relative terms or with regard to the relative risk aversion, since this would in

⁶ Considering that the interim measure requested would potentially amount to an order for specific performance, the emergency arbitrator noted that under Swedish law, specific performance would be an available remedy in the present case.

principle mean that larger entities were to be treated under a different standard than smaller entities”.

Having considered all the conditions for granting interim measures, as set out in the UNCITRAL Model Law, the emergency arbitrator granted the claimant’s second request, subject to certain qualifications. The arbitrator rejected respondent’s argument that a request must be granted or rejected as it has been put forward, holding instead that it is within the emergency arbitrator’s mandate to grant interim relief to a lesser or more confined extent than requested.

The claimant’s first request was dismissed on a *prima facie* level of assessment, as the way in which the request was framed appeared to be incompatible with certain provisions of the underlying contract.

3.3. Case No. EA 2016/046

Background

The claimant was a chemical company, and the respondent was a producer of fertilizers owned by non-EU state. Claimant made certain deliveries to respondent, for which respondent made only partial payments. As a result, respondent owed a significant debt to claimant. In early 2016, the state made known its intention to privatize the company. Claimant feared that prior to privatization, respondent would restructure in a way that would render the debt impossible to collect.

Procedure

The day after the application was submitted, the SCC appointed an emergency arbitrator and determined Stockholm as the seat. The arbitrator invited the respondent to submit a response to the claimant’s application by midnight the next day and the claimant to provide comments on the respondent’s submission by midnight the following day. The next day, the respondent responded that it was prepared to negotiate payment terms but did not respond substantively to the claimant’s application for interim relief. The following day, the claimant provided comments to the respondent’s letter. Two days later, the respondent provided further comments. A phone conference was convened two days after the claimant’s submission of comments to the respondent’s letter. The parties subsequently exchanged further comments. The emergency arbitrator rendered the award 7 days after referral.

Request for interim relief

The claimant sought an order directing the respondent to refrain from transferring or encumbering its immovable assets, and from authorizing any such asset transfer or pledge, until the rendering of a final award in the forthcoming arbitration.

Analysis and decision

Referencing broad consensus and “common sense”, and citing the treatises of Gary Born and Redfern & Hunter, the emergency arbitrator set out four elements to be considered when deciding whether to grant interim measures:

- (1) A reasonable prospect of success on the merits of the claim. The arbitrator explained that “this had been described as a *prima facie* test, but in fact it should be something slightly more. . . . if there is no reasonable prospect of success (a ‘colorable claim’, one might say, which is more than a *prima facie* showing, which requires no evidence at all) then there is no tangible right deserving of protection, and any relief granted will upset rather than preserve the status quo.”
- (2) The claimant must demonstrate that, absent the relief requested, harm will result to its interests that is serious and not adequately compensated by an award of damages. The arbitrator explained: “It is generally accepted that this need not rise to the level of ‘irreparable harm’ as the term is used in some domestic legal systems. But it must

normally be harm of more than a purely monetary nature – otherwise the tribunal can award compensation with interest that will cure the harm in due course without the need for interim intervention.”

- (3) There must be reasonable confidence that the harm identified by the claimant will materialize imminently. The arbitrator reasoned that this “urgency requirement” does not mean that relief should be forthcoming only where the danger is mere days away; rather, the consideration is whether the danger is likely to come to fruition before a final award is rendered.
- (4) The proportionality of the measure requested must be taken into account. The arbitrator explained that this criterion is commonly assessed as a balance of hardships. He noted, “If the negative impact of the requested relief is disproportionate to its benefit, then either the request must be declined or the relief redesigned to reduce the burden on the subject party”.

First, the emergency arbitrator determined that, in the dispute at hand, the claimant had established a reasonable chance of success on the merits. The respondent had acknowledged the existence of the debt that was the subject of the principal claim, and had not expressly denied liability for the additional claim for penalties.

Second, the emergency arbitrator determined that the interim measures would serve to avoid serious harm. Based on evidence submitted by claimant, he found that there was a risk that the respondent would restructure in such a way as to separate its assets from its liability to claimant. The very purpose of an arbitral process would then be in doubt, as there would be no assets against which to enforce an award.

Third, the emergency arbitrator considered the “urgency” requirement. The claimant had submitted evidence to show that the privatization was to occur within a few months. The arbitrator found that because the respondent’s corporate restructuring was likely to take place prior to the constitution of a tribunal, the claimant’s request for interim measures was urgent.

Fourth, the emergency arbitrator considered the proportionality the interim relief sought. The arbitrator recognized that a freeze of respondent’s immovable assets might have a significant impact on the privatization process. Nonetheless, on balance, the potential harm to the claimant outweighed the inconvenience to the respondent.

Based on this analysis, the emergency arbitrator ordered the interim measures requested, but with some modifications to narrow their scope and temporal application. The respondent was ordered to refrain from transferring or encumbering any of its immovable property before a certain date, by which it was likely that an arbitral tribunal had been constituted.

3.4. Case No. EA 2016/050

Background

The parties, both Estonian companies, were joint shareholders in a third company. Respondent notified claimant of its intention to sell its shares in the company. Claimant stated that it wished to exercise its right of first refusal within the deadline stipulated by the shareholders’ agreement, and that it needed to commence due diligence. Respondent refused access.

Procedure

The SCC appointed an emergency arbitrator the day after receiving the application. A day later, the emergency arbitrator issued Procedural Order No. 1, including a timetable. The next day, the respondent submitted its Reply. Neither party requested a hearing and the arbitrator did not deem a hearing necessary. The emergency arbitrator issued Procedural Order No. 2, following which the parties submitted their final comments. The arbitrator rendered the decision 6 days after the application was referred to her.

Request for interim measures

The claimants requested that the emergency arbitrator order respondent to: (1) allow the claimants to conduct due diligence of the company with immediate effect; (2) communicate to the management of the company its unconditional acceptance of the claimants' right to due diligence; and to (3) refrain from interfering with the due diligence.

Analysis and decision

Referencing the applicable provision in the SCC Rules, the emergency arbitrator stated, "although the rules do not expressly set out the standards to be met for granting a request for interim measures, there are requirements, developed in practice, that need to be satisfied". She deemed those requirements to include:

- (1) *Prima facie* jurisdiction over the substantive claim;
- (2) a reasonable possibility that the claimant would succeed on the merits of the claim, on a *prima facie* basis;
- (3) urgency; and
- (4) a risk of irreparable harm that can be prevented by the interim measure.

First, the arbitrator noted that SCC jurisdiction over the substantive claim was undisputed.

Second, the emergency arbitrator considered whether claimant had established a *prima facie* case on the merits. The key question on the merits was whether the claimants, or their financier, had a right to conduct due diligence in the company. Although due diligence may be necessary to protect the claimants' right of first refusal, the claimants' entitlement to due diligence was not supported by express provisions in the contract. To reach the claimants' conclusion that the right to due diligence was implicit in the contract, it would be necessary to examine evidence relating to contractual history and interpretation.

Having found that the claimant had failed to identify a contractual right to due diligence, and thus not established a *prima facie* case on the merits, the emergency arbitrator dismissed the application for interim measures.

3.5. Case No. EA 2016/067

Background

The claimant was a Swiss natural resource supplier. Respondent was a Russian producer of metal. The dispute arose from respondent's purported termination of a long-term supply contract between the parties, and its subsequent refusal to accept delivery of claimant's goods.

Procedure

The claimant commenced ordinary arbitration by submitting a request for arbitration to the SCC. The respondent was given two weeks to submit an answer. Prior to the expiry of that deadline, the claimant applied for the appointment of an emergency arbitrator. On the day after the application was submitted, the SCC appointed an emergency arbitrator. The following day, the arbitrator convened a telephone conference and issued a procedural order and timetable. Two days after that, the respondent submitted its response, and the claimant its reply. After a further round of comments, a hearing was held by telephone. The emergency arbitrator rendered his decision 7 days after referral.

Request for interim measures

The claimant requested that respondent be ordered to continue to perform its obligations arising from the purportedly terminated contract, pending the resolution of the dispute – specifically to accept the deliveries, ensure the operation of the transportation system used for the deliveries, and pay in accordance with the contract.

Analysis and decision

The respondent challenged the emergency arbitrator's jurisdiction on numerous grounds. Primarily, the respondent argued that the SCC Rules in force when the arbitration agreement was signed did not include the emergency arbitrator provisions, and that the respondent had therefore not agreed to submit to emergency proceedings. The emergency arbitrator rejected this argument, stating that it is generally accepted that parties agree to submit to arbitration under the version of the chosen rules in force at the time of commencement of arbitration. He explained that "the underlying rationale for such a 'dynamic' reference to the current version of the arbitration rules is [that], in submitting to arbitration, the parties normally want to submit to effective dispute resolution. Hence it can be assumed that they want to benefit from any improvements made to the arbitral rules chosen[.]"

Having established that he had jurisdiction, the emergency arbitrator considered the merits of the application. He noted the SCC Rules do not include criteria for granting interim relief, and that previous SCC emergency decisions had drawn guidance from the conditions set out in Article 17 of the UNCITRAL Model Law. With regard to the question of whether urgency should be considered a separate requirement, the arbitrator stated:

the prevailing approach . . . is to combine the urgency requirement with the closely connected irreparable harm criteria. Thus, the urgency test has been formulated such that it needs to be established that there is a reasonable possibility that, unless the order for interim relief be granted before the Tribunal has been constituted, it is likely that irreparable harm will be caused to the applicant.

The emergency arbitrator thus formulated the test for granting interim measures as follows:

- (1) There is a reasonable possibility that the requesting party will succeed on the merits of the claim;
- (2) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered as a matter of urgency and before the Tribunal is constituted; and
- (3) The harm to the applicant substantially outweighs the harm if any that is likely to result to the party against whom the measure is directed, should the measure be granted.

The emergency arbitrator found that the applicant had satisfied the first requirement by showing that the respondent *either* had not been entitled to terminate the contract, *or* if respondent were entitled to terminate the contract, there was reasonable possibility that it would have been required to continue performance under the contract until the end of the arbitration. Claimant had presented five alternative arguments in support of its claim that respondent's termination of the contract was unlawful, and the emergency arbitrator found that at least one of these arguments had a reasonable possibility of success.

Satisfied that the first requirement had been met, the emergency arbitrator then considered whether the claimant had established urgency and irreparable harm. He was convinced that the relief sought was urgent, meaning that in the absence of an interim measure, the claimant would suffer harm. He was not convinced, however, that the harm was irreparable – meaning not adequately reparable by an award of damages.

The arbitrator noted that due to the time constraints inherent in emergency proceedings, the arbitrator cannot to enter into a detailed damage calculation. Here, the threatened harm was vaguely argued by claimant, and difficult for the arbitrator to assess. Most of the threatened harm flowing from respondent's refusal to accept deliveries would be consequential damages, the extent of which would depend on third parties, such as banks. Similarly difficult to assess were the social damages resulting from claimant having to stop production and lay off much of its workforce.

Despite the problems claimant may encounter in quantifying harm incurred in the period before the dispute was referred to a tribunal, the emergency arbitrator did not find that this harm was irreparable by an award of damages. On that basis, the emergency arbitrator dismissed the claimant's application for emergency relief.

3.6. Case No. EA 2016/082

Background

The claimant was a Russian investor who owned shares in a bank in the respondent state. The claimant argued that through a decree issued by its national bank, the respondent had suspended claimant's shareholder rights, and forced claimant to divest its shares by a certain date. The claimant argued that respondent's actions were in breach of the applicable bilateral investment treaty ("BIT").

Procedure

The SCC appointed an emergency arbitrator the day following receipt of the application. The respondent was served by courier to the ministry of justice and the ministry of foreign affairs, but did not appear in the proceedings. On the day after referral, a telephone conference was held. In light of the respondent's absence, a summary of that conference was circulated to the parties. Pursuant to the emergency arbitrator's directions, the claimant submitted observations on its application the following day. The emergency decision was issued within 5 days of the referral of the application to the arbitrator.

Request for interim measures

The claimant requested an emergency decision declaring the decree at issue stayed or suspended pending final resolution of the dispute.

Analysis and decision

Before considering whether claimant's application for interim measures met the requirements for granting such relief, the emergency arbitrator ascertained that all the jurisdictional requirements were met on a *prima facie* basis. He found that the SCC emergency arbitrator provisions were applicable and that the claimant appeared to qualify as an investor under the BIT. He also found that the cooling-off period stipulated by the BIT was inapplicable due to the "manifest futility" of claimant's efforts to settle the dispute amicably.

The emergency arbitrator then analyzed whether the claimant's application met the conditions for granting interim measures. He noted that the requirements are "substantially uncontroversial" – regardless of whether one applies the Swedish law as the *lex arbitri* or international law as the law that governs the treaty claims. He considered the applicable requirements to be those codified in Articles 17 and 17A of the UNCITRAL Model Law and in Article 26 of the UNCITRAL Arbitration Rules.

First, the emergency arbitrator considered whether claimant had shown a risk of non-compensable harm or unenforceability of award.⁷ The claimant contended that unless the requested relief was granted, claimant would irrevocably lose its rights as a shareholder in the bank and any subsequent award in the claimant's favor would be rendered effectively unenforceable.

The emergency arbitrator explained that the question was whether the harm that the requested injunctions sought to avert was "adequately reparable by an award of damages". After assessing each of the claimant's sources of actual or imminent harm against this standard, he found that all of the harm associated with the claimant's investment could be made good by an award of damages. The arbitrator also saw "no reason why that harm [could] not be properly assessed by the tribunal in the main proceedings."

⁷ Citing ICJ President Jimenez de Arechaga, the emergency arbitrator stated that the "essential justification" of interim measures was that the action of one party 'pendente lite' causes or threatens a damage to the rights of the other, of such a nature that it would not be possible fully to restore those rights, or remedy the infringement thereof, simply by a judgment in its favour (Aegean Sea Continental Shelf, ICJ Reports 1976, p 3 at pp 15-16).

The arbitrator distinguished the dispute from those where interim injunctive relief was ordered in respect of economic harm, such as *Paushok v. Mongolia* and *Chevron v. Ecuador*.⁸ Those cases involved harm that, though capable of financial compensation, was such that compensation could not fully remedy the damage suffered. The arbitrator explained that, “[b]y contrast with those cases, in the present case the Claimant’s economic harm is confined and discrete, and there is no suggestion that it may economically ruin the Claimant.”

In light of this finding, the emergency arbitrator dismissed the claimant’s application for interim relief without evaluating the requirements of urgency and proportionality.

3.7. Case No. EA 2016/090

Background

The parties, both Estonian companies, were joint shareholders in a third company. Respondent notified claimant of its intention to sell its shares in the company. Claimant notified respondent that it wished to exercise its right of first refusal under the contract. The contract stipulated a 30-day deadline for the transaction to close, or claimant’s right would be forfeited. Claimant needed certain regulatory approvals that could not be obtained within the 30-day window.

Procedure

The SCC appointed an emergency arbitrator the day after receiving the claimant’s application. The first procedural order was issued the same day. The respondent submitted its response two days later. The parties filed another set of submissions, and a telephone conference was held. The decision was rendered 6 days after referral.

Request for interim measures

The claimant requested that the respondent be ordered not to sell or transfer its shares to another company, pending further order of the tribunal in the arbitration between the parties.

Analysis and decision

The emergency arbitrator stated that “the basic method for the interim decision is to follow a pattern which has been established in earlier cases under Appendix II to the SCC Rules.” He found this to include a *prima facie* assessment of (1) jurisdiction, (2) reasonable chance of success on the legal issue in dispute in the main arbitration, (3) whether the requested measure is required to avoid irreparable harm, (4) whether the requested measure is urgent, and (5) whether the requested measure is proportional.

The arbitrator found that the claimant had not shown that it had a reasonable chance of success on the merits of the dispute. The claimant’s request for interim measures rested on an argument that the 30-day deadline for closing the share purchase transaction should not apply. The arbitrator rejected this argument, noting that the shareholders’ agreement was a commercial agreement between sophisticated parties, and that it had been subject to extensive negotiations in which the parties were represented by legal counsel. Under these circumstances, there was no reason to interpret the contract outside of its clear wording.

Because claimant had not presented sufficiently convincing facts and arguments to constitute a *prima facie* reasonable chance of success on the merits, the emergency arbitrator denied the request for interim relief without assessing the remaining factors.

⁸ *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008; *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*, PCA Case No 2009- 23, Fourth Interim Award on Interim Measures, 7 February 2013.

3.8. Case No. EA 2016/095

Background

The claimant was a Russian investor who owned shares in a bank in the respondent state. The claimant argued that through a decree issued by its national bank, the respondent had suspended claimant's shareholder rights, and forced claimant to divest its shares by a certain date. The claimant argued that respondent's actions were in breach of the applicable bilateral investment treaty ("BIT").

Procedure

The day following receipt of the application, the SCC appointed an emergency arbitrator and determined that the seat of arbitration was Stockholm. The emergency arbitrator invited the respondent to submit its response to the application by the following day. No response was received. The emergency arbitrator sought confirmation from the respondent whether it intended to submit comments, and respondent confirmed that it did not. The following day, the emergency arbitrator noted that the respondent had decided not to respond to the claimant's application and declared the proceedings closed. The emergency decision was rendered 4 days after referral to the arbitrator.

Request for interim relief

The claimant requested that respondent be ordered to (1) refrain from enforcing or implementing the decree; and (2) refrain from interfering with the claimant's shareholding in the bank, pending a final arbitral award on the merits.

Analysis and decision

Before considering whether claimant's application for interim measures met the requirements for granting such relief, the emergency arbitrator considered three jurisdictional requirements on a *prima facie* basis. He found that the claimant appeared to qualify as an investor under the applicable BIT, and that the SCC emergency arbitrator provisions were applicable. He also held that the cooling-off period stipulated by the BIT did not present an obstacle to the emergency arbitration, due to the respondent's refusal to engage in settlement discussions when it received the claimant's notice of dispute.

The emergency arbitrator noted that, in the absence of any specific standards for granting interim measure in the SCC Arbitration Rules or the applicable *lex arbitri*, he could seek guidance in Article 17 and 17A of the UNCITRAL Model Law on International Commercial Arbitration. The arbitrator then considered the claimant's application against the Model Law's conditions for granting interim measures.

First, the emergency arbitrator determined that the application met the urgency requirement, meaning that claimant had established *prima facie* that it may suffer imminent harm in the absence of interim relief. The arbitrator found that there was an imminent risk of harm because the government decree at issue had threatened to cancel the claimant's shares by a certain date.

Second, the emergency arbitrator considered whether the claimant had established, *prima facie*, a reasonable possibility of success on the merits. The arbitrator found that this requirement was met because, based on the submissions, there was a reasonable chance that a tribunal would find that respondent's actions amounted to discriminatory treatment under the applicable BIT.

Third, the emergency arbitrator turned to the requirement that claimant suffer irreparable harm in the absence of the interim measure. The arbitrator cited two ICSID decisions⁹ for the proposition that "irreparable harm in international law has a flexible meaning, and . . . the possibility of monetary compensation does not necessarily eliminate the need for interim measures". Against

⁹ *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order no 1, 29 June 2009; and *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008.

this standard, he found that even if claimant may receive compensation for the forced sale of the shares, this compensation may not reflect the shares' real value.

Finally, the emergency arbitrator found that the harm that respondent would potentially suffer as a result of the interim measures appeared limited. Considering that respondent would not be prejudiced, the emergency arbitrator decided that an order to prevent the cancellation of the claimant's shares, pending resolution of the dispute by way of a final award on the merits, would constitute a proportional interim measure.

Based on this analysis, the emergency arbitrator granted the interim relief as requested by claimant.

3.9. Case No. 2016/139

Background

The claimant and respondent were both Swedish providers of digital information and services. Under the parties' contract, the respondent provided its subscribers access to claimant's databases. The dispute arose when the respondent allegedly breached the contract *inter alia* by making claimant's databases available offline on smartphones and tablets.

Procedure

The day after receiving the application, the SCC appointed an emergency arbitrator and referred the application to her. That same day, the arbitrator and the parties jointly agreed upon a time plan for the emergency proceeding. The respondent submitted its answer to the application at noon 3 days later, with comments by the claimant the same day. Both parties submitted further comments the following day. The emergency arbitrator rendered her decision 5 days after referral.

Request for interim relief

The claimant requested that respondent be ordered to (1) immediately cease providing offline access to claimant's databases on smartphones and tablets, (2) inform its subscribers that claimant's databases would not be included in its services as of a certain date, and (3) ensure that all copies of claimant's databases were erased and made unavailable as of a certain date.

Analysis and decision

The emergency arbitrator noted that the SCC Rules do not specify the conditions for granting interim measures, but affords the arbitrator wide discretion in this regard. She stated that such measures can relate to active or passive behavior and be intended to avoid irreparable harm, preserve evidence, or ensure enforceability of a final award.

Further, the emergency arbitrator noted the importance of assessing the totality of the circumstances. The applicant's interests in being granted the interim measures must be weighed against the extent to which those measures would infringe upon the respondent's interests and rights. Arbitrators should be restrictive in ordering interim measures, and do so only where there is a real reason to believe that the measures will serve a relevant purpose. Citing a Swedish treatise on security measures in court proceedings, she noted that interim measures cannot amount to advance enforcement of a final award; the measures must in principle be reversible.

Against this background, the emergency arbitrator stated that she could grant the applicant's request only if (1) the applicant had shown probable cause for its claim, (2) there was a risk of sabotage, (3) granting the application would be proportional, and (4) the requested relief was appropriate.

With regard to the claimant's first request, the emergency arbitrator found that the contested offline access to claimant's database in any case would expire at the end of the calendar year. She found it unlikely that any damage caused in the three-month period until then would be irreparable by an award of damages in the final award. On this ground, she dismissed the claimant's first request.

Turning to the claimant's second and third requests, the emergency arbitrator noted that both requests turned on questions of contract interpretation, and could be granted only if the claimant's interpretation was more plausible than the interpretation proposed by the respondent. Based upon her assessment of the contract and the parties' submissions, the arbitrator concluded that both parties' interpretations had some support in the contract. As she did not find claimant's interpretation more plausible than respondent's, the arbitrator dismissed the claimant's second and third requests.

3.10. Case No. EA 2016/142

Background

The claimants were companies incorporated in Sweden and the United States. The respondent was a U.S. company. Respondent was the sole supplier of a crucial component of claimants' product. The dispute arose when respondent refused to deliver the components, thereby threatening claimants' continued business.

Procedure

The claimants filed an application for the appointment of an emergency arbitrator, along with exhibits and witness statements. The following day, the respondent objected to the claimants' application, arguing that the SCC manifestly lacked jurisdiction, and that the emergency arbitrator lacked jurisdiction over some of the claims because the second claimant was not a party to the arbitration agreement. The same day, the claimants replied to the jurisdictional objections. Further that day, the SCC confirmed that it did not manifestly lack jurisdiction, and appointed an emergency arbitrator. The same evening, the emergency arbitrator convened a telephone conference in which all parties participated. Two days later, the respondent filed its reply to the emergency application, with exhibits and witness statements. The next day, the claimants submitted their comments to the respondent's reply. The following day, the respondent submitted a rejoinder. The arbitrator rendered the emergency award 5 days after referral.

Request for interim measures

The claimants requested that the emergency arbitrator order the respondent to deliver goods according to the terms of the contract, and as set out in past and future purchase orders.

Analysis and decision

Noting the wide discretion afforded him by the SCC Rules, the arbitrator held that an emergency decision should be based on the following "key factors": (1) jurisdiction on the matter on a *prima facie* basis; (2) reasonable possibility on a *prima facie* basis that the claim of the applicant would succeed on the merits; and (3) the requested interim measure is urgent or imminent by nature and it is needed to avoid irreparable harm. In addition to these three factors, the arbitrator considered it necessary to balance the interests of the parties with care and diligence. He noted, "the threshold for a relief is certainly very high if the requested relief would cause severe harm or damage to the respondent."

Assessing the claimant's application against these factors, the emergency arbitrator first found that he had jurisdiction, as all three parties appeared *prima facie* to be bound by the arbitration agreement.

Second, the emergency arbitrator found a reasonable possibility that the applicant's claim would succeed on the merits. He emphasized that the assessment of the merits is to be done on a *prima facie* basis and should not be set too high. The wording of the parties' agreement regarding the obligation to deliver products was clear and strict, and respondent had not demonstrated that it had a right to stop accepting purchase orders or to refuse delivering under the agreement.

Third, with regard to the urgency requirement, the emergency arbitrator stated:

The emphasis should be on the requirement of irreparable harm to be prevented and of urgent or imminent nature of the measure sought. Interim measures should not be granted when the risk of irreparable harm is not imminent but remains remote or avoidable. . . . Irreparable harm means a harm which is irreparable by an award on damages. Substantial, but reparable, harm does not, as a rule, provide sufficient grounds for granting interim measures.

The arbitrator further noted that although loss of customers or delay in deliveries to customers could be compensated by an award of damages, such award would be rendered practically meaningless should claimants not be able to survive as companies. Since that risk was present here, he found that the urgency requirement had been met.

Fourth, the arbitrator balanced the interests of the parties. He found that ordering respondent to honor its commitments under the agreement would not cause it any harm, and that even if any harm would be found, it would not amount to the harm caused to claimants by a potential ending of business.

Having concluded that all requirements for interim relief were met, the emergency arbitrator granted the claimant's application.

3.11. Case No. EA 2016/150

Background

The claimant was an Australian company distributing electronic products. Respondent was a British company, whose products were distributed by claimant. The dispute arose from a distribution agreement. Respondent had purported to terminate the agreement on the basis of unpaid royalties. Claimant challenged the termination.

Procedure

The SCC appointed an emergency arbitrator on the day that it received the claimant's application. The next day, the emergency arbitrator set a procedural timeline and requested the parties to state their positions regarding the applicable substantive law and the *lex arbitri*. The respondent requested an extension to submit its response, to which the claimant objected. The emergency arbitrator rejected the request. Respondent submitted its response three days after receiving the application. The claimant filed its reply the next day, and the respondent submitted its rejoinder and witness statement one day later. The claimant objected to the respondent's submission of a witness statement as new evidence. The arbitrator declared respondent's witness statement inadmissible on the basis that it could have been included with the respondent's first submission.

Request for interim measures

The claimant requested the emergency arbitrator to issue an order restraining respondent from: (1) taking any action pursuant to the notice of termination; (2) taking any step which had the effect of terminating the distribution agreement; (3) suspending or ceasing the supply of products and services to claimant; and (4) appointing another distributor for products to which claimant had exclusive distribution rights under the distribution agreement.

Analysis and decision

The emergency arbitrator considered that, "absent a definition in the applicable rules of what interim measures mean, it seems pertinent in an international dispute to refer to Article 17(2) of the UNCITRAL Model Law on International Commercial Arbitration rather than to entirely rely on domestic concepts developed in the law of the forum". That said, the arbitrator noted that Article 17(2) was in line with Swedish law.

First, the emergency arbitrator analyzed whether the requested relief qualified as an interim measure, meaning that it either sought to maintain or restore the status quo pending determination of the dispute, or that it sought to prevent respondent from taking an action that would cause imminent harm or prejudice to the arbitral process itself. The arbitrator found that some of

claimant's requests, as framed in the application, did *not* meet either requirement and thus did not qualify as interim relief.

Second, the emergency arbitrator considered whether the remaining requests – those that sought to restore the status quo – met the conditions for granting interim relief pursuant to Article 17A of the UNCITRAL Model Law. He found it necessary only to analyze one of those conditions, namely whether the claimant had established that there was a reasonable possibility that it would succeed on the merits of the claim.

The emergency arbitrator found that claimant had not shown such a reasonable possibility of success. Based on the submissions, the arbitrator found that it appeared that the respondent had a material claim for royalty payments, and that the balance of probabilities was that the respondent had the right to terminate the distribution agreement. The emergency arbitrator thus found that the claimant had failed to show a reasonable possibility of success on the merits of the claim, and dismissed the remaining requests for interim measures.

3.12. Case No. EA 2016/195

The request for interim measures concerned the appointment of an expert in accordance with the parties' contract. After several rounds of submissions, the emergency arbitrator appointed an expert. Further discussion of the case is omitted due to its particular nature.

4. Conclusions

Between January 2015 and December 2016, SCC received 14 applications for the appointment of an emergency arbitrator. Close to 30 such applications have been received since the emergency arbitrator provisions entered into force in 2010. SCC has thus had ample opportunity to refine its routines for administering emergency applications, resulting in efficient proceedings and timely decisions. In all emergency proceedings that took place in 2015 and 2016, the SCC appointed an emergency arbitrator within 24 hours of the claimant submitting an application.¹⁰ In half of the proceedings, decisions were rendered within the 5-day timeframe stipulated by the SCC Rules; in the remaining half, decisions were rendered within 7 days. In sum, the SCC emergency arbitrator procedure is a reliable procedural tool for parties in need of prompt interim relief.

The SCC Rules do not specify the grounds or conditions for granting interim relief, but give the emergency arbitrator broad discretion. The decisions rendered in SCC emergency arbitrations now make up a significant body of jurisprudence with regard to that discretion. Most, but not all, emergency arbitrators refer to Article 17 of the UNCITRAL Model Law, the *lex arbitri*, as well as previously published decisions on interim relief. A set of factors have crystallized and are now commonly accepted as prerequisites for granting interim relief. These factors are: (1) jurisdiction, (2) chance of success on the merits, (3) urgency, (4) irreparable harm, and (5) proportionality.

The first factor, *prima facie* jurisdiction, has rarely been a contested issue in SCC emergency proceedings. That said, some respondents have argued that because the emergency arbitrator provisions were not part of the SCC Rules when the arbitration agreement was signed, they had not consented to submit to emergency proceedings. This argument does not succeed, however, as it is generally accepted that an arbitration clause is deemed to reference the version of the rules in force when the arbitration is initiated. Other respondents have argued that they are not bound by the arbitration agreement. In such cases, the arbitrator makes a jurisdictional finding based on the

¹⁰ Most emergency arbitrations have involved parties from many different jurisdictions. Similarly, the emergency arbitrators have been an international. The emergency arbitrators appointed in 2015-2016 were of the following nationalities: Swedish (7), German (2), Finnish (2), American, Greek, Danish.

limited submissions available within the scope of the emergency proceedings; ultimately, the definitive jurisdictional determination becomes an issue for the tribunal.

The second factor, chance of success on the merits, has been framed in different ways by emergency arbitrators. Some are satisfied if a claimant presents a *prima facie* case on the merits – a mere showing that the elements of a claim are present. Most arbitrators, however, set a somewhat higher threshold; they require claimant to demonstrate a *reasonable possibility* of success on the merits. This means that based on the limited submissions before the emergency arbitrator, the claimant must appear more likely than respondent to succeed on the merits of the claim. For example, if the decision turns on a contract interpretation, the claimant must show that its interpretation is somehow more plausible or more likely to prevail than the interpretation proposed by the respondent.

The urgency and irreparable harm requirements are frequently discussed together. Some arbitrators do not consider urgency to be a separate factor, but rather that it is inherent in the requirement that the interim measures are necessary to avoid irreparable harm. Another way of framing this is that irreparable harm is a measure of urgency; if the claimant is likely to suffer irreparable harm before a final award is issued, the request for interim measures is necessarily urgent. Most emergency arbitrators, in measuring urgency or risk of irreparable harm, analyze whether the harm may be compensable by way of damages. If the harm that claimant seeks to avoid can be adequately compensated by an award of damages, most arbitrators find that interim relief is not warranted.

Lastly, proportionality. Where all other factors are met, all emergency arbitrators consider the proportionality of the interim relief by weighing the harm avoided against the potential harm inflicted upon the respondent. If granting the interim measure would cause significant harm to the respondent, the emergency arbitrator is unlikely to grant the applicant's request.

All emergency arbitrators appointed in 2015-2016 applied some or all of these factors in their analysis of the claimant's request. In the end, this resulted in 4 requests being granted in full, 6 being dismissed, and 3 granted in part. It is important to note that, while the cases summarized herein may be indicative of how an emergency arbitrator would rule in a future emergency proceeding, the arbitrators are not bound by, or in any way required to follow, previously rendered SCC decisions. Each appointed emergency arbitrator will consider the request for interim measures on its own merits.

Some but not all emergency proceedings lead to regular arbitral proceedings. In some cases, the parties appear to settle the dispute after the emergency decision is rendered; or perhaps the claimant chooses not to pursue the claims in light of the emergency arbitrator's findings. Without speculating as to the intentions of the claimants that apply for emergency measures, it appears that the emergency arbitrator proceeding provides a procedural tool that can be used for a variety of purposes.

Finally, a few words about enforcement. The SCC occasionally receives information about the compliance with and enforcement of SCC emergency decisions. Based on this anecdotal evidence, it appears that the degree of voluntary compliance with emergency decisions is relatively high. This hypothesis is also supported by the fact that the number of applications for emergency relief has steadily increased in recent years, even though decisions on interim measures remain unenforceable in many jurisdictions.¹¹

¹¹ Kaj Hobér, "Emergency Arbitration: A lasting trend?", *Funding in Focus*, Vannin Capital, July 2016.