APRAG Conference 2013

Arbitration in Asia and the Pacific in the Next Ten Years - Opportunities and Challenges

June 28-29, 2013, Beijing

SCC Emergency Arbitrator Proceedings

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I. The Arbitration Institute of the Stockholm Chamber of Commerce

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) was founded in 1917 and has handled international disputes since the 1970’s.

Most disputes at the SCC are decided under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules). The SCC also has adopted rules for Expedited Arbitration, and frequently acts as appointing authority under the UNCITRAL Arbitration Rules.

Roughly 50% of the SCC caseload consists of international cases. Traditionally, the SCC caseload has had a strong East-West footprint. However, in recent years the case load has diversified, and in 2012 parties from more than 40 jurisdictions appeared before SCC.

SCC and Sweden have also developed into a preferred venue for investment treaty arbitration. In addition, the SCC is one of two institutions listed in in the Energy Charter Treaty (“ECT”) as a forum to resolve investor-state disputes.
II. SCC Statistics

SCC caseload 2003-2012

Number of Investment Arbitration Cases per Year
III. SCC Emergency Arbitrator Procedures


Under the previous SCC Rules, a party could not request an interim measure until the case had been referred to the arbitral tribunal. The Emergency Arbitrator mechanism aims to bridge this gap and provide parties with the possibility of obtaining interim measures before the case has been referred to the arbitral tribunal.

The rules apply to all SCC arbitrations unless the parties expressly agree otherwise. It may be noted that in many jurisdictions, including Sweden, an arbitration agreement does not constitute procedural impediment against a court granting interim measures.¹

The provisions on the appointment of an Emergency Arbitrator under the 2010 SCC Rules enables a request for an interim measure prior to and after the commencement of arbitration, but before the case has been referred to the arbitral tribunal.²

The SCC shall notify the Respondent as soon as the application has been received, and the Board of the SCC shall seek to appoint an Emergency Arbitrator within 24 hours of receipt of the application.³

The Emergency Arbitrator shall give each party an equal and reasonable opportunity to present its case, taking into account the urgency inherent in such proceedings.⁴ An emergency decision on interim measures shall be made not later than five days from the date when the application was referred to the Emergency Arbitrator. This time limit may be extended upon a reasoned request by the Emergency Arbitrator, or if otherwise deemed necessary.⁵

The SCC Emergency Arbitrator procedure is not available on an ex parte basis.

¹ Section 4 paragraph 3 of the Swedish Arbitration Act and Chapter 15 paragraph 5 of the Swedish Code of Judicial Procedure
² Article 1 (1) Appendix II of the SCC Rules
³ Ibid. Art. 4 (1)
⁴ Ibid. Art. 7 and Art 19 (2) of the SCC Rules
⁵ Article 8 (1) Appendix II of the SCC Rules
The decision by the Emergency Arbitrator will be binding on the parties when rendered, and may be amended or revoked by the Emergency Arbitrator upon a reasoned request by a party. The powers of the Emergency Arbitrator terminates when the case has been referred to an arbitral tribunal. Further, the 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, and 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 shall be 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.

The costs comprise the fee of the Emergency Arbitrator in the amount of EUR 12,000, and the administrative fee of the SCC, which amounts to EUR 3,000. Costs may be adjusted, depending on the circumstances of the case.

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6 Ibid. Art. 9 (1) and (2)  
7 Ibid. Art. 1 (2) and Art. 9 (4)  
8 Ibid. Art 10 (5)  
9 Ibid. Art. 10 (2)
IV. SCC EA Procedure Overview

Claimant Applies for the appointment of an Emergency Arbitrator and pays the costs

SCC Notifies Respondent

SCC Appoints the Emergency Arbitrator; sends CV and Confirmation to the parties

SCC Refers the application to the Emergency Arbitrator

24 h

Claimant Submits any additional comments

Emergency Arbitrator Contacts the parties and makes timetable

Emergency Arbitrator Reviews written submissions and hears the parties.

Emergency Arbitrator makes a decision

5 days
V. Summary of SCC EA Experience

Numbers
- Four cases in 2010, two in 2011, two in 2012 and one (as of 30 April) in 2013
- SCC has appointed the Emergency Arbitrator within 24 hours in all cases
- Six out of nine decisions were rendered within five days.
- Extensions were granted in three cases. No decision took more than 12 days.

Substance
- Two requests for interim measures have been in principal successful, seven requests have been denied.
- Applications were rejected because of the following reasons (or a combination of listed reasons):
  - No "urgency" (5)
  - No "irreparable harm" (4)
  - No jurisdiction to bind third parties (2)
  - Relief sought was a substitute for judgment (1)

- A "prima facie case" / "reasonable possibility of success on the merits" was established by the Emergency Arbitrator in 4 of 7 of the applications which were however finally rejected on other grounds.

- Application resulted in (other) undertakings from the Respondents in two cases.
VI. SCC Emergency Arbitrator cases

The below provides brief summaries of seven emergency arbitrator proceedings before the SCC which will be further discussed on 28 June 2013.

1. SCC EA case 064/2010

BACKGROUND:
The dispute between the parties related to an agreement for the sale and purchase of a shipment business. The Claimant asserted that the Respondent was in breach of this agreement due to failure to pay an outstanding amount.

Nationality of the Parties:  
Claimant: Dutch  
Respondent: Cypriot

Seat:  
Stockholm

Nationality of the Emergency Arbitrator:  
Swedish

Language:  
English

Choice of law:  
Laws of England and Wales

Amount in dispute:  
USD 145 million

REQUEST FOR INTERIM RELIEF:
The Claimant requested the Emergency Arbitrator to render the following decisions:
i) an injunction prohibiting the Respondent, company X and company Y to alienate, pledge, charge, sell or otherwise dispose the shares of company Y and real estate listed in the annex of the Agreement for the Sale and Purchase of the 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 on alienation, pledge, charge sale or disposal in any matter of the shares of company Y and real estate listed in the annex of the Agreement for the Sale and Purchase of the shares in company X;

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10 Reported by Johan Lundstedt, SCC legal counsel, and Anna Amosova, SCC intern.
iii) an injunction prohibiting the Registrar, Mr Z, maintaining 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 matter;
iv) an injunction prohibiting state authorities of country A to register any transactions regarding real estate listed in the annex of the Agreement for the Sale and Purchase of the shares in company X.

DECISION
The Claimant’s Application for interim measures was denied.
The Emergency Decision was made on day 12 of the procedure.

2. SCC EA case 139/2010

BACKGROUND
The parties had entered into a contract under which the Claimant had undertaken to complete a building project for the Respondent. Pursuant to the terms of the contract, 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. Subsequently, Claimant submitted a request for arbitration to the SCC and one week later the application for the appointment of an Emergency Arbitrator.

Nationality of the Parties:
Claimant: Israeli
Respondent: Georgian

Seat:
Stockholm

Nationality of the Emergency Arbitrator:
Swedish

Language:
English

Choice of law:
Georgian law

Amount in dispute:
USD 65 million
REQUEST FOR INTERIM RELIEF

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”.

DECISION

Claimant’s Application for the requested interim measure was denied.

The Emergency Decision was handed down on day 5 of the procedure.

3. SCC EA case 144/2010

BACKGROUND

The parties had an agreement which 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 basis that the Claimant was developing a competing product.

| Nationality of the Parties: | Claimant: Norwegian |
| Respondent: Finnish |
| Seat: | Stockholm |
| Nationality of the Emergency Arbitrator: | Swedish |
| Language: | English |
| Choice of law: | Swedish law |
| Amount in dispute: | EUR 600,000 |
REQUEST FOR INTERIM RELIEF

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 the prices set by the Respondent; and

iii) Order the Respondent to provide the Claimant with access to tools for service and maintenance work regardless if the Respondent duly terminated the Agreement.

DECISION

With 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 of the procedure.

4. SCC EA case 187/2010

BACKGROUND

The parties were both shareholders in Company X and had entered into a Shareholders Agreement. During 2009 and 2010, Company X had 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 was below the said 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 the 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 the appointment of the Emergency Arbitrator, the Respondent sent an offer to the other shareholders of Company X to sell its shares. However, this offer was not sent to the Claimant.

**Nationality of the Parties:**
- Claimant: Swiss
- Respondent: Swedish

**Seat:**
- Gothenburg

**Nationality of the Emergency Arbitrator:**
- Swedish

**Language:**
- English

**Choice of law:**
- Swedish law

**Amount in dispute:**
- EUR 2 million

**REQUEST FOR INTERIM RELIEF**

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

**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 of the procedure.
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 according to which the Claimant undertook to sell a certain quantity of a product to the Respondent.

Nationality of the Parties:  
Claimant: Russian  
Respondent: German

Seat:  
Stockholm

Nationality of the Emergency Arbitrator:  
Swedish

Language:  
English

Choice of law:  
International Law

Amount in dispute:  
USD 2.6 million

REQUEST FOR INTERIM RELIEF
The Claimant requested the interim measures in the form of a measure to block all EUR and USD banking accounts of the Respondent with [bank].

The Respondent argued inter alia that the Emergency Arbitrator lacked jurisdiction, holding that the arbitration clause of the Contract must be interpreted as a reference to ad hoc arbitration.

DECISION
The Claimants' request for interim measures was rejected.

The Emergency Decision was handed down on day 5 of the procedure.
BACKGROUND
The parties were both shareholders in Company X. The dispute arose regarding the shareholders’ rights, corporate governance and execution of certain contracts. The Respondent had initiated state court proceedings relating to corporate governance of Company X.

Nationality of the Parties:  
Claimant: Russian  
Respondent: Lithuanian

Seat:  
Stockholm

Nationality of the Emergency Arbitrator:  
Dutch

Language:  
English

Choice of law:  
Lithuania

Amount in dispute:  
EUR 25.5 million

REQUEST FOR INTERIM RELIEF
The Claimant requested the Emergency Arbitrator to issue an emergency order instructing the Respondent inter alia to:

(i) move for a stay of its claim before the state court pending the rendering of a final arbitration award;

(ii) 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 arbitration award;

DECISION
Claimant’s Application for an emergency order was rejected.

The Emergency Decision was handed down on day 11 of the procedure.
BACKGROUND

According to a purchase agreement executed between the parties the Respondent had undertaken to provide the Claimant with products including technical on-site assistance at a plant in [country].

| Nationality of the Parties: | Claimant: Swedish       |
|                           | Respondent: German      |
| Seat:                     | Stockholm               |
| Nationality of the Emergency Arbitrator: | English       |
| Language:                 | English                 |
| Choice of law:            | Sweden                  |
| Amount in dispute:        | EUR 46.4 million        |

REQUEST FOR INTERIM RELIEF

The Claimant requested the Emergency Arbitrator to order that:

(i) the Respondent shall fulfill its contractual obligations under purchase agreement of products by immediately delivering the products and documentation as listed in the agreement to the Claimant, or, alternatively, if such relief was not granted, that;

(ii) the Respondent shall immediately store the products and documentation as listed in purchase agreement of products with a neutral third party, or, alternatively, if such relief is not granted, that;

(iii) The Respondent shall not in any way move, dispose of or otherwise dissipate, or diminish the value of the products and documentation as listed in in purchase agreement of products.

DECISION

Claimant’s Application for interim relief was rejected.

The Emergency Decision was handed down on day 6 of the procedure.
BACKGROUND
The dispute related to a joint venture (JV). According to Claimant, Respondent's contribution to the JV had consisted of certain property. According to Claimant, a Company X had taken possession of these assets. Claimant submitted that Company X had no title to the property in question and that its taking of possession thereof was unlawful.

**Nationality of the Parties:**
- Claimant: US
- Respondent: Chinese

**Seat:**
- Stockholm

**Nationality of the Emergency Arbitrator:**
- Swedish

**Language:**
- English

**Choice of law:**
- China

**Amount in dispute:**
- EUR 7 million

REQUEST FOR INTERIM RELIEF
The Claimant requested the Emergency Arbitrator to:

(i) declare that the land and the buildings are the property of JV;
(ii) declare that the Company X or any other entity, with exception of JV, is not entitled to occupy, own or possess this land and property; and
(iii) order that Company X and all other entities with exception of the JV be immediately removed from the property and restrained from further use of the premise.

Respondent did not file any answer to the Claimant’s Application.

EMERGENCY DECISION
Claimant’s Application for the requested interim measure was dismissed.
The Emergency Decision was handed down on day 6 of the procedure.
BACKGROUND
Having entered into a service agreement, the parties went into disputes over certain contractual matters relating to the payment of fees and royalties or damages. Claimant held i.a. that certain objects were unlawfully kept by the Respondents.

Nationality of the Parties: Claimant: Dutch
Respondents: Turkish

Seat: Stockholm

Nationality of the Emergency Arbitrator: Austrian

Language: English

Choice of law: Dutch

Amount in dispute: EUR 620 400

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 commit certain precise responsibilities, such as provide free access to the objects, provide electricity and relevant service, etc.;
(ii) to achieve all necessary licenses and work permits during the removal of objects;
(iii) to comply with all reasonable instructions given by the Claimant and/or its appointed agents/attorneys in relation with the returning of the objects; and
(iv) to return the objects.

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 of the procedure.
VII. Additional Information

To learn more about the SCC Emergency Arbitrator Procedure, please visit www.sccinstitute.com, or contact us at arbitration@chamber.se