



SCC Practice: Emergency Arbitrator Decisions

1 January 2010 – 31 December 2013

By Johan Lundstedt¹

I. Introduction

The Emergency Arbitrator mechanism aims to enable parties to seek interim measures before the case has been referred to the arbitral tribunal. It has formed part of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules) since 1 January 2010.

During the first four years of the Emergency Arbitration provisions, the SCC has received nine applications for the appointment of an Emergency Arbitrator. This article summarizes in each case the interim measures requested from the Emergency Arbitrator, the reasoning and the outcome.²

II. The Procedure

The provisions on appointment of an Emergency Arbitrator under the 2010 SCC Rules enable a request for an interim measure prior to and after commencement of arbitration, but before the case has been referred to the arbitral tribunal.³

The SCC must notify the Respondent as soon as the application has been received, and the Board of the SCC will seek to appoint an Emergency Arbitrator within 24 hours of receiving the application.⁴ The SCC Emergency Arbitrator procedure calls for notice to be given to the responding party. It is not available on an *ex parte* basis.

The rules apply to all SCC arbitrations unless the parties expressly agree otherwise but do not prevent a party from requesting the courts to grant interim measures.

¹ The author is former Legal Counsel at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). Johan Lundstedt may be contacted by e-mail at johanlundstedt@gmail.com. The opinions expressed in this article are entirely and solely the author's. The author would like to thank intern Anna Amosova Svensson for her kind assistance with this article.

² The first four cases under the Emergency Arbitration provisions have also been included in a previous article by Johan Lundstedt, available at <http://www.sccinstitute.com/library/articles.aspx>

³ Article 1 (1) Appendix II of the SCC Rules.

⁴ *Ibid.* Art. 4 (1).



A majority of SCC arbitrations are seated in Sweden. Under Swedish law, an arbitration agreement does not constitute a procedural impediment against a court granting interim measures.⁵ A prerequisite for such an interim measure by a Swedish court is that the applicant shows probable cause to believe that he has a claim against another that is or can be made the basis of judicial proceedings or determined by another similar procedure (i.e. arbitration).⁶

The Emergency Arbitrator should give each party an equal and reasonable opportunity to present its case, taking into account the urgency inherent in such proceedings.⁷ An emergency decision on interim measures should be made not later than five days from the date when the application was referred to the Emergency Arbitrator. The Board may extend the five-day time limit upon a reasoned request by the Emergency Arbitrator, or if otherwise deemed necessary.⁸

The emergency decision is binding on the parties when rendered, and may be amended or revoked by the Emergency Arbitrator upon a reasoned request by a party.⁹ The powers of the Emergency Arbitrator terminate when the case has been referred to an arbitral tribunal.¹⁰ The emergency decision ceases to be binding if arbitration is not commenced within 30 days from the date of the emergency decision, or if the case is not referred to an arbitral tribunal within 90 days.

The arbitral tribunal is not bound by the decision of the Emergency Arbitrator.

Further, the Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the same dispute, unless otherwise agreed by the parties.

The costs of the Emergency Arbitrator proceedings are paid by the party applying for the appointment of an Emergency Arbitrator upon filing the application. The costs of the proceedings may be apportioned between the parties in the final award at the request of a party.¹¹ The costs comprise:

- in a standard procedure, the fee of the Emergency Arbitrator in the amount of EUR 12,000, and the administrative fee of the SCC, which amounts to EUR 3,000¹²
- in an expedited procedure, the fee of the Emergency Arbitrator in the amount of EUR 6,000, and the administrative fee of the SCC, which amounts to EUR 1,500¹³.

⁵ Section 4 paragraph 3 of the Swedish Arbitration Act and Chapter 15 paragraph 5 of the Swedish Code of Judicial Procedure.

⁶ Chapter 15 paragraph 3 of the Swedish Code of Judicial Procedure.

⁷ Ibid. Art. 7 and Art 19 (2) of the SCC Rules.

⁸ Article 8 (1) Appendix II of the SCC Rules.

⁹ Ibid. Art. 9 (1) and (2).

¹⁰ Ibid. Art. 1 (2) and Art. 9 (4).

¹¹ Ibid. Art 10 (5).

¹² Ibid. Art. 10 (2).

¹³ Article 10 (2) Appendix II of the Rules for expedited arbitrations.



It should be noted that costs may be adjusted, if circumstances so warrant. In one of the cases described in this article, the fee to the Emergency Arbitrator was decided at an amount less than EUR 12,000, given the non-complexity of the case.

III. Cases

1. SCC Emergency Arbitration (064/2010)

<u>The Parties:</u>	Claimant: Dutch Respondent: Cypriot
<u>Seat:</u>	Stockholm
<u>The Emergency Arbitrator:</u>	Swedish
<u>Language:</u>	English
<u>Choice of law:</u>	Laws of England and Wales
<u>Amount in dispute:</u>	USD 145 million

BACKGROUND

The dispute between the parties related to an agreement for the sale and purchase of a transshipment business. The Claimant asserted that the Respondent was in breach of the agreement since the Respondent had failed to pay an outstanding amount. The Claimant simultaneously filed a Request for Arbitration.

THE PROCEDURE

The SCC appointed the Emergency Arbitrator within 13 hours of receiving a request for appointment. The Emergency Arbitrator issued its first Procedural Order on Day 2 of the proceedings. On Day 4, the Respondent notified the Emergency Arbitrator that it needed additional time to confirm its representation. Following a request by the Emergency Arbitrator, the SCC extended the time limit for rendering a decision by three days.

On Day 7, the Emergency Arbitrator invited the Respondent to (i) confirm that it would refrain from taking any action aimed at disposal of assets prior to any decision by the Emergency Arbitrator and (ii) indicate when a response to the Claimant's Application could be expected. To allow for the



Respondent to answer the questions set forth and to answer the Application by the Claimant, the Emergency Arbitrator asked the SCC to extend the time limit for the emergency decision by another four days. The SCC granted the Emergency Arbitrator's request. The Respondent's counsel became involved in the proceedings on Day 7 and filed a reply to the Claimant's application the following day.

REQUEST FOR INTERIM RELIEF

The Claimant requested:

- i) an injunction prohibiting the Respondent, company X and company Y to alienate, pledge, charge, sell or otherwise dispose of the shares of company Y and real estate listed in the annex to the Agreement for the Sale and Purchase of shares in company X;
- ii) an injunction prohibiting the Respondent, company X and company Y and their corporate agents, directors and other corporate bodies as the case may be to issue any corporate resolutions, approvals, decisions, authorizing any transaction for alienation, pledge, charge sale or disposal in any manner of the shares of company Y and real estate listed in the annex to the Agreement for the Sale and Purchase of shares in company X;
- iii) an injunction prohibiting the Registrar, Mr Z, to maintain the register of shareholders of company Y, to register any transactions regarding the shares of company Y, including alienation, pledge, charge sale or disposal in any manner;
- iv) an injunction prohibiting the state authorities of country A to register any transactions regarding real estate listed in the annex to the Agreement for Sale and Purchase of shares in company X.

REASONING

The Emergency Arbitrator made an assessment whether the Claimant had satisfied the tribunal, *prima facie*, that there was a reasonable possibility that it may succeed on the merits of the claim. The Emergency Arbitrator found that the Claimant had done so since its case was based on non-payment by the Respondent and the fact that the Respondent in its submissions before the Emergency Arbitrator had not denied that it owed the Claimant the amount allegedly due to it.

The Emergency Arbitrator continued by stating that it could only direct an entity or an individual who was a party to the arbitration to take or to refrain from taking certain actions. The Claimant, however, requested the Emergency Arbitrator not only to grant an injunction prohibiting the Respondent from taking certain actions, but also to prohibit company X, company Y, the state authorities of country A, Registrar Mr Z and corporate agents, among others, from taking certain actions. The Emergency Arbitrator stated that since the third party entities and state organs covered by the request were not parties to the arbitration agreement, the Emergency Arbitrator had no jurisdiction and was prevented from granting interim measures with respect to them. Claimant's requests (iii) and (iv) were therefore denied.



With respect to Claimant's requests (i) and (ii), both requests were aimed at prohibiting a number of entities and individuals from taking certain actions with respect to the shares of company Y and real estate listed in the annex to the Agreement for Sale and Purchase of shares in company X. The Emergency Arbitrator found that he had jurisdiction over these requests only insofar as the requests related to the Respondent, but not to the extent the requests related to others than the Respondent.

The Emergency Arbitrator then went on to look at the issue of harm. He stated that a party requesting an interim measure must, as a general principle, also establish that the harm which is to be prevented by the interim measure is irreparable and of an urgent or imminent nature. The Emergency Arbitrator was not persuaded that the Claimant's request for interim measures was of an urgent nature or that there was an imminent risk that the Respondent would dispose of the assets in question. The Claimant had not pointed to any threat that the Respondent would transfer assets beyond the reach of the Claimant. Nor had the Claimant established that any sale or disposal of the relevant assets would be to the detriment of the Claimant and other creditors of the Respondent, in the sense that the proceeds from such sale or disposal would not come to the creditors' benefit. For these reasons, requests (i) and (ii) were denied.

The allegedly irreparable loss or injury that the Claimant had requested the Emergency Arbitrator to prevent would not only arise from the Respondent taking action, but also from the actions of third parties. The Emergency Arbitrator noted that he could not issue orders binding third parties, and there was no protection that the Emergency Arbitrator could grant the Claimant to protect its priority in assets against third party claims.

EMERGENCY DECISION

The Claimant's Application for interim measures was denied. The Emergency Decision was made on Day 12.



2. SCC Emergency Arbitration (139/2010)

<u>The Parties:</u>	Claimant: Israeli Respondent: Georgian
<u>Seat:</u>	Stockholm
<u>The Emergency Arbitrator:</u>	Swedish
<u>Language:</u>	English
<u>Choice of law:</u>	Georgian law
<u>Amount in dispute:</u>	USD 65 million

BACKGROUND

The parties had entered into a contract under which the Claimant had undertaken to complete a building project for the Respondent. Under to the terms of the contract, the Claimant had provided three bank guarantees to the Respondent.

The Respondent terminated the contract alleging that the Claimant had failed to comply with certain provisions under the Contract. The Claimant countered by giving the Respondent a “notice of dispute”, demanding that the dispute should be referred and resolved in accordance with the contract, which stipulated that a dispute should first be referred to a sole adjudicator. The Respondent thereafter demanded that the respective bank issue full payment under the bank guarantees.

The Claimant submitted a request for arbitration to the SCC one week prior to applying for the appointment of an Emergency Arbitrator.

THE PROCEDURE

The SCC appointed the Emergency Arbitrator within 18 hours and set the date for rendering a decision to five days later.

On Day 2 the Respondent sent a communication to the SCC claiming that the SCC and the Emergency Arbitrator lacked jurisdiction over the dispute. The parties thereafter exchanged two briefs each, where



the Respondent filed its rejoinder on Day 4. Each of the parties invoked several documents as evidence. No oral hearing took place.

REQUEST FOR INTERIM RELIEF

The Claimant requested the arbitrator to grant “an interim injunction ordering Respondent to refrain from collecting or receiving any amount under the Guarantees [...], until a decision which permits Respondent to collect or receive such amounts under the Guarantees is given in the already commenced SCC Arbitration”.

The Respondent argued that the Emergency Arbitrator lacked jurisdiction and that the Claimant’s request for interim measures lacked merit.

REASONING

With respect to the issue of jurisdiction, the Emergency Arbitrator found that he could only conduct a *prima facie* assessment, and not a detailed assessment on the underlying merits of the jurisdictional issue; the arbitral tribunal in the initiated SCC arbitration must do any such analysis. With this background, the Emergency Arbitrator found that there was a valid arbitration agreement between the parties that identified arbitration to be conducted under the SCC Rules and that he had *prima facie* jurisdiction.

The Emergency Arbitrator assessed whether the Claimant had satisfied the tribunal that there was a reasonable possibility that it might succeed on the merits of the claim. The Emergency Arbitrator found that the Claimant had done so since it had *prima facie* substantiated its objections to the Respondent’s termination of the contract.

The Emergency Arbitrator further stated that a party requesting an interim measure must, as a general principle, also establish that the harm which is to be prevented by the interim measure is irreparable and of an urgent or imminent nature. This is a requirement under many legal systems and is codified in Article 17 and 17 (A) of the UNCITRAL Model Law on International Commercial Arbitration. In the present case, the Emergency Arbitrator found that the request was not of an urgent nature and no irreparable harm would be inflicted upon the Claimant if the interim measure were not granted.

The Emergency Arbitrator was not persuaded that the Claimant’s request was of an urgent nature or that there was a risk that the Claimant would suffer irreparable harm as a result of the Respondent invoking payment under the Guarantees. The Claimant had not established that the alleged damage constituted such irreparable harm as is required for an interim measure to be granted. Even if it were to be proven that the Respondent’s decision to call upon the Guarantees was, in fact, incorrect, the Claimant would later be able to recover any damage suffered.



EMERGENCY DECISION

The Claimant's Application for the requested interim measure was denied. The Emergency Decision was handed down on Day 5.

3. SCC Emergency Arbitration (144/2010)

<u>The Parties:</u>	Claimant: Norwegian Respondent: Finnish
<u>Seat:</u>	Stockholm
<u>The Emergency Arbitrator:</u>	Swedish
<u>Language:</u>	English
<u>Choice of law:</u>	Swedish law
<u>Amount in dispute:</u>	EUR 600,000

BACKGROUND

The parties had a reseller agreement that for a number of years had granted the Claimant a right to sell a product that included technology provided by the Respondent. In late 2009 the Respondent terminated the agreement on the basis that the Claimant was developing a competing product.

THE PROCEDURE

The SCC appointed the Emergency Arbitrator within 20 hours and set the date for rendering a decision to five days later. The Respondent requested that the time limit should be extended due to the need to address a number of issues with representatives of the Respondent. Following a request by the Emergency Arbitrator, the SCC decided that the decision by the Emergency Arbitrator should be rendered on Day 7.

The parties exchanged one brief each and the Claimant thereafter submitted closing comments. Each of the parties invoked several documents as evidence. No oral hearing took place



REQUEST FOR INTERIM RELIEF

The Claimant requested the Emergency Arbitrator to:

- i) order the Respondent to deliver certain products, or alternatively if the arbitrator should find that the Agreement was duly terminated by the Respondent;
- ii) order the Respondent to deliver certain products at a fair market value to be set by the arbitrator, or in the last instance at prices set by the Respondent; and
- iii) order the Respondent to provide the Claimant with access to tools for service and maintenance work regardless of whether the Respondent had duly terminated the Agreement.

The Respondent requested the arbitrator to dismiss the Claimant's request for interim relief.

REASONING

The Emergency Arbitrator found that even though the expression "interim measures" has not been specified in Article 32 and Appendix II of the SCC Rules, these provisions clearly rely on the regulation in Section 25 paragraph 4 of the Swedish Arbitration Act. This regulation states that the arbitrators may (unless the parties have agreed otherwise) at the request of a party decide that the opposing party must undertake a certain interim measure to secure the claim which is to be adjudicated by the arbitrators.

The Emergency Arbitrator declared that even though the SCC provisions may have a wider scope, it is obvious that they focus on interim measures to secure a claim or a future claim. A reference was also made to Chapter 15 Section 3 of the Swedish Code of Judicial Procedure, which states that an interim measure may include a prohibition on carrying on a certain activity or performing a certain act, an order to have regard to the applicant's claim or a direction suitable in other ways to safeguard the applicant's rights.

The Emergency Arbitrator found that the Claimant's request under i) and ii) did not aim at interim measures but rather at a substitute for a judgment. The Emergency Arbitrator stated that there is very limited scope for an Emergency Arbitrator to order a party to make a delivery which might make a later judgment wholly or partly superfluous. Such an order might be possible mainly in case of a manifest obstruction or obvious misconduct in business.

The Emergency Arbitrator stated that he was not entitled to rule upon a substantive issue such as whether or not termination of the agreement was correct, but only to make an interim decision to secure a claim or a future claim.

The Emergency Arbitrator held that the requests under i) and ii) should be dismissed without prejudice.



Regarding the request under iii), the Claimant asserted that it was in a position where the company urgently depended on using certain equipment held by the Respondent in order to avoid breaching its own contracts with its customers and in order to avoid significant liability for damages.

The Emergency Arbitrator found that use of the equipment represented a limited burden for the Respondent and that the prerequisites for an interim order were thus fulfilled. However, as the Respondent had subsequently decided to let the Claimant use the equipment in question, an interim order was not necessary.

EMERGENCY DECISION

Having regard to the consents given by the Respondent during the proceedings, all requests by the Claimant were dismissed without prejudice.

The Emergency Decision was handed down on Day 6.

4. SCC Emergency Arbitration (187/2010)

Nationality of the Parties: Claimant: Swiss
Respondent: Swedish

Seat: Gothenburg

The Emergency Arbitrator: Swedish

Language: English

Choice of law: Swedish law

Amount in dispute: EUR 2 million

BACKGROUND

The parties were both shareholders in Company X and had entered into a Shareholders Agreement. During 2009 and 2010, Company X issued shares to third parties in order to secure further financing.

Under the Shareholders Agreement the parties had agreed that the Claimant's shareholding should not be less than a certain percentage of the shares in Company X. After a number of share issues the Claimant's shareholding had fallen below the minimum level, which according to the Claimant would



trigger an obligation for the Respondent to transfer its shares. Two months prior to the request for appointment of an Emergency Arbitrator the Claimant had notified the Respondent of alleged breaches under the Shareholders Agreement and requested a transfer of shares to uphold the Claimant's guaranteed minimum level under the agreement.

A week prior to the request for appointment of the Emergency Arbitrator, the Respondent sent an offer to the shareholders of Company X to sell its shares. However, this offer was not sent to the Claimant.

THE PROCEDURE

The SCC appointed the Emergency Arbitrator within 6 hours and set the date for rendering a decision to five days later.

The Respondent filed an answer to the application on Day 3. The Claimant commented on this in a submission on Day 5, where after the parties made some final remarks the same day. No oral hearing took place.

REQUEST FOR INTERIM RELIEF

The Claimant requested the Emergency Arbitrator to grant interim measures and order the Respondent not to sell, assign, transfer, pledge or otherwise dispose any of its shares in Company X.

REASONING

The Emergency Arbitrator first established that the only prerequisite for granting an application for an interim measure was that the measure should be deemed appropriate. In the Emergency Arbitrator's view, this entailed that the applicant should establish probable cause for its case and that the requested interim measure was necessary to safeguard the substantive rights of the applicant.

The Claimant argued that it had a right to receive shares from the other parties in the Shareholders Agreement in order to maintain a minimum percentage of the shareholding. The Respondent, however, took the position that this minimum holding was not an absolute guarantee. The Respondent did not offer any explanation as to why it had offered to sell its shares or why the Claimant had been excluded from this offer.

In the view of the Emergency Arbitrator, the Shareholders Agreement in conjunction with subsequent developments supported the Claimant's application. Consequently, the Emergency Arbitrator found that the Claimant had shown probable cause for its case.

The Claimant had listed a number of alleged contract breaches by the Respondent. The Respondent did not file a reply to these allegations, apart from a general denial of wrongdoing.



The Emergency Arbitrator found that the Claimant had shown probable cause for breaches of contract by the Respondent, which triggered a right to redeem the Respondent's shares.

The Emergency Arbitrator found that the Respondent's offer to sell shares to other shareholders was sufficient proof of a need for interim measures to protect the Claimant's position. The request from the Claimant should therefore be granted as stated in its application.

EMERGENCY DECISION

The Respondent was ordered not to sell, assign, transfer, pledge or otherwise dispose of any of its shares in Company X.

The Emergency Decision was handed down on Day 5.

5. SCC Emergency Arbitration (070/2011)

The Parties: Claimant: Russian
Respondent: German

Seat: Stockholm

The Emergency Arbitrator: Swedish

Language: English

Choice of law: International law

Amount in dispute: USD 2.6 million

BACKGROUND

The Claimant's request for interim measures had arisen in the context of a dispute between the parties under a sale-purchase contract concluded between the parties in 2010, according to which the Claimant undertook to sell a certain quantity of a product to the Respondent on delivery and payment terms provided in the contract. The Claimant argued that it had fulfilled its obligations under the contract while the Respondent had not.

After the Claimant had repeatedly attempted to reach a settlement of the outstanding issues between the parties, the Claimant was of the impression that in the event of a future award favorable to the



Claimant, the Respondent and its manager would try to frustrate enforcement of the award by shielding its assets.

THE PROCEDURE

The SCC appointed the Emergency Arbitrator within 24 hours. On Day 2 of the proceedings, the Emergency Arbitrator forwarded a letter to the parties containing a number of issues that the parties were asked to comment upon no later than Day 4. On the basis of this letter, both parties submitted observations within the stipulated time limit.

REQUEST FOR INTERIM RELIEF

The Claimant requested interim measures in the form of a measure to block all EUR and USD bank accounts of the Respondent with a major European bank.

The Respondent argued that the Emergency Arbitrator lacked jurisdiction and that the arbitration clause of the Contract should be interpreted as a reference to *ad hoc* arbitration.

REASONING

With respect to the issue of jurisdiction, the Emergency Arbitrator noted that the arbitration clause of the Contract, which stated that all disputes were to be “resolved exclusively by the International Arbitration Court in Stockholm, Sweden”, was indeed defective. However, in the view of the Emergency Arbitrator, “the reference is clear as to indicating an institution (capital initial letters and the designation ‘Court’, which has the connotation of a permanent institutional framework). The only institution providing services for international arbitration in Stockholm (Sweden) is the SCC Arbitration Institute”. Thus the Emergency Arbitrator held that “the only rational and readily available interpretation of the arbitration clause in the Contract is that the parties intended that disputes arising thereunder be referred to arbitration according to the SCC Rules”. Consequently, the Emergency Arbitrator concluded that he had jurisdiction to act as the Emergency Arbitrator.

The Emergency Arbitrator first stated that Appendix II of the SCC Expedited Rules makes it clear that the Emergency Arbitrator has the power to “order any interim measures it deems appropriate”.

According to the Emergency Arbitrator, although the term “interim measures” has not been defined, it is by general consensus held to imply that the arbitral tribunal (or, in the present case, an Emergency Arbitrator) may construe those words as broadly as may be appropriate in the particular instance.

According to the Emergency Arbitrator, it is accepted that “the categorization ‘interim measures’ extends beyond the mere conservation or disposal of goods and also includes injunctions of all kinds, such as for purposes of preserving evidence, ordering provisional payment, posting guarantees and the like. The provision also allows a tribunal to order or enjoin any particular course of conduct or make any other order that in the arbitral tribunal’s opinion will be conducive to the proper conduct of the proceedings, to preserve the integrity of the arbitration, to eliminate or reduce economic loss or other



impairment of valuable rights and to provide reasonable safeguards for the preservation of the relief sought against improper or unwarranted conduct.”

The Emergency Arbitrator further assessed the provisions of the Swedish Arbitration Act (“SAA”), the *lex arbitri* of the arbitration, and stated that the SAA does not furnish any criteria to be applied in determining whether interim relief should be granted. The Emergency Arbitrator agreed with the statement of a prior Tribunal seated in Sweden, holding that “the requirements under Swedish procedural law for granting interim measures in essence can be reduced to the two criteria that the petitioner *prima facie* must have proved his case and that there must be an urgent need for the requested interim relief”.¹⁴ The Emergency Arbitrator held that “this statement reflects the universal consensus with regard to the requirements that need to be present when granting interim measures, e.g. *prima facie* establishment of a case; urgency; and, irreparable harm, or serious or actual damage if the measure requested is not granted”.

The Emergency Arbitrator then went on to look at the issue of urgency based on considerations of irreparable harm, as these two criteria are frequently interconnected. The Emergency Arbitrator held that this interconnection particularly applies in situations where there is reason to assume that a Respondent party is actively undertaking measures to dissipate or otherwise make assets unavailable for enforcement, should an award at a later stage entitle a creditor to collect under an award. The Emergency Arbitrator stated that the applicant, at least on a *prima facie* basis, was required to provide a reasonable case that the Respondent has taken specific action to make its assets unavailable to the party seeking relief. “While the applicant certainly cannot be required to provide full proof of such action on the part of the respondent entity and its lack of any good faith motive, it will still need to provide a probable cause that such an improper intent is a driver of the particular conduct.”

The Emergency Arbitrator stated that he had placed particular weight on representations made by the Respondent in respect of its conduct in good faith of its economic affairs and that it had expressed no intention to frustrate the enforcement of any future award, should such award be in favor of the Claimant.

Based on submissions made by the parties, the Emergency Arbitrator reached the conclusion that there was no urgency that would justify granting interim measures in the circumstances of the case. Nor was there a basis to assume that a decision not to grant such measures would otherwise lead to irreparable harm. Having regard to the conclusions on urgency and irreparable harm, the Emergency Arbitrator stated that there was no need to consider whether the Claimant had a *prima facie* case.

The Emergency Arbitrator finally noted that taking into account the rules pertaining to interim measures under the *lex arbitri*, while the parties are under a duty to abide by any Emergency Decision (in accordance with the Rules for Expedited Arbitrations of the SCC Arbitration Institute Appendix II, Article 9, “Binding effect of emergency decisions”), the same obligation does not oblige any third party - as for instance a financial institution, holding funds for the account of a party - to abide by any

¹⁴ SCC Case No. 96/2011, reported in *Stockholm Arbitration Report* 2003:2, p 47 & seq.



emergency ruling issued by the Emergency Arbitrator. Thus, for this reason also, the Claimant's application had to be dismissed.

EMERGENCY DECISION

The Claimants' request for interim measures was rejected. The Emergency Decision was handed down on Day 5.

6. SCC Emergency Arbitration (091/2011)

The Parties: Claimant: Russian
Respondent: Lithuanian

Seat: Stockholm

The Emergency Arbitrator: Dutch

Language: English

Choice of law: Lithuanian law

Amount in dispute: EUR 25.5 million

BACKGROUND

The parties were both shareholders in Company X. After a dispute had arisen regarding shareholders' rights, corporate governance and the execution of certain contracts, the Respondent initiated state court proceedings. The claimant alleged that the dispute between the parties fell within the terms of the arbitration agreement contained in the Shareholders Agreement.

THE PROCEDURE

The SCC appointed the Emergency Arbitrator within 24 hours of receiving a request for appointment.

REQUEST FOR INTERIM RELIEF

The Claimant requested the Emergency Arbitrator to:



(i) issue an emergency order instructing the Respondent to move for a stay of its claim before the state court pending the rendering of a final award by a tribunal to be constituted under the SCC Rules to hear the present dispute;

(ii) issue an emergency order instructing the Respondent to refrain from any further or future actions before the state court or any other state court in relation to the dispute described above pending the rendering of a final award by a tribunal to be constituted under the SCC Rules;

(iii) order such other relief as the Emergency Arbitrator deemed just and proper.

REASONING

The Emergency Arbitrator declined to grant the relief.

EMERGENCY DECISION

The Claimant's Application for an emergency order was rejected. The Emergency Decision was handed down on Day 11.

7. SCC Emergency Arbitration (010/2012)

The Parties: Claimant: Swedish
Respondent: German

Seat: Stockholm

The Emergency Arbitrator: English

Language: English

Choice of law: Swedish law

Amount in dispute: EUR 46.4 million



BACKGROUND

According to a purchase agreement signed between the parties in 2010, the Respondent had undertaken to manufacture and supply certain products to the Claimant, including technical on-site assistance in country X.

In late 2011, nine days before the delivery date of the products, the Respondent informed the Claimant that the Respondent was terminating the agreement and would not perform its obligations under the agreement. The Respondent argued that its potential performance of the agreement would be illegal under the mandatory laws of country Y and country Z and that termination therefore was legally justified.

The Claimant rejected the Respondent's alleged termination of the agreement and demanded performance of the Respondent's contractual obligations. According to the Claimant, the products in question had been manufactured and were ready for delivery by the Respondent to the Claimant before the termination of the agreement.

THE PROCEDURE

The SCC appointed the Emergency Arbitrator within 24 hours of receiving a request for appointment. On Day 1 of the proceedings the Emergency Arbitrator made two procedural orders regarding the timetable for the proceedings. The Respondent submitted a written answer on Day 3 of the proceedings. On Day 4, the Claimant replied in writing to the answer, to which the Respondent then submitted a short rejoinder later the same day.

REQUEST FOR INTERIM RELIEF

The Claimant requested the Emergency Arbitrator to render a decision that:

- (i) The Respondent should fulfill its contractual obligations under the agreement for purchase of products by immediately delivering to the Claimant the products and documentation as listed in the agreement, or, alternatively, if such relief was not granted, that;
- (ii) The Respondent should immediately store the products and documentation as listed in the agreement with a neutral third party, or, alternatively, if such relief was not granted, that;
- (iii) The Respondent should not in any way move, dispose of or otherwise dissipate, or diminish the value of the products and documentation as listed in the agreement.

REASONING

The Emergency Arbitrator first stated that the SCC Rules do not expressly set out the standards to be met by a request for interim measures to an Emergency Arbitrator. Whilst not fully agreed by the



Parties, the Emergency Arbitrator exercised his discretion under Article 32 (1) of the SCC Rules by reference to several factors listed by the Claimant in its application. The factors considered by the Emergency Arbitrator included urgency, risk of dissipation, irreparable harm and proportionality.

The Emergency Arbitrator accepted that the emergency request was urgent with no alternative supply available to the Claimant and its deadlines for delivery of goods under an agreement with a third party.

With regard to the risk of dissipation, the Emergency Arbitrator took note of the Respondent's express undertaking not to dispose of, otherwise dissipate, move or diminish the value of the products in its possession or that of its agents, until an Arbitral Tribunal appointed under Article 18 of the SCC Rules issued a final award on the merits of the parties' claims. According to the Emergency Arbitrator, this undertaking by the Respondent satisfied item (iii) of the Claimant's demand for interim relief and was sufficient to preserve the rights of both parties pending determination of the merits of the dispute between them.

Further, the Emergency Arbitrator took note of the Respondent's undertaking "to address and resolve those issues on the schedule to be ordered by that tribunal", i.e. the legal and factual issues raised by the Respondent's case under the laws of country Y and country Z. The Emergency Arbitrator held that it was manifest that the case could be conducted by an SCC tribunal on an expedited basis, possibly also in relation to one or more preliminary threshold issues under an accelerated procedural timetable; and the Respondent would therefore be required, by its own undertaking, strictly to meet the SCC tribunal's requirements without complaint or delay. In light of these undertakings, the Emergency Arbitrator determined that there was no appreciable risk of the products' dissipation pending formation of an SCC tribunal and its final award on the merits of the Parties' dispute.

As to harm, the Emergency Arbitrator accepted that the Claimant had most likely suffered and would suffer substantial harm - but not irreparable harm, i.e. harm that is not capable of being fully compensated in damages, interest and costs by an SCC tribunal under the agreement and Swedish substantive law. Given the size and reputation of the Respondent's parent company, the Emergency Arbitrator considered that an award in favor of the Claimant, even in a substantial amount, would most likely to be honored by the Respondent and, if not honored, successfully enforced against the Respondent.

The Emergency Arbitrator then went on to look at the principle of proportionality and stated that the Claimant had established a *prima facie* case, i.e. a serious claim under the agreement and Swedish substantive law meriting further consideration by an SCC tribunal. However, the Emergency Arbitrator also accepted that the Respondent had established a *prima facie* case, i.e. a serious defense under the laws of country Y and country Z.

In this respect the Emergency Arbitrator held it was not appropriate for the Emergency Arbitrator to decide which of these two *prima facie* cases was more likely to prevail before an SCC tribunal. The Emergency Arbitrator held that "[i]t is not the function of any Emergency Arbitrator under Appendix II to the SCC Rules to decide the merits of the parties' respective cases, particularly where such cases



are, necessarily, materially incomplete and turn on complicated and potentially difficult issues of law. In particular, a decision granting the Claimant's interim request as to specific performance of the agreement by the Respondent risks effectively deciding the Parties' dispute both prematurely and finally in the Claimant's favor. If the products were delivered to [the third party] under an order for interim measures, it would seem improbable that the Claimant could later secure their re-delivery to the Respondent in the event of an adverse final award dismissing its claim for specific performance."

In addition, the Emergency Arbitrator concluded that if part of the interim relief claimed by the Claimant was ordered by the Emergency Arbitrator, then that would risk exposing the Respondent (with its parent company and officers) to grave risks of severe civil and criminal sanctions under the laws of country Y and country Z. An interim order by an Emergency Arbitrator should not immediately place a respondent party under conflicting legal obligations, particularly with the risk of criminal liability for its officers.

For these reasons, given also the Respondent's undertakings, the Emergency Arbitrator determined that "proportionality", whether described as the *status quo* or the balance of inconvenience for the parties, was better served by rejecting the Claimant's application than by granting it.

Applying these considerations to the three items of interim relief requested, the Emergency Arbitrator determined that item i) was rejected since it did not meet the test in regard to "harm" and "proportionality"; that item ii) did not confer any material benefit on the Claimant beyond item iii) which was met by the undertakings made by the Respondent, as a result of which there was no material risk of "dissipation".

EMERGENCY DECISION

The Claimant's Application for interim relief was rejected. The Emergency Decision was handed down on Day 6.



8. SCC Emergency Arbitration (087/2012)

<u>The Parties:</u>	Claimant: US Respondent: Chinese
<u>Seat:</u>	Stockholm
<u>The Emergency Arbitrator:</u>	Swedish
<u>Language:</u>	English
<u>Choice of law:</u>	Chinese
<u>Amount in dispute:</u>	EUR 7 million

BACKGROUND

The dispute related to a joint venture (“JV”) between the parties. According to the Claimant, the Respondent’s contribution to the JV was a certain property. The Claimant had initiated arbitration proceedings against the Respondent before the SCC seeking *inter alia* to liquidate the assets of the JV. According to the Claimant, its legal counsel had visited the property of the JV and discovered that another entity, Company X, had taken possession of the property. The Claimant submitted that Company X held no title to the property in question and that its taking possession thereof was unlawful.

The Claimant initiated emergency proceedings and at the same time filed a Request for Arbitration.

THE PROCEDURE

The SCC appointed the Emergency Arbitrator within 24 hours of receiving a request for appointment and fixed the seat of the proceedings to Stockholm, Sweden. The Emergency Arbitrator issued a procedural order on Day 2 of the proceedings where the Respondent was to file an answer to the application no later than Day 5. By the same time, the Claimant was asked to submit any documents upon which it relied. On Day 5, the Claimant submitted certain documents. The Respondent, who had been served, did not file an answer to the application.

REQUEST FOR INTERIM RELIEF

The Claimant requested the Emergency Arbitrator to declare:



- (i) that the land and the buildings were the property of the JV;
- (ii) that Company X or any other entity, with the exception of the JV, was not entitled to occupy, own or possess the land and property; and
- (iii) that Company X and all other entities with the exception of the JV be immediately removed from the property and restrained from further use of the premises.

REASONING

The Emergency Arbitrator first referred to the concept of due process and stated that under the *lex arbitri* if the respondent does not appear in the case, the arbitrators will not render a judgment by default, but will examine the facts and evidence before them to arrive at their conclusion, and that these principles also apply in emergency arbitrator proceedings.

The Emergency Arbitrator then reviewed the issue of jurisdiction and found that he was properly appointed and had jurisdiction over the Claimant and the Respondent.

The Emergency Arbitrator further stated that an emergency arbitrator has jurisdiction only over parties who have consented to arbitration, normally in the form of an arbitration clause included in a contract between the parties and that it is generally impossible for two parties to impose obligations on a third party by an agreement between themselves. They cannot vest an arbitrator with that power. In this context the Emergency Arbitrator found that the declarations under items (ii) and (iii) sought by the Claimant were directed against entities other than the Respondent, and therefore the Emergency Arbitrator had no jurisdiction to issue those orders.

With regard to item (i) of the declarations sought by the Claimant, the Emergency Arbitrator noted that the declaration was directed to establish that certain property belonged to the JV. The Emergency Arbitrator continued by stating that under Swedish procedural law a party can normally not seek relief for the benefit of a third party, but in company law it does occur that an interested party is allowed to act for the company, a type of action often referred to by the Latin term *actio pro socio*. Under the joint venture agreement, the parties agreed that the JV was to be governed by the laws of the People's Republic of China. The Emergency Arbitrator noticed that the Claimant had not provided any legislation, case-law or other authority that suggested any relevant basis in Chinese law for granting relief for the benefit of a third party. Therefore the conclusion of the Emergency Arbitrator was that any declaration pertaining to the rights of the JV to the property in question must be sought by the JV itself in the appropriate forum.

The Emergency Arbitrator also noted that the interim relief sought by the Claimant was declaratory in character, although normally interim relief would be available only to obtain measures of a nature capable of being enforced.



The Emergency Arbitrator was also not convinced that there was any urgency in the case in the sense of Appendix II to the SCC Rules.

EMERGENCY DECISION

The Claimant's Application for the requested interim measure was dismissed. The Emergency Decision was handed down on Day 6.

9. SCC Emergency Arbitration (057/2013)

<u>The Parties:</u>	Claimant: Dutch Respondents: Turkish
<u>Seat:</u>	Stockholm
<u>The Emergency Arbitrator:</u>	Austrian
<u>Language:</u>	English
<u>Choice of law:</u>	Laws of the Netherlands
<u>Amount in dispute:</u>	EUR 620 400

BACKGROUND

In 2012 the parties had entered into an agreement under which the Claimant was leasing certain objects to the Respondents for a limited period. At the end of the agreed period the parties were in dispute as to the performance, or lack of performance, by the Claimant and by the Respondents in relation to several contractual obligations. According to the Claimant, the Respondents had not fulfilled their payment obligations, whereas the Respondents alleged that the Claimant had deceived them in certain contractual aspects and that the Respondents were therefore entitled to damages. Hence, the Respondents were withholding the objects of the dispute. The Claimant contended that it had an obligation to deliver the objects to a third party one month after the contract period or it would be facing substantial losses. As the Claimant feared that the objects would not be delivered in time by the Respondents, the Claimant filed an application for interim relief as well as a Request for Arbitration.



THE PROCEDURE

The SCC appointed the Emergency Arbitrator within 24 hours of receiving a request for appointment. As soon as the SCC had referred the Claimant's application to the Emergency Arbitrator, a telephone conference was held between the parties and the Emergency Arbitrator. Following this telephone conference, the Emergency Arbitrator sent a letter to the parties inviting the Respondents to file their comments on the Claimant's application by Day 3. The Respondents filed comments on the applicability of the Emergency Arbitrator Rules on Day 2, and additional comments on substantive issues on Day 4.

REQUEST FOR INTERIM RELIEF

The Claimant requested the Emergency Arbitrator to order each of the Respondents to immediately comply with their obligations under the Agreement, specifically requiring the Respondents:

- (i) to fulfill certain specific obligations under the contract, such as to provide free access to the objects, provide electricity and relevant services;
- (ii) to obtain all necessary licenses and work permits during removal of the objects;
- (iii) to comply with all reasonable instructions given by the Claimant and/or its appointed agents/attorneys in relation to return of the objects; and
- (iv) to return the objects under forfeiture of a penalty for each day that the Respondents were in default of the order.

The Respondents contested the applicability of the Emergency Arbitration Rules arguing that only a full Arbitral Tribunal constituted in accordance with the agreement was entitled to render a decision.

REASONING

The Emergency Arbitrator first assessed the position of the Respondents as regards the applicability of the Emergency Arbitrator Rules and found that by agreeing to the "Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce" the Parties had therefore agreed not only to the provisions related to "ordinary" arbitral proceedings, but also to the three Appendices, including "Appendix II - Emergency Arbitrator". Although the Emergency Arbitrator stated that it was irrelevant whether the Claimant and/or Respondents had actually read or analyzed the SCC Arbitration Rules before signing the arbitration agreement, based on analysis of the arbitration clause of the Agreement the Emergency Arbitrator came to the conclusion that judging from the language of the arbitration agreement, the parties had looked into the SCC Arbitration Rules.



The Emergency Arbitrator then went on to decide whether the request for interim measures was justified under the circumstances of the case. The Emergency Arbitrator stated that the case at hand was “a text-book example of a case in which a request for interim relief is justified”. On the basis of the uncontested statements by the Claimant concerning its obligation to deliver the objects to a third party within a month after the term of the Agreement, the Emergency Arbitrator held that the urgency was evident as well as explicitly admitted by the Respondent.

The Emergency Arbitrator also reviewed the question whether the Respondent had a right of retention in relation to the objects. While noting that it is obviously not the role of the Emergency Arbitrator to render a final decision on the merits, i.e. who owed money to whom, the Emergency Arbitrator stated that the only relevant question, assuming that the Respondents would be entitled to payment from the Claimant, was whether the Respondents would be entitled not to comply with their contractual obligations and to retain the objects. The Emergency Arbitrator stated that the agreement did not provide for any right of retention, nor had the Respondents relied on any provision of Dutch law that would grant them such a right. In addition, “[e]ven assuming that Dutch law contains provisions that might normally grant the Respondents a right of retention, such provisions would not be of mandatory nature but of dispositive nature only, in view of the general principle of party autonomy. Such a retention right provided by the law would be incompatible with a good faith interpretation of the agreement and the parties’ mutual contractual rights and obligations, and must therefore be considered implicitly excluded by the parties. Even assuming that the Respondents did not positively know that the objects were to be delivered to a third party, they must at least have been aware of the possibility that the Claimant had entered into further agreements, that the objects must arrive in good and safe conditions and that any delay would cause substantial losses”. Based on these reasons, the Emergency Arbitrator concluded that Respondents had no right of retention and that they must comply with their obligations under the Agreement.

The Emergency Arbitrator continued by addressing each item under the relief sought by the Claimant through a step-by-step analysis. The Emergency Arbitrator found that a request for a very general order that each of the two Respondents “immediately comply with their obligations under the agreement” was going too far since it would also include obligations unrelated to the removal and return of the objects, in particular possible payment obligations under the agreement. Therefore the Emergency Arbitrator decided not to issue the general order requested by the Claimant. In contrast to the request for a general order, the Emergency Arbitrator held that the specific orders requested by the Claimant (items (i)-(iv) of the Request for Interim Relief) were justified, subject to certain amendments by the Emergency Arbitrator.

Further, the Emergency Arbitrator reviewed the specific relief requested by the Claimant to order the various interim measures “under forfeiture of a penalty”. In this regard the Emergency Arbitrator found that according to Swedish arbitration law (the *lex arbitri*), arbitrators (including the emergency arbitrator) do not have the power to impose any fine or penalty in the context of an interim decision, and, as a consequence, declared that the Claimant’s request for the ordering of penalties must be rejected for lack of jurisdiction.



EMERGENCY DECISION

The Respondents were ordered to fulfill in good faith their specific responsibilities regarding the removal and return of the objects to the Claimant.

The Emergency Decision was handed down on Day 4.

IV. Concluding Remarks

It has now been four years since the SCC introduced the option for parties to apply for relief from an Emergency Arbitrator under the SCC Rules. Since then, many other international arbitration institutions have introduced similar provisions under their own rules (see for example the ICC, Swiss Chambers and the HKIC). The trend is clear and there seems to be a general consensus within the international arbitration community that these types of provisions are here to stay.

Judging from the practical experience of the SCC, it might at first glance seem difficult for an applicant to obtain the pre-arbitral relief sought. This contention might be true to a certain degree. However, if one takes a closer look at the applications that have been denied, one may notice that the Respondents in two Emergency Arbitrator procedures gave explicit undertakings, which, in part or in whole, accepted the relief sought by the applicant (see emergency arbitration 144/2010 and 010/2012).

The SCC Rules (as well as most similar provisions in other institutional rules) leave it to the arbitrator to decide which interim measures are suitable in the specific case at hand. Indeed, the Emergency Arbitrator has the power to “grant any interim measures it deems appropriate” (Art 32(1) of the SCC Rules). This formulation merely confirms the Emergency Arbitrator’s broad authority to grant interim measures and does not establish a set standard for when that authority should be recognized.

As has been seen in SCC practice, all Emergency Arbitrators (even though in somewhat different wording) have required the applicants to show that they indeed have a *prima facie* case on the merits. Further, the majority of the Emergency Arbitrators have also applied a rather strict test where the Emergency Arbitrator has made a careful and structured analysis of whether the applicant has shown urgency and irreparable harm.

The parties have been from all around the world and every case has been international in the sense that the parties have been from different countries. No emergency arbitration has so far involved a domestic dispute. One natural explanation behind this fact may of course be that one of the main advantages of applying for an emergency arbitrator is that the applicant does not have to go to a local court in a foreign jurisdiction to obtain interim relief.

Two applications for interim measures have been successful, whereas seven requests have been denied. Looking at the applications that were rejected it is clear that the most difficult standard to meet is the standard of urgency (five out of seven applications were denied) as well as the closely interconnected standard of irreparable harm (four out of seven applications were denied). Not



surprisingly, in the two emergency arbitrations where the applicant sought relief targeted against a party not bound by the arbitration agreement, the Emergency Arbitrator concluded lack of jurisdiction over those third parties.

Interestingly, however, in four out of the seven cases where the applications were denied, the Emergency Arbitrator first found that the applicant had shown a *prima facie* case on the merits, or a reasonable possibility of success on the merits.

Of course, an emergency arbitration procedure may be somewhat burdensome for the parties involved in the proceedings given the limited timeframe. That said, there can be little doubt that the Respondent party is well protected in an SCC emergency arbitration.

First of all, a Respondent must be served. The SCC Rules do not allow for an *ex parte* procedure.

Secondly, each party should be given an “equal and reasonable opportunity to present its case”, something that several Emergency Arbitrators explicitly stated in their decisions.

Thirdly, the Applicant has to pay for the emergency arbitration (it should be noted, however, that the costs of the emergency arbitrator procedure may be claimed as costs in any ensuing arbitration procedure).

Fourthly, and as was seen in emergency arbitration 087/2012, the Emergency Arbitrator will not render a default award if the Respondent does not participate. Instead, the Emergency Arbitrator will do a thorough analysis of the facts and evidence, including *ex officio* jurisdiction.

The neutrality and specialization of an emergency arbitrator as compared to some local state courts, as well as the confidential aspect of an emergency arbitration, are the strongest arguments for a party choosing to seek interim relief from an Emergency Arbitrator instead of a state court. But even so, the parties have chosen arbitration as their preferred dispute resolution mechanism for a reason, and in order for this dispute resolution process to function in a fair and effective manner, it is essential that there is power to safeguard the parties’ rights before the main proceedings.
