

SCC PRACTICE

Emergency Arbitrator Decisions Rendered 2014

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I. Introduction

It has now been five years since the rules on emergency arbitrator in Appendix II, which are part of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC Rules”), entered into force. By applying for the appointment of an emergency arbitrator, a party who is in need of a prompt interim decision may receive a decision on interim measures within five days.

Since the introduction of the emergency procedure, the SCC has seen a total of 13 applications for the appointment of an emergency arbitrator.² This article will outline the main issues raised in the four emergency proceedings that were initiated at the SCC during 2014, followed by concluding remarks based on all 13 cases. Apart from having seen its first domestic emergency dispute between two Swedish parties, two applications in treaty based investor-state disputes were filed in 2014.

II. The procedure

Under Appendix II of the SCC Rules, a party may apply for the appointment of an emergency arbitrator before the case has been referred to an arbitral tribunal. The emergency arbitrator may, at the request of a party, grant any interim measures it deems appropriate and may order the party requesting an interim measure to provide appropriate security in connection with the measure. The interim measure takes the form of an order or an award.

An application for the appointment of an emergency arbitrator must, apart from names and addresses, include a summary of the dispute, a statement of the interim relief sought and reasons therefor, a copy or description of the applicable arbitration agreement, comments on the seat, applicable law and language of the proceedings and proof of payment of costs.³ Usually, evidence of a bank transfer is attached to the application as proof of payment, to ensure that the application is complete at the time of receipt at the SCC. In contrast to a request for arbitration, the claimant’s application for the

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² The number of applications is correct as of 31 December 2014. For a review of SCC Emergency Arbitrator proceedings between 2010-2013, see Johan Lundstedt, *SCC Practice: Emergency Arbitrator Decisions 1 January 2010 – 31 December 2013*, available at <http://www.sccinstitute.com/>

³ € 15 000 on 1 January 2015

appointment of an emergency arbitrator should aim at including all relevant issues in the dispute concerned since the deadlines in emergency proceedings are very short.

As soon as an application for the appointment of an emergency arbitrator has been received, the Secretariat sends it to the other party. This is done by e-mail and express courier. In the event that the respondent has not engaged counsel, it is preferred that the claimant states a contact person for the respondent, if any, in the application.

Applications for the appointment of an emergency arbitrator should be sent to emergencyarbitrator@chamber.se, a mailbox which is monitored 24/7. The Secretariat is also most often contacted by the claimant shortly before an application for the appointment of an emergency arbitrator is filed.

The Board will seek to appoint an emergency arbitrator within 24 hours of receiving the application. Out of the 13 emergency arbitrator cases filed at the SCC by the end of 2014, an appointment was made within 24 hours in 12 of those cases. In the one case where an appointment was not made within 24 hours, the application was sent on a Friday evening to the regular registrar e-mail address of the SCC Secretariat.

When appointing an emergency arbitrator, the Board considers the nature and circumstances of the dispute, the applicable law and the language of the proceedings, as well as the nationality of the parties. Given the urgency of the proceedings, the Board usually also takes other practical issues into consideration such as time zones, the possibility to conduct a quick conflict check, and so on. Before suggesting names of possible arbitrators to the Board, the Secretariat always eliminates firms and individuals which may have a conflict.

Once the Board has decided on a list of possible candidates for the appointment, the Secretariat starts contacting potential emergency arbitrators by telephone and e-mail. Usually, the question of availability is posed first, after which information on the parties and the dispute is provided for the arbitrator to conduct a conflict check.

Once an emergency arbitrator has been appointed, the Secretariat will promptly refer the application to the emergency arbitrator. This is usually done within an hour after the appointment, as soon as the Secretariat has received signed confirmation on impartiality and independence from the emergency arbitrator. The emergency arbitrator may conduct the arbitration as it considers appropriate. Normally, the emergency arbitrator invites the parties to participate in a telephone conference immediately after the referral. After the conference, a timetable for the proceedings is often set up by the arbitrator and circulated to the parties. Most often, the next step in the proceedings is for the respondent to file its comments on the claimant's application. Thereafter, the parties are often given an opportunity to file rejoinders. Usually, a second telephone conference is held, sometimes followed by final comments from the parties, before the emergency arbitrator renders a decision or award.

According to Article 1 of Appendix II, the powers of the emergency arbitrator are those set out in Article 32 (1)-(3) of the SCC Rules. Hence, the emergency arbitrator may, at the request of a party, grant any interim measures it deems appropriate; the emergency arbitrator may order the party

requesting an interim measure to provide appropriate security in connection with the measure; and an interim measure must take the form of an order or an award.

Emergency proceedings are not available on an *ex parte*-basis and, accordingly, proof must be shown that the respondent has received the application for an interim measure to be granted. It is within the emergency arbitrator's discretion to decide whether the respondent has been correctly notified.

III. Cases

1. SCC Emergency Arbitration 2014/138

The Parties:	two Swedish companies
Seat:	Stockholm
The Emergency Arbitrator:	Swedish
Language:	Swedish
Choice of law:	Swedish
Amount in dispute:	EUR 16 000 000 (estimate)

BACKGROUND

The parties had entered into a contract regarding construction of part of a building. According to the contract, the work should be completed on a certain day. Any delays would result in penalties.

THE PROCEDURE

Claimant filed an application on a Monday morning for the appointment of an emergency arbitrator. After the SCC had received a receipt showing that the registration fee had been transferred, the application was complete at 13:05. The SCC confirmed receipt of the application at 13:25. The application was sent to the respondent on the same day. The emergency arbitrator was appointed by the SCC Board the following day at 10:40 and the application was referred to the emergency arbitrator at 10:50 (day 0).

After having conferred with the parties, in the early afternoon of day 0 the emergency arbitrator set up a time schedule, whereby the respondent was asked to file its reply to the claimant's application by the end of day 1. Thereafter, the claimant had the possibility to file comments on the respondent's submission by noon on day 2. Any final remarks by the respondent were to be filed by 17.00 on day 2. The emergency decision was to be made on day 5 at the latest, according to the SCC Rules.

The parties filed their submissions according to the time schedule.

REQUEST FOR INTERIM RELIEF

The claimant requested that the emergency arbitrator should issue an interim declaration that the claimant had the right to postpone completion of the construction by a certain fixed number of days and thereby amend the parties' contract that the work should be completed on a later date than previously agreed.

The respondent requested that the claimant's request should be dismissed or denied. The respondent also requested that the emergency arbitrator should order the claimant to cover the respondent's costs in the proceedings and to solely bear the costs of the emergency arbitrator and the SCC.

REASONING

The respondent had submitted that the claimant's request was beyond the powers of the emergency arbitrator, since the measure requested was actually a request for a material amendment of the parties' contractual relationship. Regarding the question on jurisdiction, the emergency arbitrator first stated that there is no definition in the SCC Rules of what should be deemed an "interim measure". Since the parties had agreed that Swedish law applied to the dispute, the emergency arbitrator assessed that the meaning of "interim measures" could be interpreted using general principles regarding interim measures in Chapter 15 of the Swedish Code of Judicial Procedure, bearing in mind that the concept of interim measures in the SCC Rules would not have to be applied as restrictively as the provisions in the Code. Hence, the emergency arbitrator concluded that there was no ground for dismissal of the claimant's application based on lack of jurisdiction. The question whether the specific request was suitable or not was to be assessed separately.

Subsequently, the emergency arbitrator addressed the question whether the claimant had, *prima facie*, established that it had a reasonable possibility to succeed on the merits. After some discussion on the material issues in the case, the emergency arbitrator concluded that the claimant had fulfilled this requirement. The emergency arbitrator continued to assess other prerequisites; namely whether there was a risk of sabotage on the part of the respondent, whether the urgency requirement was met and whether there was a risk that the claimant would suffer imminent harm. Additionally, the emergency arbitrator assessed whether the respondent had acted in a disloyal manner. The emergency arbitrator concluded that, although the claimant did suffer from uncertainties arising from the dispute, neither of the necessary prerequisites was fulfilled. The emergency arbitrator finally stated that, even if the necessary prerequisites for granting an interim measure had been fulfilled, the measure requested would not be suitable to grant as an interim measure, considering the nature of the parties' contractual relationship.

The respondent had requested that the claimant cover its costs of the emergency proceedings, arguing that Article 10 (5) in Appendix II of the SCC Rules only applies to costs stated in Article (2) of the same appendix, namely the fee of the emergency arbitrator and the application fee. The emergency arbitrator dismissed this request stating that Article 10 (5) of Appendix II could be interpreted as including other costs for the emergency proceedings than expressly stated in (2), but nonetheless that a decision on costs is beyond the emergency arbitrator's mandate according to Article 1(2) of Appendix II.

Following the respondent's request, an extension of time to file a reply was granted by the emergency arbitrator. Accordingly, a three-day extension of time limit to render the interim decision was granted by the SCC Board. Both parties filed their submissions with the emergency arbitrator.

REQUEST FOR INTERIM RELIEF

In its request for arbitration, the claimant asserted monetary claims against the respondent regarding, *inter alia*, payments under the share purchase agreement and the shareholders' agreement.

In the emergency proceedings, the claimant requested that the emergency arbitrator grant the following interim measures:

1. ordering the respondent to deposit in an escrow account of a first class European bank, [...], an amount equal to the aggregate amount of claims brought by the claimant. The funds deposited in this account would be transferred in accordance with the final award to be issued in the arbitration to the claimant's or the respondent's account depending on the outcome;

or, alternatively, if funds in the above amount were not deposited within 14 days after the issue of an order by the emergency arbitrator:

2. prohibiting the respondent from transferring its direct ownership over and otherwise alienating, pledging, charging, selling or disposing of the shares or property of [a few specific companies – the Companies]
3. Alternatively, the claimant requested that the emergency arbitrator order the respondent to inform the claimant and the Tribunal in SCC Arbitration [...] (after it is in place) no later than 30 days in advance about any measures which would result in selling or putting in pledge or other form of security the shares of the Companies.

The respondent requested that the claimant's application should be rejected.

REASONING

Referring to the parties' agreement and the SCC Rules, the emergency arbitrator initially concluded that it did not lack jurisdiction to decide on the claimant's request.

Subsequently, the emergency arbitrator assessed whether the standards for ordering emergency interim relief were fulfilled. The respondent had denied that the claimant would suffer harm, and that the harm would be of an imminent and urgent nature and that it would be irreparable. The respondent also submitted that the claimant had no *prima facie* case on the merits. The emergency arbitrator noted that according to the SCC Rules, an emergency arbitrator has wide discretion to "grant any interim measures it deems appropriate". The emergency arbitrator also referred to Article 17(A) (1) (a) and (b) of the UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006, stating that the rules therein represent an appropriate starting point. Noting that Article 17 (A) primarily addresses interim decisions in general, the emergency arbitrator found it appropriate to consider the urgency requirement especially, since it is the main focus in the emergency provisions. The emergency

arbitrator formulated an urgency test “such that it needs to be established *prima facie* that, unless the order for interim relief is granted before such relief can be obtained from the arbitral tribunal, irreparable harm is likely to be caused to the requesting party.”

Regarding the question of urgency, the emergency arbitrator stated that the urgency requirement had not been met, since the evidence did not support that it was likely that the respondent was currently removing, or planning to remove, assets. Furthermore, the irreparable harm requirement was not fulfilled since there was no evidence in the proceedings suggesting that the respondent was in the process of stripping the Companies of assets by illegitimate means, stressing that legitimate measures to improve the respondent’s financial situation could not be assumed to cause harm.

Since the urgency and irreparable harm requirements were not met, the emergency arbitrator did not continue to assess the other requirements required to grant a request for interim measures.

Regarding costs, the emergency arbitrator stated that no costs order would be issued and that the parties were invited to raise claims on costs in the arbitration proceedings initiated under the SCC Rules. This had also been communicated to the parties at an earlier stage of the proceedings.

EMERGENCY DECISION

The claimant’s application for interim measures was denied in its entirety. The emergency decision was made on day 8.

3. SCC Emergency Arbitrations 2014/053 and 2014/183

Two applications in 2014 derived from treaty based disputes between an investor and a state. In both cases, the Board decided Stockholm as the seat of the proceedings. The language was English. One emergency arbitrator was of Swedish nationality, and the other non-Swedish.

BACKGROUND

The claimant, in each case, alleged that the respondent had unlawfully expropriated the claimant’s assets. In both cases, an entity within the respondent’s territory had rendered a decision or judgment against the claimant, allegedly resulting in expropriation.

THE PROCEDURE

Both applications were made in the afternoon and sent to the respondent the same day. Both respondents confirmed receipt of the application the following day. The SCC Board appointed an emergency arbitrator and decided on the seat for the emergency arbitration proceedings within 24 hours from receiving the applications, which were then referred to the emergency arbitrators immediately after the appointments. The emergency arbitrators established a timetable for the proceedings without delay after the referral.

REASONING

The two emergency proceedings gave rise to a number of procedural issues, two of which are described in more detail below, including

- cooling-off periods,
- *prima facie* decision on jurisdiction,
- applicable version of the SCC Rules,
- prerequisites for a decision on interim measures,
- form of decision; award or order, and
- decision on costs.

(i) Applicable version of the SCC Rules

The respondent contested jurisdiction arguing that i) the respondent envisaged a previous version of the SCC Rules, not including any emergency arbitrator procedure, at the time of signing the Treaty and ii) even if the parties had envisaged later versions of the SCC Rules to apply, the emergency arbitrator procedure was such an extraordinary qualitative change of the SCC Rules that the respondent could not be regarded as having given advance consent to the procedure. The respondent submitted that it was an extraordinary change of the later version of the SCC Rules to give adjudicative functions to somebody other than the tribunal.

The emergency arbitrator, referring to Article 31 of the Vienna Convention on the Law of Treaties, stated that the relevant provision in the treaty should be interpreted, *inter alia*, in accordance with its meaning, context and in the light of its object and purpose.

The emergency arbitrator stated that “when a treaty is formulated in terms whose content is susceptible of evolving over time, it is fair to presume that the contracting states intended their treaty content to evolve accordingly, unless of course there is evidence of contrary intention.”

First, the emergency arbitrator discussed a possible interpretation that the parties generally should be deemed to have referred to the later applicable version of the SCC Rules, when the agreement referred to an institution instead of a set of rules, as it did in this case.

Thereafter, the emergency arbitrator decided to look upon the question from another point of view. The parties agreed that the arbitration agreement was perfected in 2014, when the investor accepted the offer to arbitrate, and selected SCC as the applicable forum. Both at the time of signing the Treaty and on its entry into force, the critical time for selecting the applicable version of the SCC Rules was the time of conclusion of the parties’ agreement. Therefore, the emergency arbitrator concluded, the SCC Rules of 2010 were applicable.

The emergency arbitrator did not accept the respondent’s objection that Appendix II of the SCC Rules should not be applicable, firstly, since the contracting states to the Treaty had not excluded application of Appendix II in their offer to arbitrate, which they could have done, especially considering the

specificity of the relevant provision in the Treaty. Secondly, regarding the respondent's objection that the addition of an emergency procedure was an extraordinary qualitative change of the SCC Rules, the emergency arbitrator pointed out that there have been several qualitative changes to the older versions of the SCC Rules.

(ii) Prerequisites for a decision on interim measures

Both emergency arbitrators outlined the requirements to be assessed for the granting of interim measures, which included:

- jurisdiction over the substantive claim, on a *prima facie* basis,
- reasonable possibility that the claimant would succeed on the merits of its claim, on a *prima facie* basis,
- the irreparable harm which was to be prevented by the interim measure was of an urgent or imminent nature,
- appropriateness of the measure sought, and
- the measure sought must relate to the substantive claims and purport to protect rights that were the subject of the proceedings on the merits.

It was noted that the requirements were “not merely a mechanical check-list”, but rather that they were the foundation for forming the emergency arbitrator's overall view of whether the requested measures were “necessary and appropriate” and therefore should be granted.

EMERGENCY DECISION

The application for an emergency order was rejected in one case, and granted in the other. The decision was handed down on day 5, and day 6, respectively.

IV. Concluding Remarks

Since the introduction of the Emergency Arbitration Rules in 2010, emergency arbitrators have developed the same or similar prerequisites for granting a request for interim measures; firstly, *prima facie* jurisdiction must exist. Secondly, the claimant must establish a reasonable possibility that they will succeed on the merits of their claim. Thirdly, the claimant must establish urgency and risk of irreparable harm. Having established all this, the request must also, according to SCC practice, be considered necessary and appropriate, allowing for a broader assessment.

By 31 December 2014, a total of three requests for interim measures from an emergency arbitrator had been granted, and ten requests had been denied.

The most common ground for rejecting the claimant's request had been lack of urgency (eight cases) and lack of imminent harm (seven cases).

In half of the ten unsuccessful cases, the emergency arbitrator found that the claimant had established, *prima facie*, that it had a reasonable chance to succeed on the merits of its claim.

This year, the SCC saw its first two Treaty based emergency proceedings. In both proceedings, the emergency arbitrator conducted a careful examination on jurisdiction, on a *prima facie* basis. This examination included an assessment whether the claimant had the right to invoke the treaty.

In terms of procedure, the emergency provisions are urgent and, accordingly, the deadlines are short. Nevertheless, as has been apparent in the emergency proceedings conducted during 2014, the parties and arbitrators are very loyal to the institution of emergency proceedings. Arbitrators make themselves available on holidays and put great effort into providing their services to the parties at very short notice. The parties have also, in the majority of cases, put great efforts into being available for the proceedings.

Each party should be given a reasonable opportunity to present its case during emergency proceedings. Consequently, where an extension of time to render an interim decision has been granted, it has generally been allowed in order to make sure that the respondent has sufficient time to present its case.

During 2014, the SCC has seen the first arbitral award rendered in emergency proceedings. The parties requested that the order should take the form of an award and the emergency arbitrator accepted the request.

According to Article 9 of Appendix II, an emergency decision is binding on the parties when rendered. The parties have, by agreeing to arbitrate under the SCC Rules, undertaken to comply with it without delay. In the same article, there is a possibility for the emergency arbitrator to amend or revoke a decision upon a reasoned request from the parties. As of 31 December 2014, no such amendment had been requested by any party since the introduction of the emergency arbitrator provisions in 2010.
