

Emergency relief in international arbitration

Emergency Relief - The Basics: Why, Where, When and How?

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About the emergency arbitrator mechanism



- Emergency arbitrator mechanisms are increasingly standard in the main institutional rules.
- These provisions allow for the appointment of an “emergency arbitrator” (“**EA**”) prior to the constitution of the tribunal. Parties can thus obtain urgently-needed interim relief without going before national courts.
- These rules replace the previous generation of EA provisions that were **opt-in** (e.g. the International Chamber of Commerce (“**ICC**”) Pre-Arbitral Referee procedure in the ICC Rules 1990) and consequently not very effective.
- The first, more ambitious, “**opt-out**” EA provision was introduced in the 2006 International Centre for Dispute Resolution (**ICDR**) Rules. Other institutions followed suit: Stockholm Chamber of Commerce (**SCC**) and Singapore International Arbitration Centre (**SIAC**) in 2010, ICC and Swiss Chambers’ Arbitration Institution (**SCAI**) in 2012, Hong Kong International Arbitration Centre (**HKCIAC**) in 2013, London Court of International Arbitration (**LCIA**) and World Intellectual Property Organization (**WIPO**) in 2014.

Why have emergency arbitrator provisions?



- Before the development of the EA mechanism, parties seeking urgent interim remedies prior to the constitution of the arbitral tribunal would have no choice but to go before the national courts.
- Applications before the national courts present several disadvantages.
 - Parties turn to arbitration in order to preserve their **privacy** and **confidentiality**. Applications before national courts are not always private.
 - There may be issues of **neutrality** in the jurisdiction where a party is seeking interim relief.
 - National courts may not be able to act **fast** enough or deal with **highly technical** issues.
 - A court process can be **time-consuming** and **costly**.
 - Interim remedies **may not be available** in the relevant jurisdiction.

Leading arbitral institutions with emergency arbitrator mechanisms

An overview

ICC, SCAI, LCIA, SIAC and SCC



International Chamber of Commerce (ICC) - Article 29 and Appendix V (ICC 2012 Rules)



- **Opt out / scope : EA provisions apply if three cumulative conditions are met.**

(1) The parties have not agreed or impliedly agreed otherwise:

“(...) shall not apply if (...) the parties have agreed to opt out of the Emergency Arbitrator Provisions (...)” (Article 29(6)(b))

“the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.” (Article 29(6)(c))

(2) The parties to the EA procedure are the signatories or the successors to the same arbitration agreement, meaning that third parties are not caught:

“(...) shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories.” (Article 29(5))

International Chamber of Commerce (ICC) - Article 29 and Appendix V (ICC 2012 Rules) (cont. 1)



(3) The arbitration agreement has been entered into on or after 1 January 2012:

“(...) shall not apply if: a) the arbitration agreement under the Rules was concluded before the date on which the Rules came into force;” (Article 29(6)(a))

- **The ICC Court acts as gatekeeper ensuring that EA applications meet the conditions:**

“If and to the extent that the President of the Court (the “President”) considers, on the basis of the information contained in the Application, that the Emergency Arbitrator Provisions apply with reference to Article 29(5) and Article 29(6) of the Rules, the Secretariat shall transmit a copy of the Application and the documents annexed thereto to the responding party (...)” (Article 1(5), Appendix V)

- **Parties can still seek emergency relief from competent courts:**

“The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application (...), and in appropriate circumstances even thereafter (...)” (Article 29(7))

International Chamber of Commerce (ICC) - Article 29 and Appendix V (ICC 2012 Rules) (cont. 2)



- **Timings**

(1) An application can be made before submission of the Request for Arbitration (following within 10 days) until the constitution of the tribunal:

“(...) Any such application shall be accepted only if it is received (...) prior to the transmission of the file to the arbitral tribunal (...) and irrespective of whether the party making the application has already submitted its Request for Arbitration.” (Article 29(1))

The proceedings are terminated if *“(...) a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days of the Secretariat’s receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary.” (Article 1(6), Appendix V)*

(2) The EA may still issue a decision even though the tribunal has since been constituted:

“(...) An emergency arbitrator appointed prior thereto shall retain the power to make an order within the time limit permitted by Article 6(4) of this Appendix.” (Article 2(2), Appendix V)

International Chamber of Commerce (ICC) - Article 29 and Appendix V (ICC 2012 Rules) (cont. 3)



(3) Tight time limits:

*“A challenge against the emergency arbitrator must be made within **three days** from receipt (...) of the notification of the appointment or from the date when that party was informed of the facts and circumstances on which the challenge is based (...).” (Article 3(1), Appendix V)*

*“The emergency arbitrator shall establish a procedural timetable (...) within as short a time as possible, normally within **two days** from the transmission of the file (...).” (Article 5(1), Appendix V)*

*“The Order shall be made no later than **15 days** from the date on which the file was transmitted to the emergency arbitrator (...) The President may extend the time limit (...).” (Article 6(4), Appendix V)*

International Chamber of Commerce (ICC) - Article 29 and Appendix V (ICC 2012 Rules) (cont. 4)



- **Threshold - need to show urgency:**

“(...) urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal (...)” (Article 29(1))

“The emergency arbitrator shall determine whether the Application is admissible pursuant to Article 29(1) (...)” (Article 6(2), Appendix V)

- **Cost - upfront payment of US\$ 40,000:**

“The applicant must pay an amount of US\$ 40,000, consisting of US\$ 10,000 for ICC administrative expenses and US\$ 30,000 for the emergency arbitrator’s fees and expenses.” (Article 7(1), Appendix V)

International Chamber of Commerce (ICC) - Article 29 and Appendix V (ICC 2012 Rules) (cont. 5)



- **Effect of the decision**

(1) The decision takes the form of an order that is not binding on the arbitral tribunal and that may be modified by the EA:

“The emergency arbitrator’s decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator.” (Article 29(2))

“The emergency arbitrator’s order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. (...)” (Article 29(3))

“Upon a reasoned request by a party made prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 of the Rules, the emergency arbitrator may modify, terminate or annul the Order.” (Article 6(8), Appendix V)

International Chamber of Commerce (ICC) - Article 29 and Appendix V (ICC 2012 Rules) (cont. 6)



(2) The decision ceases to be binding in certain instances:

“The Order shall cease to be binding (...) upon: a) the President’s termination of the emergency arbitrator proceedings (...); b) the acceptance by the Court of a challenge against the emergency arbitrator (...); c) the arbitral tribunal’s final award, unless the arbitral tribunal expressly decides otherwise; or d) the withdrawal of all claims or the termination of the arbitration before the rendering of a final award.” (Article 6(6), Appendix V)

International Chamber of Commerce (ICC) - Article 29 and Appendix V (ICC 2012 Rules) (cont. 7)



- **Interesting characteristics of the ICC EA mechanism**
 - EA provisions only apply to arbitration agreements entered into after 1 January 2012.
 - Relatively limited in scope.
 - Parties can only seek court relief “*if appropriate*” once the EA application has been filed.
 - High initial cost.
 - The form of interim relief available is an order (as opposed to an award) – this means that decisions can be issued more swiftly as will bypass the ICC scrutiny process.

Swiss Chambers' Arbitration Institution (SCAI) - Article 43 (Swiss Rules 2012)



- **Opt out / scope: EA provisions apply if two cumulative conditions are satisfied.**

(1) The parties have not agreed otherwise:

“Unless the parties have agreed otherwise (...)” (Article 43(1))

(2) The arbitral proceedings commenced on or after 1 June 2012:

“This version of the Rules shall come into force on 1 June 2012 and, unless the parties have agreed otherwise, shall apply to all arbitral proceedings in which the Notice of Arbitration is submitted on or after that date.” (Article 1(3))

- **The SCAI Court acts as gatekeeper on jurisdiction:**

“(...) the Court shall appoint and transmit the file to a sole emergency arbitrator, unless (a) there is manifestly no agreement to arbitrate referring to these Rules (...)” (Article 43 (2)(a))

Swiss Chambers' Arbitration Institution (SCAI) - Article 43 (Swiss Rules 2012) (cont. 1)



- **Parties can still seek emergency relief from competent courts:**

“(...) the parties do not waive any right that they may have under the applicable laws to submit a request for interim measures to a judicial authority. (...)” (Article 26(5))

- **Timings**

(1) An EA application can be made before submission of the Notice of Arbitration (following within 10 days) until the constitution of the tribunal:

“(...) a party requiring urgent interim measures (...) before the arbitral tribunal is constituted may submit to the Secretariat an application for emergency relief proceedings (...) (Article 43(1))

*“If the Application is submitted before the Notice of Arbitration, the Court shall terminate the emergency relief proceedings if the Notice of Arbitration is not submitted within **ten days** from the receipt of the Application. In exceptional circumstances, the Court may extend this time-limit.” (Article 43(3))*

Swiss Chambers' Arbitration Institution (SCAI) - Article 43 (Swiss Rules 2012) (cont. 2)



(2) The EA may still issue a decision even though the tribunal has since been constituted:

*“(...)
The decision on the Application may be made even if in the meantime the file has been transmitted to the arbitral tribunal.” (Article 43(7))*

(3) Tight time limits:

*“**As soon as possible** after receipt of the Application (...) the Court shall appoint and transmit the file to a sole emergency arbitrator (...)” (Article 43(2))*

*“Articles 9 to 12 shall apply to the emergency arbitrator, except that the time-limits set out in Articles 11(1) [arbitrator challenge] and (2) [decision on the challenge] are shortened to **three days**.” (Article 43(4))*

*“The decision on the Application shall be made within **fifteen days** from the date on which the Secretariat transmitted the file to the emergency arbitrator. This period of time may be extended (...)” (Article 43(7))*

Swiss Chambers' Arbitration Institution (SCAI) - Article 43 (Swiss Rules 2012) (cont. 3)



- **Threshold - need to show urgency with SCAI Court deciding whether an EA is appropriate:**

“(...) a party requiring urgent interim measures (...)” (Article 43(1))

“(...) the Application shall include: (a) A statement of the interim measure(s) sought and the reasons therefor, in particular the reason for the purported urgency” (Article 43(1)(a))

“(...) the Court shall appoint and transmit the file to a sole emergency arbitrator, unless (...) (b) it appears more appropriate to proceed with the constitution of the arbitral tribunal and refer the Application to it.” (Article 43(2)(b))

- **Cost - CHF 24,500:**

“A party applying for Emergency Relief shall pay a non-refundable Registration Fee of CHF 4,500 and a deposit as an advance for the costs of the emergency relief proceedings of CHF 20,000 (...)” (Section 1.6, Appendix B)

Swiss Chambers' Arbitration Institution (SCAI) - Article 43 (Swiss Rules 2012) (cont. 4)



- ***Ex parte* relief**

(1) An EA can order emergency relief without informing the responding party beforehand:

*“In exceptional circumstances, the arbitral tribunal may rule on a request for interim measures by way of a **preliminary order** before the request has been communicated to any other party, provided that such communication is made at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard.” (Article 26(3))*

(2) The emergency relief can be challenged (see above) and the EA can modify its decision:

“(…) Any interim measure granted by the emergency arbitrator may be modified, suspended or terminated by the emergency arbitrator or, after transmission of the file to it, by the arbitral tribunal.” (Article 43(8))

Swiss Chambers' Arbitration Institution (SCAI) - Article 43 (Swiss Rules 2012) (cont. 5)



- **Effect of the decision**

(1) The EA can order interim awards that may subsequently be modified either by the EA or the arbitral tribunal:

“A decision of the emergency arbitrator shall have the same effects as a decision pursuant to Article 26 [an Interim Award]. Any interim measure granted by the emergency arbitrator may be modified, suspended or terminated by the emergency arbitrator or, after transmission of the file to it, by the arbitral tribunal.” (Article 43(8))

(2) The emergency relief ceases to be binding in certain circumstances:

“Any measure granted by the emergency arbitrator ceases to be binding on the parties either upon the termination of the emergency relief proceedings pursuant to Article 43(3), upon the termination of the arbitral proceedings, or upon the rendering of a final award, unless the arbitral tribunal expressly decides otherwise in the final award.” (Article 43(10))

Swiss Chambers' Arbitration Institution (SCAI) - Article 43 (Swiss Rules 2012) (cont. 6)



- **Interesting characteristics of the SCAI EA mechanism**
 - EA provisions apply to **all** arbitrations conducted under the Swiss Rules (unless express opt out). Application broad in scope.
 - Six EA applications filed since 2012. The EA issued decisions in five instances. In one instance, the EA proceedings were terminated at the parties' request.
 - Strong gatekeeper role for the SCAI Court both jurisdictionally and substantively. May consider it more “appropriate” to proceed with the constitution of the tribunal.
 - Possibility of *ex parte* relief. In total, there have been two *ex parte* applications for emergency relief. Of the two, only one has been accepted.
 - The EA can still issue an interim award even though tribunal has been constituted.

London Court of International Arbitration (LCIA) – Article 9(B) (LCIA 2014 Rules)



- **Opt out / scope: the EA provisions shall not apply in two instances.**

(1) The parties concluded their arbitration agreement before 1 October 2014 and have not opted in to the EA provisions:

“Article 9B shall not apply if either: (i) the parties have concluded their arbitration agreement before 1 October 2014 and the parties have not agreed in writing to ‘opt in’ to Article 9B; (...)”
(Article 9.14(i))

(2) The parties have opted out of the EA provision at any other time:

“(...) or (ii) the parties have agreed in writing at any time to ‘opt out’ of Article 9B.” **(Article 9.14(ii))**

- **Parties can still seek emergency relief from competent courts:**

“Article 9B shall not prejudice any party’s right to apply to a state court or other legal authority for any interim or conservatory measures before the formation of the Arbitration Tribunal; and it shall not be treated as an alternative to or substitute for the exercise of such right (...)” **(Article 9.12)**

London Court of International Arbitration (LCIA) – Article 9(B) (LCIA 2014 Rules) (cont. 1)



- **Timings**

(1) An EA application can be made until the formation of the tribunal but not before the filing of the request / response for arbitration (as applicable):

“(...) in the case of emergency at any time prior to the formation or expedited formation of the Arbitral Tribunal (...), any party may apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or expedited formation of the Arbitral Tribunal (...)” (Article 9.4)

“Such an application shall be made (...) together with a copy of the Request (if made by a Claimant) or a copy of the Response (if made by a Respondent) (...)” (Article 9.5)

London Court of International Arbitration (LCIA) – Article 9(B) (LCIA 2014 Rules) (cont. 2)



(2) Tight time limits:

*“(...) an Emergency Arbitrator shall be appointed by the LCIA Court within **three days** of the Registrar’s receipt of the application (or as soon as possible thereafter).(...)” (Article 9.6)*

*“The Emergency Arbitrator shall decide the claim for emergency relief as soon as possible, but no later than **14 days** following the Emergency Arbitrator’s appointment. This deadline may only be extended by the LCIA Court in exceptional circumstances (...) or by the written agreement of all parties to the emergency proceedings.” (Article 9.8)*

*“A party challenging an arbitrator under Article 10.1 shall, within **14 days** of the formation of the Arbitral Tribunal or (if later) within 14 days of becoming aware of any grounds described in Article 10.1 or 10.2, deliver a written statement of the reasons for its challenge (...)” (Article 10.3)*

London Court of International Arbitration (LCIA) – Article 9(B) (LCIA 2014 Rules) (cont. 3)



- **Threshold - it must be an emergency and the LCIA Court determines the application:**

“(...) in the case of emergency (...)” (Article 9.4)

“(...) The application shall set out (...): (i) the specific grounds for requiring, as an emergency, the appointment of an Emergency Arbitrator; and (ii) the specific claim, with reasons, for emergency relief. (...)” (Article 9.5)

“The LCIA Court shall determine the application (...)” (Article 9.6)

- **Cost - £ 28,000:**

“Application fee (payable with the application for the appointment of an Emergency Arbitrator under Article 9B of the Rules: non-refundable) (...) £8,000” (7(i), Schedule of LCIA Costs)

“Emergency Arbitrator’s fee, to cover time charges and expenses (payable with the application for the appointment of an Emergency Arbitrator: non-refundable if the LCIA Court appoints an Emergency Arbitrator). (...) £20,000” (7(ii), Schedule of LCIA Costs)

London Court of International Arbitration (LCIA) – Article 9(B) (LCIA 2014 Rules) (cont. 4)



- **Effect of the decision**

(1) The EA can issue any order or award that is binding on the parties:

“(….) The Emergency Arbitrator may make any order or award which the Arbitral Tribunal could make under the Arbitration Agreement (excepting Arbitration and Legal Costs (...)); and, in addition, make any order adjourning the consideration of all or any part of the claim for emergency relief to the proceedings conducted by the Arbitral Tribunal (when formed).”

(Article 9.8)

“An order of the Emergency Arbitrator shall be made in writing, with reasons. An award of the Emergency Arbitrator shall comply with Article 26.2 and, when made, take effect as an award under Article 26.8 (subject to Article 9.11) (...).” **(Article 9.9)**

“Every award (...) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (...); **(Article 26.8)**

London Court of International Arbitration (LCIA) – Article 9(B) (LCIA 2014 Rules) (cont. 5)



(2) An EA order or award is not binding on the Arbitral Tribunal:

“Any order or award of the Emergency Arbitrator (...) may be confirmed, varied, discharged or revoked, in whole or in part, by order or award made by the Arbitral Tribunal upon application by any party or upon its own initiative.” (Article 9.11)

(3) Waiver of the right to appeal:

“(...) and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court (...)” (Article 26.8)

London Court of International Arbitration (LCIA) – Article 9(B) (LCIA 2014 Rules) (cont. 6)



- **Interesting characteristics of the LCIA EA mechanism**
 - No retroactive application. EA provisions apply to arbitration agreements entered into after 1 October 2014.
 - Only available after request for arbitration (or the response).
 - No time limit on the subsequent constitution of the tribunal.
 - Explicit waiver of any right to appeal against the EA's decision.
 - EA cannot modify the award.

Singapore International Arbitration Centre (SIAC)

– Schedule 1 (SIAC Rules 2016)



- **Opt out / scope: EA provisions apply unless the parties have agreed otherwise. The EA has the power to rule on his own jurisdiction:**

“These Rules shall come into force on 1 August 2016 and, unless otherwise agreed by the parties, shall apply to any arbitration which is commenced on or after that date.” (Article 1.2)

“(…) The Emergency Arbitrator shall have the powers vested in the Tribunal pursuant to these Rules, including the authority to rule on his own jurisdiction, without prejudice to the Tribunal’s determination.” (¶ 7, Schedule 1)

- **Parties can still seek emergency relief from competent courts:**

“A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules.” (Article 30.3)

Singapore International Arbitration Centre (SIAC)

– Schedule 1 (SIAC Rules 2016) (cont. 1)



- **Timings**

(1) The application may be submitted concurrently with the Notice of Arbitration but must be submitted before the constitution of the tribunal:

“A party (...) may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Tribunal, file an application (...)” (¶ 1, Schedule 1)

Singapore International Arbitration Centre (SIAC)

– Schedule 1 (SIAC Rules 2016) (cont. 2)



(2) Tight time limits:

*“The President shall (...) appoint an Emergency Arbitrator within **one day** of receipt (...) application and payment of the administration fee and deposits.” (¶ 3, Schedule 1)*

*“(...) Any challenge (...) must be made within **two days** of the communication (...) of the appointment of the Emergency Arbitrator and the circumstances disclosed”. (¶ 5, Schedule 1)*

*“The Emergency Arbitrator shall, as soon as possible but, in any event, within **two days** of his appointment, establish a schedule (...)” (¶ 7, Schedule 1)*

*“The Emergency Arbitrator shall make his interim order or Award within **14 days** from the date of his appointment unless, in exceptional circumstances, the Registrar extends the time. (...)” (¶ 9, Schedule 1)*

(3) The EA’s powers terminate when the case is referred to an Arbitral Tribunal:

“The Emergency Arbitrator shall have no power to act after the Tribunal is constituted. (...)” (¶ 10, Schedule 1)

Singapore International Arbitration Centre (SIAC)

– Schedule 1 (SIAC Rules 2016) (cont. 3)



- **Threshold - need to show urgency with SIAC President acting as gatekeeper to the EA mechanism:**

“A party that wishes to seek emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1.” (Article 30.2)

“The application for emergency interim relief shall include (...) the reasons why the party is entitled to such relief (...)” (¶ 1(b), Schedule 1)

“The President shall, if he determines that SIAC should accept the application for emergency interim relief, seek to appoint an Emergency Arbitrator (...)” (¶ 3, Schedule 1)

- **Cost - S\$ 35,000:**

“Administration Fee for Emergency Arbitrator Applications (Non-Refundable): Singapore Parties S\$5,350; Overseas Parties S\$5,000” (SIAC Schedule of Fees)

“Emergency Arbitrator’s Fees and Deposits: The deposits towards the Emergency Arbitrator’s fees and expenses shall be fixed at S\$30,000 (...)” (SIAC Schedule of Fees)

Singapore International Arbitration Centre (SIAC)

– Schedule 1 (SIAC Rules 2016) (cont. 4)



- **Effect of the decision:**

(1) The EA issues a binding Award or order which can be modified by the EA or Tribunal:

“The Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary, including preliminary orders (...)” (¶ 8, Schedule 1)

“The parties agree that an order or Award by an Emergency Arbitrator (...) shall be binding (...) and undertake to carry out the interim order or Award immediately and without delay.” (¶ 12, Schedule 1)

“(...) The Emergency Arbitrator may modify or vacate the preliminary order, the interim order or Award for good cause.” (¶ 8, Schedule 1)

“(...) The Tribunal may reconsider, modify or vacate any interim order or Award issued by the Emergency Arbitrator, including a ruling on his own jurisdiction. The Tribunal is not bound by the reasons given by the Emergency Arbitrator (...).” (¶ 10, Schedule 1)

Singapore International Arbitration Centre (SIAC)

– Schedule 1 (SIAC Rules 2016) (cont. 5)



(2) It ceases to be binding in certain circumstances:

“(...) cease to be binding if the Tribunal is not constituted within 90 days of such order or Award or when the Tribunal makes a final Award or if the claim is withdrawn.” (¶ 10, Schedule 1)

(3) Effect of the decision : waiver of the right to appeal:

“(...) The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made.” (¶ 12, Schedule 1)

Singapore International Arbitration Centre (SIAC)

– Schedule 1 (SIAC Rules 2016) (cont. 6)



- **Interesting characteristics of the SIAC EA mechanism:**
 - One of the earlier institutions to adopt EA provisions (2010). Has now issued two further sets of SIAC Rules (2013 and 2016) with EA provisions.
 - EA provisions apply to **all** arbitrations conducted under the SIAC Rules (unless express opt out). Application broad in scope.
 - SIAC EA provisions have been regularly invoked. This is at least partly owing to Singapore's International Arbitration Act which provides that awards by emergency arbitrators are as enforceable as those of an arbitral tribunal.

Stockholm Chamber of Commerce (SCC) - Article 32, Appendix II (SCC 2010 Rules)



- **Opt out / scope: the EA provisions apply if two conditions are satisfied.**

(1) The arbitral proceedings started after 1 January 2010:

“Under any arbitration agreement referring to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (...) the parties shall be deemed to have agreed that the following rules, or such amended rules, in force on the date of the commencement of the arbitration, or the filing of an application for the appointment of an Emergency Arbitrator (...) shall be applied” (Preamble)

(2) The parties have not agreed otherwise:

“(...) the following rules(...) shall be applied unless otherwise agreed by the parties.” (Preamble)

- **The SCC Board has a gatekeeping role with regard to jurisdiction:**

“An Emergency Arbitrator shall not be appointed if the SCC manifestly lacks jurisdiction over the dispute.” (Article 4(2), Appendix II)

Stockholm Chamber of Commerce (SCC) - Article 32, Appendix II (SCC 2010 Rules) (cont. 1)



- **Parties can still seek emergency relief from competent courts:**

“A request for interim measures made by a party to a judicial authority is not incompatible with the arbitration agreement or with these Rules.” (Article 32(5))

- **Timings**

(1) An EA application can be made before the arbitration has been commenced until the case is referred to the tribunal:

“Provisions with respect to interim measures requested before arbitration has been commenced or a case has been referred to an Arbitral Tribunal are set out in Appendix II [Emergency Arbitrator]”. (Article 32(4))

“A party may apply for the appointment of an Emergency Arbitrator until the case has been referred to an Arbitral Tribunal (...)” (Article 1(1), Appendix II)

Stockholm Chamber of Commerce (SCC) - Article 32, Appendix II (SCC 2010 Rules) (cont. 2)



(2) Tight time limits:

*“The Board shall seek to appoint an Emergency Arbitrator within **24 hours** of receipt of the application for the appointment of an Emergency Arbitrator.” (Article 4(1), Appendix II)*

*“(…) a challenge must be made **within 24 hours** from when the circumstances giving rise to the challenge of an Emergency Arbitrator became known to the party.” (Article 4(3), Appendix II)*

*“Any emergency decision on interim measures shall be made not later than **5 days** from the date upon which the application was referred to the Emergency Arbitrator (…)” (Article 8(1), Appendix II)*

(3) The EA’s powers terminate when the case is referred to an Arbitral Tribunal:

“(…) The powers of the Emergency Arbitrator shall (…) terminate when the case has been referred to an Arbitral Tribunal (…)” (Article 1(2), Appendix II)

Stockholm Chamber of Commerce (SCC) - Article 32, Appendix II (SCC 2010 Rules) (cont. 3)



- **Threshold - EA will decide whether the application for relief has merit:**

“The Arbitral Tribunal may, at the request of a party, grant any interim measures it deems appropriate.” (Article 32(1))

- **Cost - EUR 15,000:**

“The costs of the emergency proceedings include: (i) the fee of the Emergency Arbitrator which amounts to EUR 12,000; and (ii) the application fee which amounts to EUR 3,000.” (Article 10(2), Appendix II)

Stockholm Chamber of Commerce (SCC) - Article 32, Appendix II (SCC 2010 Rules) (cont. 4)



- **Effect of the decision**

(1) The decision is a binding order or award that does not constrain the tribunal or the EA:

“An interim measure shall take the form of an order or an award.” (Article 32(3))

“An emergency decision shall be binding on the parties when rendered.” (Article 9(1), Appendix II)

“The emergency decision may be amended or revoked by the Emergency Arbitrator upon a reasoned request by a party.” (Article 9(2), Appendix II)

“By agreeing to arbitration under the Arbitration Rules, the parties undertake to comply with any emergency decision without delay.” (Article 9(3), Appendix II)

“An Arbitral Tribunal is not bound by the decision(s) and reasons of the Emergency Arbitrator.” (Article 9(5), Appendix II)

Stockholm Chamber of Commerce (SCC) - Article 32, Appendix II (SCC 2010 Rules) (cont. 5)



(2) The decision ceases to be binding in certain circumstances including failure to commence the arbitration within 30 days of the decision being issued:

*“The emergency decision ceases to be binding if: (i) the Emergency Arbitrator or an Arbitral Tribunal so decides; (ii) an Arbitral Tribunal makes a final award; (iii) arbitration is not commenced **within 30 days** from the date of the emergency decision; or (iv) the case is not referred to an Arbitral Tribunal **within 90 days** from the date of the emergency decision.”*

(Article 9(4), Appendix II)

Stockholm Chamber of Commerce (SCC) - Article 32, Appendix II (SCC 2010 Rules) (cont. 6)



- **Interesting characteristics of the SCC EA mechanism**

- EA provisions apply to **all** arbitrations conducted under the SCC Rules (unless express opt out). Application broad in scope.
- The SCC 2010 Rules entered into force on 1 January 2010 making them the first set of rules with the EA mechanism as we know it today. SIAC followed suit a few months later.

Take away points

Features in common, differences and next steps



Features in common



- All followed the opt out model.
- The EA has the ability to modify its own orders (exception of the LCIA).
- The EA can be challenged.
- The EA can condition the interim relief on the provision of security.
- The EA cannot bind the arbitral tribunal.

Main differences



- Application before filing of the request for arbitration vs. afterwards
- Retroactive application vs. non-retroactive application of EA provisions.
- Fees.
- Ability of the EA to sit on the arbitral tribunal after it is constituted.
- Power of the EA ceases after the arbitral tribunal is constituted vs. phasing out period.
- *Ex parte* relief – only available pursuant to the Swiss Rules.

Other institutions with / without emergency arbitrator provisions



With	Without
<p>Hong Kong International Arbitration Centre (HKIAC) Rules 2013</p> <p>International Centre for Dispute Resolution (ICDR) Rules 2014</p> <p>World Intellectual Property Organization (WIPO) Rules 2014</p> <p>Netherlands Arbitration Institute (NAI) Rules 2015</p> <p>Panel of Recognised International Market Experts in Finance (PRIME Finance)</p> <p>The Australian Centre for International Commercial Arbitration (ACICA)</p> <p>China International Economic and Trade Arbitration Commission (CIETAC)</p>	<p>Vienna International Arbitration Centre (VIAC) 2013</p> <p>The Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID)</p> <p>Milan Chamber of Arbitration 2010</p>

What next after getting the emergency relief?



- What comes next? How do parties enforce the decision issued by the EA?
- Which jurisdictions (e.g. Singapore) enforce the decisions of an EA?
- More generally, would a national court enforce the decision of an EA pursuant to the New York Convention?
- Are parties better off seeking interim measures before national courts?

Thank you for your attention



For additional information about Orrick's International Arbitration practice, please contact us:



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