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Edgardo MUÑOZ[1]

How urgent shall an emergency be? – The standards required to grant urgent relief by emergency arbitrators

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Abstract

In recent years, many arbitration institutions have adopted so-called 'emergency relief rules'. These rules allow parties to request an 'emergency arbitrator' to issue interim measures before the arbitral tribunal is constituted. The author submits that while emergency arbitrators might apply the same substantive requirements that arbitral tribunals apply for granting interim relief, the standard required to meet each substantive requirement shall be different. In addition, the author explores the power of emergency arbitrators to grant urgent relief ex parte and a particular fact scenario where emergency arbitrators will add imminent value to the process of arbitration.

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1 Dr. Edgardo Muñoz is Professor of Law at Panamericana University in Guadalajara, Mexico. The author would like to thank Professor George A. Bermann and Professor Alejandro Garro both from Columbia University Law School and Dr. Cesar Pereira (Colombia Law Visiting Scholar 2013-2014) for their comments on the ideas in this paper which were first presented by the author at the Visiting Scholars Monthly Forum – Columbia Law School on 9 October 2013.

Keywords

Emergency arbitrator, emergency relief, urgent relief, interim relief, interim measures, provisional measures, temporary measures, *ex parte* measures, institutional arbitration, CISG

I Introduction

Provisional measures granted by arbitrators are a relatively recent chapter in the law of arbitration. Only some decades ago, arbitrators had no power to grant provisional measures in many jurisdictions.[2] Back then State courts were the only judicial body empowered to grant provisional measures.[3] Parties to arbitration proceedings had to apply for the aid of State courts when need existed. Nowadays, however, most national arbitration laws give arbitrators the power to grant interim measures.[4] This is the case in jurisdictions which have adopted the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL MAL")[5] and in the main international arbitration centres such as England,[6] France,[7] Germany,[8] Switzerland,[9] the United States,[10] etc. Provisional measures granted by arbitrators have thus come to be a new chapter in the law of arbitration, with the exception of some specific countries' laws.[11]

2 Ali Yesilirmak, Provisional Measures in International Commercial Arbitration, The Hague 2005, 42-43; Gary B. Born, International Commercial Arbitration, 2nd ed., Alphen aan den Rijn 2014, 2431-32; Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 288.

3 Ali Yesilirmak, Provisional Measures in International Commercial Arbitration, The Hague 2005, 42-43.

4 Gary B. Born, International Commercial Arbitration, 2nd ed., Alphen aan den Rijn 2014, 2433; Jean Francois Poudret/Sebastien Besson, Comparative Law of International Arbitration, 2nd ed., London 2007, 521-22.

5 UNCITRAL MAL contains detailed provisions in Art. 17-17J; Gay B. Born, International Commercial Arbitration, 2nd ed., Alphen aan den Rijn 2014, 2434-35.

6 Sec. 38 (3), (4) and (6) English Arbitration Act.

7 Art. 1468 and Art. 1506 (3) French Code of Civil Procedure.

8 Art. 1041 German Code of Civil Procedure.

9 Art. 183 Swiss Federal Private International Law Act.

10 Gary B. Born, International Commercial Arbitration, 2nd ed., Alphen aan den Rijn 2014, 2436, FN 61: "In the United States, the text of the FAA is silent on the arbitrators' powers to order provisional measures. Nonetheless, U.S. courts now recognize broad authority on the part of arbitral tribunals to grant interim relief, again, absent contrary agreement." […] "*Toyo Tire Holdings of Ams. Inc. v. Cont'l Tire N. Am., Inc.,* **609 F.3d 975** (9th Cir. 2010); *Arrowhead Global Solutions, Inc. v. Datapath, Inc.,* 166 F.Appx. 39, 44 (4th Cir. 2006) ('arbitration panels must have the power to issue temporary equitable relief in the nature of a preliminary injunction'); *Banco de Seguros del Estado v. Mut. Marine Office, Inc.,* **344 F.3d 255** (2d Cir. 2003); *Island Creek Coal Sales Co. v. City of Gainesville,* **729 F.2d 1046**, 1049 (6th Cir. 1984)".

11 The arbitration law in Italy, Thailand, Argentina and China still give to State courts the exclusive power to issue interim measure in support of the arbitration proceedings; see Art. 818 Italian Code of Civil Procedure; Art. 68 Chinese Arbitration Law; Sec. 16 Thai Arbitration Act; Art. 753 Argentine National Code of Civil and Commer-

Despite being a relatively recent chapter in arbitration, thus, less common than interim measures in the context of civil court proceedings, interim measures are becoming increasingly important in arbitration practice. According to White & Case 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process ("White & Case 2012 Survey"), 77% of participants answered that they had experience with interim measures ordered by arbitral tribunals in one quarter of their arbitrations.[12] In addition, 89% of the participants answered that they had experience with interim measures ordered by State courts in aid of arbitration proceedings in one quarter of their arbitrations.[13]

The use and importance of interim measures is expected to increase with the recent adoption of rules on emergency arbitrators (or urgent relief) by major arbitration institutions. The forerunner of the modern rules on urgent relief is Article 9 of the London Court of International Arbitration ("LCIA") Rules of 1998. This provision envisioned the expedited formation of the arbitral tribunal in cases of exceptional urgency.[14] Article 9 LCIA Rules has since evolved in a 2014 version which enables the application to the LCIA Court for the immediate appointment of an emergency arbitrator prior to the formation or expedited formation of the arbitral tribunal.[15]

Article 37 (1) of the International Centre for Dispute Resolution of the American Arbitration Association ("ICDR") Rules of 2006 was the first of its kind.[16] Since their 2006 edition, the ICDR Rules entitle a party to arbitration to request the appointment of an emergency arbitrator who will hear requests for emergency relief prior to the formation of the arbitral tribunal.[17] The ICDR Rules and its urgent relief rules were amended in a 2014 version integrating recent developments in arbitration practice.[18] Other institutions have followed up with the adoption of emergency arbitrator rules. The Hong Kong International Arbitration Centre ("HKIAC")[19] and the Mexico City National Chamber of Commerce ("CANACO")[20] in 2008. The Singapore International Arbitration Centre ("SIAC")[21] and the Stockholm Chamber of Commerce ("SCC")[22] in 2010. Finally, the Swiss Chambers' Arbitration Institution ("SWISS")[23] and the International Chamber of

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cial Procedure; Regarding Italy see Ferdinando Emanuele/Milo Molfa, Selected Issues in International Arbitration: The Italian Perspective, London 2014, 159.

12 White and Case, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, London 2012, 2, available at http://annualreview2012.whitecase.com/International_Arbitration_Survey_2012.pdf (20 November 2014).

13 Ibid.

14 Art. 9.1 LCIA Rules 1998; Marie Öhrström, Chapter XII: SCC Rules, in: Rodolf A. Schütze (ed.), Institutional Arbitration - Article-by-Article Commentary, Munich 2013, 445-46.

15 Art. 9.4 LCIA Rules 2014.

16 Gary B. Born, International Commercial Arbitration, 2nd ed., Alphen aan den Rijn 2014, 2452.

17 Art. 37 (1) ICDR Rules 2006.

18 Art. 6 ICDR Rules 2014.

19 Art 38 HKIAC Rules 2008.

20 Art. 36 and Art. 50 CANACO Rules 2008.

21 Art. 26 (2) and Schedule I SIAC Rules 2010 (updated in 2013).

22 Appendix II SCC Rules 2010.

23 Art. 42 and Art. 43 SWISS Rules 2012.

Commerce ("ICC") in 2012.[24] This article will focus on the LCIA Rules 2014, the SIAC Rules 2013, the ICC Rules 2012, the SWISS Rules 2012, the SCC Rules 2010 and the HKIAC Rules 2008.

The adoption of the urgent relief rules is an attempt to improve the functioning and practical benefits of the above institutional rules.[25] Under the principle of concurrent power of arbitral tribunals and State courts (see Part II below), a party seeking urgent interim measures before the arbitral tribunal was constituted, had only one choice: to request such measures before State courts. Why? Because it usually takes the parties or the institution one to five months to constitute an arbitral tribunal from the filing of the notice of arbitration; in a best case scenario.

Rules on emergency relief were aimed at responding to the parties' demand to have the choice to avoid approaching State courts with interim relief requests before the formation of the arbitral tribunal.[26] It has been reported that parties had in some instances an interest to avoid State courts still before the formation of arbitral tribunal because of confidentiality issues and rapidity reasons.[27] It has also been pointed out that prior to the constitution of the arbitral tribunal, parties usually face difficulties in identifying the competent State court of interim measures;[28] in particular where the seat of the arbitration is not yet known. Giving the parties the choice of having an emergency arbitrator to decide these requests, solves the problem.

In addition, under most arbitration laws the catalogue of interim relief is bigger for arbitrators than for State judges (see Part III below).[29] Accordingly, emergency relief is understood to be more suitable to handle some of the modern fact

24 Art. 29 (1) and Appendix V ICC Rules 2012.

25 Andreas Respondek, Five Proposals to Further Increase the Efficiency of International Arbitration Proceedings, Journal of International Arbitration, 31 (2014) 4, 508, 510; Miguel Oural/Edgardo Muñoz, The 2012 Swiss Rules of International Arbitration – More Efficiency and Effectiveness of Arbitration Proceedings, Latin American Journal of International Trade Law, 1 (2013) 1, 452-54; Christian Aschauer, Use of the Icc Emergency Arbitrator to Protect the Arbitral Proceedings, ICC International Court of Arbitration Bulletin, 2 (2012) 23, 5; Louise Barrington, Emergency Arbitrators: Can They Be Useful to the Construction Industry?, Construction Law International, 7 (2012) 2, 7; Raja Bose/Ian Meredith, Emergency Arbitration Procedures: A Comparative Analysis, International Arbitration Law Review (2012) 5, 186; Johan Lundstedt, SCC Practice: Emergency Arbitrator Decisions, Stockholm 2014, 1, available at http://www.sccinstitute.com/filearchive/4/46698/SCC%20practice%202010%20-%202013%20emergency%20arbitrator_FINAL.pdf (20 November 2014).

26 Gary B. Born, International Commercial Arbitration, 2nd ed., Alphen aan den Rijn 2014, 2451; Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 289, 294.

27 Andrea Carlevaris, Pre-Arbitral Interim Relief: Different Models and the ICC Experience, at: Interim Relief: What, Why, When, How?, New York 2013, program available at http://blogs.law.nyu.edu/transnational/wp-content/uploads/2013/09/Interim-Measures-Brochure-Oct-7-2013.pdf (20 November 2014).

28 Ibid.; Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 294.

29 Andrea Carlevaris, Pre-Arbitral Interim Relief: Different Models and the ICC Experience, at: Interim Relief: What, Why, When, How?, New York 2013, program available at http://blogs.law.nyu.edu/transnational/wp-content/uploads/2013/09/Interim-Measures-Brochure-Oct-7-2013.pdf (20 November 2014).

scenarios giving rise to requests for interim relief. Volatility of markets is one of them. In the aftermath of the 2009 economic crisis, a new wave of fear and speculation invaded players in international markets. The value of goods subject to a dispute could fluctuate up or down by 100% in a matter of days while a party was just starting arbitration and no arbitral tribunal was set up. New means of communication also entail that a party's conduct may have an immediate and transnational impact on the other party's property or business image. Given the speed at which things can evolve in a contractual relationship, it became vital to allow an immediate access to a party's right of protection in arbitration. The remedy of indemnity through damages in a final award does not always fully compensate or compensate at all. In some instances, the constitution of the arbitral tribunal may take too long to allow it to issue an effective interim measure; irreparable harm may have already been suffered by the applicant.

In addition to a perceived need to have immediate protection against external harms through emergency relief,[30] recent views suggest that anticipation should be promoted and ensured in arbitration proceedings.[31] In particular, when specific performance of one party's contractual obligations appears to be the proper remedy, an order to maintain the *status quo* should in some instances not wait until the constitution of the arbitral tribunal not to say until the issuance of the final award.[32] The danger of making an ineffective final award should therefore be reduced to the extent possible.

Moreover, a need to record evidence alive has also increased in arbitration practice.[33] Emergency arbitrators are meant to improve the arbitration proceedings in this regard (see Part VII below). As the effectiveness of an argument is basically dependent on the existence of proper evidence, a party may have a high interest in obtaining an order against the other party to preserve documents or any type of evidence, even before the arbitral tribunal is formed. Last but not least, a broader type of disputes is now arbitrable under modern arbitration laws.[34] For instance, antitrust disputes, sports disputes, employment disputes. Therefore, interim measures are more needed.[35] And emergency relief may make the difference in some fields. Sports disputes are perhaps the best example whereby a party requests orders to restore the *status quo* that existed before the dispute. In most appeals against disciplinary decisions, athletes immediately file a request for interim relief consisting in the lifting of any sanction

30 Massimo Benedettelli, Interim Measures between Party Autonomy and State Powers, at: Interim Relief: What, Why, When, How?, New York 2013, program available at http://blogs.law.nyu.edu/transnational/wp-content/uploads/2013/09/Interim-Measures-Brochure-Oct-7-2013.pdf (20 November 2014).

31 Ibid.

32 Gary B. Born, International Commercial Arbitration, 2nd ed., Alphen aan den Rijn 2014, 2451.

33 Massimo Benedettelli, Interim Measures between Party Autonomy and State Powers, at: Interim Relief: What, Why, When, How?, New York 2013, program available at http://blogs.law.nyu.edu/transnational/wp-content/uploads/2013/09/Interim-Measures-Brochure-Oct-7-2013.pdf (20 November 2014).

34 Dominico Dipietro, Interim Measures in International Arbitration: Practical Approaches, at: Interim Relief: What, Why, When, How?, New York 2013, program available at http://blogs.law.nyu.edu/transnational/wp-content/uploads/2013/09/Interim-Measures-Brochure-Oct-7-2013.pdf (20 November 2014).

35 Ibid.

(mainly suspensions) imposed by the sport federation concerned. Many of these requests for interim relief are treated by arbitral panels constituted under the Code of the Court of Arbitration for Sports ("CAS") which ultimately decide on their merits.[36] But athletes are also entitled to request interim measures before the arbitration panel is constituted. These requests are decided within days by the President of the relevant division of the CAS.[37]

The present article addresses an emergency arbitrator's power to issue interim measures [II] and the types of measures that an emergency arbitrator may order [III]. In addition, it analyses the formal [IV] and substantive requirements for the granting of emergency relief [V]. It discusses some valid concerns with regard to an emergency arbitrator's power to issue urgent measures *ex parte* [VI]. It finally explores a particular fact scenario where emergency arbitrators may add imminent value to the process of arbitration in the context of international sales disputes [VII].

II Emergency arbitrators' power to order emergency relief

The jurisdiction of an arbitrator to grant provisional measures is not exclusive as a matter of law. State judges maintain their jurisdiction to grant interim measures in aid of arbitration proceedings under most arbitration laws.[38] Concurrent jurisdiction and power is said to exist for both arbitrators and State courts with respect to interim measures.[39] However, arbitration laws assume that this power is given to an "arbitral tribunal" duly constituted to decide a dispute in a final award and able to deal with a request for provisional measures.[40] Thus, as a matter of default rules of law, only the State courts have jurisdiction to issue interim measures before an arbitral tribunal is constituted.

Therefore, the question is whether under all those arbitration laws, the parties are free to agree on a procedure for provisional measures to be granted before arbitrators are appointed and the arbitral tribunal is constituted? The answer is yes. This possibility shall be understood as part of the parties' freedom to confer additional powers to arbitrators in terms of interim measures.[41] The parties' arbi-

36 Rule 37 CAS 2013.

37 Rule 37 CAS 2013.

38 See for example Sec. 44 English Arbitration Act (allows courts to issue preliminary injunctions in aid of arbitrations; even when the arbitration is seated outside of England and Wales); Art. 1425 Mexican Code of Commerce which follows Art. 17 UNCITRAL MAL 1985 (establishing State courts' concurrent power to issue interim measures in arbitrations); Ali Yesilirmak, Provisional Measures in International Commercial Arbitration, The Hague 2005, 66-68.

39 Though, as said before, in some jurisdictions the State courts maintain exclusive power to issue interim measures e.g. Art. 818 Italian Code of Civil Procedure; Art. 68 Chinese Arbitration Law; Sec. 16 Thai Arbitration Act; Art. 753 Argentine National Code of Civil and Commercial Procedure.

40 Gary B. Born, International Commercial Arbitration, 2nd ed., Alphen aan den Rijn 2014, 2450-51. This would be inferred from most provisions, see for example Art. 183 Swiss Federal Private International Law Act and Art. 1433 Mexican Code of Commerce.

41 It is widely accepted that the parties in an arbitration may expand or restrict the concurrent power of State courts or arbitral tribunals, cf. Ali Yesilirmak, Provisional

tration agreement may specify that arbitrators will have broader powers than the general power to grant provisional measures under the provisions of the *lex arbitri*. This happens by means of a choice of one of the institutional rules considered here.[42] This choice will enable the appointment of an emergency arbitrator before the constitution of the tribunal.[43]

This possibility implies one positive novelty: concurrent jurisdiction of arbitrators and State judges has no time restrictions even before a request for arbitration has been filed. In other words, parties may seek provisional measures from emergency arbitrators or from a State court, no matter that the arbitral tribunal has not been constituted. Once the arbitral tribunal is constituted, however, emergency arbitrators lose their power to hear any request for urgent relief.[44]

Should a party decide to apply for interim measures to a State judge despite existing the possibility to file an application for urgent relief, a well settled principle indicates that such an application will not be incompatible with the arbitration agreement and shall not be regarded as a submission of the substance of the case to the State courts.[45] In addition, the choice of arbitration rules contem-

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Measures in International Commercial Arbitration, The Hague 2005, 59: "Arbitrating parties are free to design the terms of their arbitration agreement as they see fit due to party autonomy. Consequently, the arbitrating parties are free to exclude or amend the power of arbitrators to grant provisional measures".

42 The SWISS Rules 2012 emergency arbitrator provisions will apply to all proceedings initiated on or after 1 June 2012, unless the parties agree otherwise. See Art. 1 (3) and Art. 43 (1) SWISS Rules 2012. In contrast, Art. 29 (6) (a) ICC Rules 2012 and Art. 37 (1) ICDR Rules 2014 provide that emergency proceedings only apply to arbitration agreements entered into after the entry into force of the emergency relief provisions, the Swiss Rules do not provide for such transitional rule. The emergency procedure is subject to the general rule in Art. 1 (3) SWISS Rules 2012 and therefore applies to all arbitration proceedings in which the Notice of Arbitration was submitted on or after 1 June 2012, unless the parties agree otherwise. See Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 295; Philipp Habegger, The Revised Swiss Rules of International Arbitration – an Overview of the Major Changes, ASA Bulletin, 30 (2012) 2, 295-96.

43 Chester Brown, The Enforcement of Interim Measures Ordered by Tribunals and Emergency Arbitrators in International Arbitration, in Albert Jan van Den Berg (ed.), International Arbitration: The Coming of a New Age?, The Hague 2013, 283-84; Gary B. Born, International Commercial Arbitration, 2nd ed., Alphen aan den Rijn 2014, 253: "Because the 2012 ICC, NAI, SCC, SIAC, Swiss and ICDR Rules do not require a separate agreement by the parties to this mechanism, they have enjoyed greater usage than previous efforts (particularly the ICC Pre-Arbitral Referee Rules) and are likely to continue to grow in popularity."; Marie Öhrström, Chapter XII: SCC Rules, in: Rodolf A. Schütze (ed.), Institutional Arbitration – Article-by-Article Commentary, Munich 2013, 844, 58.

44 Art. 2 (2) of Appendix V ICC Rules 2012; Art. 1 (2) of Appendix II SCC Rules 2010; Art. 20 of Schedule 4 HKIAC Rules 2008; Art. 9.8 LCIA Rules 2014; Art. 43 (10) (11) SWISS 2012; Art. 7 of Schedule 1 SIAC Rules 2013.

45 Art. 29 (7) ICC Rules 2012: "Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement." This principle was first set forth in Art. VI (4) of the European Convention 1961; Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 293; Marie Öhrström, Chapter XII: SCC Rules, in: Rodolf A. Schütze (ed.), Institutional Arbitration - Article-by-Article Commentary,

plating the possibility of urgent relief will not be understood, *per se,* as a restriction of the State courts' power to issue interim measures at any stage[46], unless the chosen institutional rules expressly restrict this power.[47] In fact, many institutional rules expressly provide for the State courts' concurrent power.[48] On the other hand, in accordance with the arbitration rules under which urgent relief is available, the parties may opt out to resort to any emergency arbitrator.[49]

III Types of measures that may be issued by emergency arbitrators

The salient feature of interim measures in all arbitration laws is that these do not have a definitive and final character and their nature is temporary or provisional.[50]

Munich 2013, 844; René-Alexander Hirth, Chapter IX: SIAC Rules, in: Rodolf A. Schütze (ed.), Institutional Arbitration - Article-by-Article Commentary, Munich 2013, 655; Jean-Francois Poudret and Sebastien Besson, Comparative Law of International Arbitration, 2nd ed., London 2007, 525.

46 Art. 29 (7) ICC Rules 2012: "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 for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules"; Art. 22 of Schedule 4 HKIAC Rules 2008: "The Emergency Arbitrator Procedures are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time"; Art. 9.12 LCIA Rules 2014: "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*"*. Jean-Francois Poudret and Sebastien Besson, Comparative Law of International Arbitration, 2nd ed., London 2007, 524-25.

47 Art. R37 (1) CAS Code 2013 contains an express waiver of any requests for interim relief made before national courts with respect to appeal arbitration proceedings. This waiver was held to be valid and binding by a decision by a Court of First Instance in Zurich (Switzerland) dated 16 August 2005 (Bezirksgericht of Zurich, Judgment of 16 August 2005, unpublished, para. 6.2,). In addition, Art. 28 (2) ICC Rules 2012 provides that after the file has been transmitted to the arbitral tribunal the parties may apply to any competent authority for provisional measures only "in appropriate circumstances". This has been interpreted as a limitation of the jurisdiction of the national courts as from the time when the file has been transmitted to the arbitrator. However, the qualification imported by the words "in appropriate circumstances" may raise more problems than it is intended to solve in practice; Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 293: suggesting that "appropriate circumstances" take place when "the tribunal is not in a position to provide suitable relief to the requesting party […] where third parties are involved, where measures will be effective only if granted ex parte, or where the court's enforcement is required".

48 Art. 28 (2) ICC Rules 2012; Art. 26 UNCITRAL Rules 2010, Art. 26 SWISS Rules 2012; Art. 23.9 HKIAC Rules 2008.

49 See for example Art. 29 and Appendix V ICC Rules 2012; Art. 9.14 LCIA Rules 2014; Art. 43 (1) SWISS Rules 2012; Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 295;

50 Art. 17 (2) UNCITRAL MAL 2006 defines an interim measure as any temporary measure by which the arbitral tribunal orders a party something required to protect

They are granted or refused upon a summary examination of the request. They may be withdrawn by the requesting party, amended or terminated by the arbitral tribunal during the arbitral proceedings.[51] As interim measures are not final, they are not binding on other courts or arbitral tribunals, unlike a final decision on the merits. As they are by essence temporary, the decision to grant them is in force only for a limited period of time, *i.e.* pending the proceedings, until the final decision on the merits is made by arbitrators. Although the interim relief may be the same relief in the final award, the granting of interim relief will be effective, however, only pending the proceedings.

A decision of the emergency arbitrator has the same provisional nature as a decision on interim measures made by an arbitral tribunal. The decision can be modified, suspended or revoked by the emergency arbitrator (or cease to be binding upon the termination of the emergency proceedings if the applicant has not filed its Notice of Arbitration under some rules).[52] The arbitral tribunal may maintain, modify or terminate the emergency relief after the file has been transmitted to it.[53] If maintained by the subsequently formed arbitral tribunal, interim measures granted by an emergency arbitrator cease to be binding on the parties upon the rendering of the final award or the termination of the arbitration proceedings by such an arbitral tribunal.[54]

Most arbitration laws and rules do not set forth the type of measures that arbitrators may grant, and rightly so.[55] Modern arbitration laws and arbitration rules[56] tend to give arbitrators ample discretion to order any type of measures they deem appropriate or necessary in order to enhance the arbitration process and achieve an effective award.[57] Measures may be intended to protect the (procedural or substantive) rights of a party.[58] Others may aim at dealing with the rela-

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another party's rights or avoid irreparable harm which may occurre during the course of the proceedings until a final award, by which the dispute is finally decided, is issued; Art. 183 Swiss Federal Private International Law Act: "Unless the parties have otherwise agreed, the arbitral tribunal may, on motion of one party, order provisional or conservatory measures"; Art. 1468 French Code of Civil Procedure: "The arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set conditions for such measures and, if necessary, attach penalties to such order".

51 See in particular Art. 1468 (2) of the French Code of Civil Procedure and Art. 17D UNCITRAL MAL 2006.

52 Art. 6 (8) of Appendix V ICC Rules 2012; Art. 18 of Schedule 4 HKIAC Rules 2008; Art. 43 (8) SWISS Rules 2012; Art. 9 (2) of Appendix II SCC Rules 2010.

53 Art. 29 (3) ICC Rules 2012; Art. 23 (5) HKIAC Rules 2008; Art. 9.11 LCIA Rules 2014; Art. 43 (8) SWISS.

54 Art. 9 (4) (ii) of Appendix II SCC Rules 2010; Ar. 6 (6) (c) of Appendix V ICC Rules 2012; Art. 19 (b) of Schedule 4 HKIAC Rules 2008; Art. 43 (10) SWISS Rules 2012.

55 There are nevertheless some exceptions in comparative law like Sect. 38 (3), (4) and (6) English Arbitration Act and Art. 17 (2) UNCITRAL MAL 2006 which contain a non-exclusive list of types of interim measures.

56 Art. 28 (1) ICC Rules 2012; Art. 26 SIAC Rules 2012; Art. 24.1 HKIAC Rules 2008; Art. 32 SCC Rules 2010; Art. 25 LCIA Rules 2014; Jason Fry/Simon Greenberg/ Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 289.

57 Gary B. Born, International Commercial Arbitration*,* 2nd ed., Alphen aan den Rijn 2014, 2464.

58 Art. 17 (2) (a) UNCITRAL MAL 2006.

tionship between the parties pending the arbitral proceedings in order to reduce or prevent harm to the requesting party or the arbitral process where such reduction or prevention is required as a matter of urgency.[59] Different types of measures may be issued by arbitrators to achieve different purposes. The catalogue of interim relief is certainly bigger in the context of arbitration than in the context of State courts litigation.[60]

Emergency arbitrators are entitled to grant any provisional measures that an arbitral tribunal would also be entitled to grant.[61] An emergency arbitrator could in principle grant a provisional measure which the State courts at the seat would grant in similar circumstances. However, an emergency arbitrator must not necessarily follow the types of provisional measures available to the State judge at the seat. Conversely, emergency arbitrators may be prevented by the law of the seat from granting certain types of provisional measures which are of the exclusive competence of State courts at the seat of arbitration.[62] For example, an arbitrator sitting in France has no power to grant interim measures consisting of an attachment of assets.[63]

Further restrictions as to the type of measures available to emergency arbitrators could be found in the institutional rules agreed upon by the parties. However, most institutional rules also provide that an emergency arbitrator may grant any interim measures he deems appropriate[64] or necessary.[65] Other institutional rules like the ICC Rules[66] do not expressly set forth what types of interim measures may be issued by emergency arbitrators. However, it is understood

59 Art. 17 (2) (b) (c) UNCITRAL MAL 2006.

60 Andrea Carlevaris, Pre-Arbitral Interim Relief: Different Models and the ICC Experience, at: Interim Relief: What, Why, When, How?, New York 2013, program available at http://blogs.law.nyu.edu/transnational/wp-content/uploads/2013/09/Interim-Measures-Brochure-Oct-7-2013.pdf (20 November 2014).

61 Thomas Webster/Michael Buhler, Handbook of ICC Arbitration, 3rd ed., London 2014, 448; Art. 29 (1) ICC Rules 2012; Art. 32 (5) SCC 2010 and Art. 1 (2) of Appendix II SCC Rules 2010; Art. 16 of Schedule 4 HKIAC Rules 2008; Art. 43 (1) (8) SWISS Rules 2012.

62 SCC Emergency Arbitration 057/2013 in Johan Lundstedt, SCC Practice: Emergency Arbitrator Decisions, Stockholm 2014, 24, available at http://www.sccinstitute.com/filearchive/4/46698/SCC%20practice%202010%20-%202013%20emergency%20arbitrator_FINAL.pdf (20 November 2014): "[…] 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".

63 Art. 1468 (1) French Code of Civil Procedure states that enforcement of an attachment of assets requires resort to execution officers or other public authorities and thus shall not be ordered by arbitrators. See also Jean-Francois Poudret and Sebastien Besson, Comparative Law of International Arbitration, 2nd ed., London 2007, 522-23.: pointing out that freezing orders or *Mareva* injunctions are also controversial in many jurisdictions.

64 Art. 1 of Appendix II SCC Rules 2010.

65 Art. 23.2 HKIAC Rules 2008; Art. 1 of Schedule 1 SIAC Rules 2014.

66 Art. 29 (2) ICC Rules.

that an emergency arbitrator may make any order or award which the arbitral tribunal could make under the arbitration agreement[67] as it is expressly set forth in the LCIA Rules[68] and the SWISS Rules.[69] International practice shows a variety of provisional measures considered or granted by arbitrators. General types of measures were recently "codified" in Article 17 (2) of the UNCITRAL MAL (2006) and Article 26 (2) of the UNCITRAL Rules (2010). These include:[70]

- Orders to preserve the subject matter of the dispute during the proceedings;
- Orders to maintain the legal relationship that exists between the parties during the proceedings;
- Orders to provisionally perform contractual obligations;
- Orders to preserve evidence;
- Order to deposit security for costs of arbitration proceedings;
- Orders to maintain the confidentiality of the proceedings.

In cases reported by SIAC and SCC, emergency arbitrators have considered the following types of measures. An applicant requested emergency arbitrators to issue an interim measure in the form of an injunction restraining the respondent from calling a performance bond without any basis.[71] Applicants have also sought urgent relief consisting in orders to restrain the respondent from breaching the confidentiality provisions in their agreement.[72] In a dispute over the quality of a cargo, an applicant (seller) requested an emergency arbitrator to allow it to sell the cargo with goods which were deteriorating.[73] In a different dispute over

67 Thomas Webster/Michael Buhler, Handbook of ICC Arbitration, 3rd ed., London 2014, 448.

68 Art. 9.8 LCIA Rules 2014: excepting arbitration and legal costs under Art. 28.2 and Art. 28.3 LCIA Rules 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).

69 Art. 43.1 in conjunction with Art. 26 (1) SWISS 2012: the emergency arbitrator may grant the same interim measures as an arbitral tribunal under the Rules, i.e. any interim measures he or she deems necessary or appropriate.

70 Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 289. The list of common types of interim relief mentioned by the ICC Secretary coincide with the list of measures in Art. 17 (2) of the UNCITRAL MAL (2006) and Art. 26 (2) of the UNCITRAL Rules (2010); see also Jean Francois Poudret/Sebastien Besson, Comparative Law of International Arbitration, 2nd ed., London 2007, 538.

71 Raja Bose/Ian Meredith, Emergency Arbitration Procedures: A Comparative Analysis, International Arbitration Law Review (2012) 5, 189; SCC Emergency Arbitration 0139/2010 in Johan Lundstedt, SCC Practice: Emergency Arbitrator Decisions, Stockholm 2014, 6-8, available at http://www.sccinstitute.com/filearchive/4/46698/SCC%20practice%202010%20-%202013%20emergency%20arbitrator_FINAL.pdf (20 November 2014): in a dispute over a building project, the claimant requested an emergency arbitrator an interim injunction ordering the respondent to refrain from collecting any amount under the bank guarantees supplied by the claimant.

72 Raja Bose/Ian Meredith, Emergency Arbitration Procedures: A Comparative Analysis, International Arbitration Law Review (2012) 5, 189.

73 Ibid.: The day after his appointment, the emergency arbitrator permitted the seller to sell cargo and order the respondent (buyer) to cooperate to permit the cargo to leave the port. Also reported in René-Alexander Hirth, Chapter IX: SIAC Rules, in: Rodolf

a distribution agreement, an applicant requested an emergency arbitrator to order the respondent to uphold the agreement pending the proceedings.[74]

An applicant requested an injunction prohibiting the respondent to alienate, pledge, charge, sell or otherwise dispose of the shares of a company sold to the respondent and whose full payment remained outstanding.[75] In a dispute arising out of a shareholders agreement, the claimant requested an emergency arbitrator to order the respondent not to sell, assign, transfer or otherwise dispose any of its shares in company X (here the claimant was also shareholder).[76] Applicants have also requested urgent relief in the form of measures to block moneys in accounts with banks.[77] Others have applied for urgent relief instructing the other party to move for stay of its claim before State courts and to refrain from any future actions before State courts pending a final award by the arbitral tribunal to be constituted.[78] In a different case, an applicant sought urgent relief consisting in an order to the other party to fulfil its contractual obligations under the agreement for the purchase of products by immediately delivering some goods and documents to the applicant.[79]

Within only few years of the enactment of urgent relief rules, practice has shown that emergency arbitrators are approached to consider (but with different eyes) the same type of requests for measures submitted in front of arbitral tribunals. Case law reports state that these can include interim injunctions restraining a party from acting in breach of a contract, for example, by calling a bank guarantee[80], by selling products in breach of a license agreement[81], by removing goods from a certain location.[82] Certain interim measures seek to secure compliance with contractual duties, for example, orders restraining a party from communicating confidential information to third parties[83] or; requiring a party to proceed with the manufacture of certain products and strictly to comply with the technical specifications given by the other[84] or interim orders granting an anti-suit injunction[85]. Others may seek to obtain the reimburse half of an advance on

A. Schütze (ed.), Institutional Arbitration - Article-by-Article Commentary, Munich 2013, 655.

74 Raja Bose/Ian Meredith, Emergency Arbitration Procedures: A Comparative Analysis, International Arbitration Law Review (2012) 5, 190: The respondent voluntarily agreed to not terminate the agreement until the arbitral tribunal decided the dispute.

75 SCC Emergency Arbitration 064/2010 in Johan Lundstedt, SCC Practice: Emergency Arbitrator Decisions, Stockholm 2014, 3-5, available at http://www.sccinstitute.com/filearchive/4/46698/SCC%20practice%202010%20-%202013%20emergency%20arbitrator_FINAL.pdf (20 November 2014).

76 SCC Emergency Arbitration 187/2010 in ibid., 10-12.

77 SCC Emergency Arbitration 70/2011 in ibid., 12-15.

78 SCC Emergency Arbitration 91/2011 in ibid., 15,16.

79 SCC Emergency Arbitration 10/2012 in ibid., 16-19.

80 See an ICC tribunal (place of arbitration: Geneva) in Didier De Montmollin, Les Mesures Provisionnelles Et Conservatoires Dans L'arbitrage, ASA Bulletin, 12 (1994) 1, 160.

81 See an ICC tribunal (place of arbitration: Geneva) in ibid.

82 See an ICC tribunal (place of arbitration: Geneva) in ibid.

83 See an ICC tribunal (place of arbitration: Geneva) in ibid.

84 See an ICC tribunal (place of arbitration: Geneva) in ibid., 142-45.

85 See Icc Case No. 8307 (Place of Arbitration: Geneva) in Emmanuel Gaillard (ed.), Anti-Suit Injunctions in International Arbitration, Bern, New York 2005, 307-15; See

costs[86] or may direct a party to make a provisional payment.[87] Orders intended to preserve certain evidence have included granting a party access to certain machines.[88]

IV Formal requirements for the application of emergency relief

All institutional rules establish strict and special formal requirements for the application of emergency relief. These requirements are more or less uniform under all arbitration rules. Applicants are advised to check the particularities of the institutional rules concerned. In general, applications for emergency measures shall include the names and full contact details of the parties, a summary of the dispute, a statement of the interim relief sought and the reasons therefore.[89] In addition, the application for emergency relief shall be accompanied by a copy or description of the arbitration agreement on the basis of which the dispute is to be decided and by proof of payment of the costs for the emergency proceedings.[90] In case such is not apparent in the arbitration agreement, some institutional rules require the applying party to provide comments on the seat of the emergency proceedings, the applicable law(s) and the language of the proceedings.[91] Under the ICC Rules, the application shall be made in the language of the arbitration if one was agreed or in the language of the arbitration agreement.[92]

Moreover, most institutional rules require that the applying party make a statement explaining the reasons why the applicant needs the emergency relief on an urgent basis or why it cannot await the constitution of an arbitral tribunal.[93] This formal requirement is in direct correlation with the substantive requirement to prove high urgency in obtaining the interim relief sought (see Part V below).

The application for emergency relief is filed with the administrative body of the institution concerned (secretariat, institute, general secretary, Court, etc.), which

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also the Interim Order made in an ICC arbitration in 2005, quoted by Matthias Scherer/Werner Jahnel, Anti-Suit and Anti-Arbitration Injunctions in International Arbitration: A Swiss Perspective, International Arbitration Law Review, 12 (2009) 4, 72.

86 See an ICC Interim Award, ASA Bulletin, 21 (2003) 4, 802-809.

87 See an *ad hoc* arbitration (place of arbitration: Geneva), ASA Bulletin 157, 12 (1994) 1, 157-159.

88 See ICC Partial Award in Case No. 10040 (place of arbitration: London) in ICC Court of Arbitration Bulletin, 21 (2000) 1, 118-119.

89 Art. 1 (3) of Appendix V ICC Rules 2012; Art. 2 and Art. 10 (1) (2) of Appendix II SCC Rules 2010; Art. 2 of Schedule 4 HKIAC Rules 2008; Art. 9.5 LCIA Rules 2014; Art. 43 (1) (b) (c) SWISS Rules 2012.

90 Art. 1 (3) of Appendix V ICC Rules 2012; Art. 2 and Art. 10 (1) (2) of Appendix II SCC Rules 2010; Art. 2 of Schedule 4 HKIAC Rules 2008; Art. 9.5 LCIA Rules 2014; Art. 43 (1) (b) (c) SWISS Rules 2012.

91 Art. 1 (3) of Appendix V ICC Rules 2012; Art. 2 and Art. 10 (1) (2) of Appendix II SCC Rules 2010; Art. 2 of Schedule 4 HKIAC Rules 2008; Art. 9.5 LCIA Rules 2014; Art. 43 (1) (b) (c) SWISS Rules 2012.

92 Art. 3 of Appendix V ICC Rules 2012.

93 Art. 1 (3) (e) of Appendix V ICC Rules 2012; Art. 2 (d) of Schedule 4 HKIAC Rules 2008; Art. 1 of Schedule 1 SIAC Rules 2013; Art. 43.1 (e) SWISS.

will appoint an emergency arbitrator and subsequently send him the file in a matter of hours or days, following receipt of a proper request for urgent relief.[94]

V Substantive requirements for the granting of emergency relief

In accordance with the White & Case 2012 Survey, only 35% of all interim measures applications addressed to the arbitral tribunal are granted.[95] This percentage of successful applications is rather low. This may be explained by a natural preference of arbitrators to look at the merits of the case before ordering any measures affecting one party, unless the circumstances so require. Despite the fact that statutory provisions on provisional measures do not generally set out the requirements to be met in order to grant interim relief,[96] some institutional rules and arbitration practice subject the granting of such relief to the same requirements that are broadly applied in court proceedings in most jurisdictions (although they may be expressed with various formulae)[97] – reducing the chances of success in an application. The requirements generally applied are as follows:

i. **Jurisdiction of the arbitrator.** The arbitrator must have jurisdiction to adjudicate on the legal right to be protected by the provisional measure sought by the applicant.
ii. **Prima facie case on the merits.** The applicant shall be able to demonstrate likelihood of succeeding on the merits according to evidence (*fumus boni juris*).
iii. **Irreparable harm suffered or likely to be suffered by the applicant.** The applicant has suffered, is suffering or will suffer harm which will not be redressed by an award of damages unless the interim relief sought is granted.
iv. **Urgency.** The measure sought is required as a matter of urgency to avoid harm or future harm.[98]
v. **Balance of convenience/proportionality.** The balance of convenience (often referred to as "proportionality" in civil law jurisdictions) is in favour of the applicant.

94 Art. 1 (5) and 2 (1) of Appendix V ICC Rules 2012; Art. 4, Art. 6, Art. 7, Art. 8 of Appendix II SCC Rules 2010; Art. 5 and Art. 12 of Schedule 4 HKIAC Rules 2008; Art. 9.8 LCIA Rules 2014; Art. 43 (2) SWISS.

95 See White and Case, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, London 2012, 17, available at http://annualreview2012.whitecase.com/International_Arbitration_Survey_2012.pdf (20 November 2014).

96 With the notable exception of Art. 17A UNCITRAL MAL 2006.

97 Jeff Waincymer, Procedure and Evidence in International Arbitration, The Hague 2012, 626-27; Gary B. Born, International Commercial Arbitration, 2nd ed., Alphen aan den Rijn 2014, 2467-68; Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 290.

98 Urgency may be considered a *sine qua non* requirement for the granting of urgent relief unless the balance of interest principle applies. Most institutional rules provide that in considering an application for urgent relief, emergency arbitrators shall take into account the urgency inherent in such proceedings; see Art. 43 (6) SWISS Rules 2010; Art. 5 (2) of Appendix V ICC Rules 2012; Art. 7 of Appendix II SCC Rules 2010; Art. 11 of Schedule 4 HKIAC Rules 2008.

Unless otherwise agreed or set forth in the *lex arbitri*, these requirements will apply solely if, and to the extent, the arbitrator finds them to be applicable as the expression of general principle of procedure.[99] In practice, most arbitrators apply them and are to be considered by both arbitral tribunals and emergency arbitrators.[100] That being said, their application by an emergency arbitrator might be different to the application of these same requirements by an arbitral tribunal. In particular, with regard to the standard required to meet each requirement. This submission is in line with an accepted view that arbitrators shall only apply the above requirements in a reasonable manner and with the degree of flexibility required under the circumstances.[101]

A Standard required for measures granted by arbitral tribunals

Jurisdiction of the arbitrator. In this regard, a *prima facie case* on jurisdiction may not always be enough to meet this requirement. A higher standard of showing or "*reasonable basis*"[102] for jurisdiction may be required where the arbitral tribunal has just been constituted and the respondent has raised a challenge to the general jurisdiction of the arbitral tribunal whose decision on this challenge is still pending. The standard may be somehow lower in cases where a *prima facie*

99 Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 290, 304; SCC Emergency Arbitration 70/2011 in Johan Lundstedt, SCC Practice: Emergency Arbitrator Decisions, Stockholm 2014, 12-15, available at http://www.sccinstitute.com/filearchive/4/46698/SCC%20practice%202010%20-%202013%20emergency%20arbitrator_FINAL.pdf (20 November 2014): after recognizing that the Sweden Arbitration Act does not furnish any requirement 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". 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"; Jean Francois Poudret/Sebastien Besson, Comparative Law of International Arbitration, 2nd ed., London 2007, 537.

100 Jean Francois Poudret/Sebastien Besson, Comparative Law of International Arbitration, 2nd ed., London 2007, 536; SCC Emergency Arbitration 10/2012 in Johan Lundstedt, SCC Practice: Emergency Arbitrator Decisions, Stockholm 2014, 16-19, available at http://www.sccinstitute.com/filearchive/4/46698/SCC%20practice%202010%20-%202013%20emergency%20arbitrator_FINAL.pdf (20 November 2014): 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".

101 Gary B. Born, International Commercial Arbitration, 2nd ed., Alphen aan den Rijn 2014, 2468-69.

102 Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 291.

jurisdiction has been decided by the arbitration institution or a State court and the respondent has not pursued its challenge in front of the arbitral tribunal or where the respondent has never raised any challenge to the jurisdiction of the arbitral tribunal. That being said, the fact that an arbitral tribunal may ultimately lack jurisdiction over the dispute does not prevent it from properly issuing provisional measures.[103]

***Prima facie* case on the merits.** This requirement also demands a reasonable probability or likelihood that the applicant will succeed on the merits of its case.[104] However, as a matter of fact, the granting of an interim measure entails assessing the merits and in practice it is difficult that the arbitral tribunal changes its view once the merits are finally tackled. As a consequence, it requires from the arbitral tribunal a rather careful thinking and review of evidence available at that point and pertaining to the merits of the case.[105] Whether the applicant has real chances of success on the merits is a matter which is not governed by the *lex arbitri*, but by the rules of law applicable to the merits of the dispute, *i.e.* the *lex contractus* or other relevant law. Where the *lex contractus* has not been agreed upon or has not been determined yet (because a decision in this respect has not been made or the applicable law is in dispute), an arbitrator will be even more careful in requiring some evidence that under the terms of the contract the applicant could win the case, since the risk of having an interim measure which is incompatible with the final relief in an award may otherwise increase.

Irreparable harm suffered or likely to be suffered by the applicant: under this requirement two elements may be distinguished: One of substantial harm or risk of harm and, a second of impossibility to repair such harm with a final award. With regard to the first element, a *prima facie* showing of substantial injury or *likelihood* of risk thereof should be enough to meet the requirement. As regards the second element, the issue is one of means rather than merits to obtain enough indemnity in the award. The applicant shall show that the likelihood of risk of substantial harm or the harm itself would not be repaired with an award on damages should the application for interim relief be denied by the arbitrator.[106]

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103 Gary B. Born, International Commercial Arbitration, 2nd ed., Alphen aan den Rijn 2014, 2482., pointing out that "arbitral tribunals have not infrequently ordered provisional relief notwithstanding the existence of an unresolved, and therefore possibly well-founded, jurisdictional challenge"; Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 291.

104 Jeff Waincymer, Procedure and Evidence in International Arbitration, The Hague 2012, 626-27.

105 Ibid., 627; Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 290: stating that "the requirement of a prima facie arguable case on the merits must be treated with more caution in arbitration. In principle, the requested measures should not reflect the relief sought on the main case. However, in practice, cases exist in which both forms of relief are closely related".

106 Gary B. Born, International Commercial Arbitration, 2nd ed., Alphen aan den Rijn 2014, 2473: "the better view is that the relevant standard does not require mechanical application of particular levels of probability. Rather, tribunals properly adopt a pragmatic inquiry that subsumes the likelihood of harm, the degree and character of harm, the balance of hardships and other factors. The issue is not so much whether, on a balance of probabilities, serious harm will occur but whether the risks of grave harm are sufficiently substantial to justify any burden that provisional measures would impose on the respondent".

Urgency. This requirement is closely linked with the above requirement. In the context of interim measures requested to an arbitral tribunal, the applicant shall show that it is not reasonable to wait for a determination in a final award in light of the evidence of the risk to suffer irreparable harm or increased injury. The standard is one of reasonableness of taking rapid steps to stop or prevent future harm.[107]

Balance of convenience/proportionality. Under this requirement the applicant shall demonstrate that its interest on the measure outweighs the inconvenience that may be caused to the other party.[108] No standard is required other than a demonstration that after comparing the applicant's interests with the disadvantages for the other party it seems appropriate to grant the requested measure.[109]

B Standard required for measures granted by emergency arbitrators

Jurisdiction of the emergency arbitrator. A *prima facie case* on jurisdiction should suffice to meet this requirement in front of an emergency arbitrator.[110] The ICC Rules 2014 require the submission of the parties' (or their successors) signed arbitration agreement.[111] Thus, showing of jurisdiction is straightforward in such instance. In addition, most arbitral institutions will do a first check on the standing of the applicant for urgent relief before appointing an emergency arbitrator.[112] This decreases the burden on the emergency arbitrator to decide on its own jurisdiction in a matter of hours or days. Situations of *prima facie* lack of jurisdiction of emergency arbitrators may include injunctions prohibiting third

107 Ali Yesilirmak, Provisional Measures in International Commercial Arbitration, The Hague 2005, 179.

108 Ibid., 182.

109 See Court of Arbitration for Sports (CAS) awards: CAS, *AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA)*, Award of 20 August 1999, CAS Award 98/200, p. 38-41; CAS, *Christian Maicon Henning v. Prudentopolis Esporte Clube & Fédération Internationale de Football Association (FIFA),* Order of 6 January 2005, CAS Award 2004/A/780 SD, p. 1, 7, 8; CAS, *AS Roma c. Fédération Internationale de Football Association (FIFA)*, ordonnance sur requête d'effet suspensif du 25 juillet 2005, CAS Award 2005/A/916 ES1, p. 1, 2. To access these awards please visit the CAS Jurisprudence Database at http://jurisprudence.tas-cas.org/sites/search/advanced.aspx (25 November 2014).

110 SCC Emergency Arbitration 0139/2010 in Johan Lundstedt, SCC Practice: Emergency Arbitrator Decisions, Stockholm 2014, 6-8, available at http://www.sccinstitute.com/filearchive/4/46698/SCC%20practice%202010%20-%202013%20emergency%20arbitrator_FINAL.pdf (20 November 2014): the emergency arbitrator found that he could only conduct a *prima facie* assessment on his jurisdiction and not a detailed one since the arbitral tribunal once constituted must do such an analysis.

111 Art. 29 (5) ICC Rules 2012.

112 Art. 1 (5) of Appendix V ICC Rules 2012; Art. 4 (2) of Appendix II SCC Rules 2012; Art. 5 of Schedule 4 HKIAC Rules 2008; Art. 9.6 LCIA Rules 2014; Art. 43 (2) (a) (b) SWISS Rules 2012; Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 307-08; Marie Öhrström, Chapter XII: SCC Rules, in: Rodolf A. Schütze (ed.), Institutional Arbitration – Article-by-Article Commentary, Munich 2013, 858.

parties such as banks, state organs, companies, etc. from taking certain actions.[113] Applying also a *prima facie* standard to establish his jurisdiction, an emergency arbitrator found that the only rational and readily available interpretation of an arbitration clause stating that all disputes were to be "resolved exclusively by the International Arbitration Court in Stockholm, Sweden" was that the parties intended that disputes arising under their contract were to be referred to arbitration according to the SCC Rules and consequently, that he had jurisdiction to act as the emergency arbitrator.[114]

Prima facie case on the merits. With respect to an application for urgent relief, the standard of probability or likelihood that the applicant will succeed on the merits of its case might be, in most cases, intrinsically lower than in an application in front of an arbitral tribunal for the following reasons. First, an emergency arbitrator does not bear any risk of rendering a future final award that may be bias based on the preliminary assessment on the merits. An emergency arbitrator's jurisdiction ends up with the constitution of the arbitral tribunal and he or she will be prevented from acting as an arbitrator in the same dispute under most institutional rules.[115] Second, for efficiency reasons, an emergency arbitrator cannot perform an in-depth assessment of the merits of the case. Under all institutional rules an emergency arbitrator shall make a decision on the urgent relief within days after receiving the case file[116] and leave to the arbitral tribunal the decision to maintain, modify or overturn the emergency arbitrator's decision.[117] Where the applicable rules to the merits have not been agreed upon, an emergency arbitrator should be able to resort to contract terms and general principles of law and should not be bound to determine the rules of law applicable to the merits before making a decision on urgent relief (unless the determination of the applicable law is a straightforward exercise or the issue has already been fully argued by the parties in their submissions on urgent relief). In emergency proceeding under the SCC Rules 2010, an emergency arbitrator granted the urgent

113 SCC Emergency Arbitration 064/2010 in Johan Lundstedt, SCC Practice: Emergency Arbitrator Decisions, Stockholm 2014, 3-5, available at http://www.sccinstitute.com/filearchive/4/46698/SCC%20practice%202010%20-%202013%20emergency%20arbitrator_FINAL.pdf (20 November 2014); stating that emergency measures are not binding over a third party for instance a financial institution holding the assets over which the emergency arbitrator had no jurisdiction.

114 SCC Emergency Arbitration 70/2011 in ibid., 12-15.

115 Art. 2 (6) of Appendix V ICC Rules 2012; Art. 4 (4) of Appendix II SCC Rules 2010; Art. 21 of Schedule 4 HKIAC Rules 2008; Art. 43 (11) SWISS Rules 2012.

116 Art. 6 (4) of Appendix V ICC Rules 2012 (fifteen-day time limit); Art. 8 (1) of Appendix II SCC Rules (five-day time limit); Art. 12 of Schedule 4 HKIAC Rules 2008 (fifteen-day time-limit); Art. 9.8 LCIA Rules (fourteen-day time-limit); Art. 43 (7) SWISS Rules 2012 (fifteen-day time limit). All deadlines are extendable in special circumstances. In the cases reviewed in the following articles, emergency arbitrators made decision within five-days average, cf. Raja Bose/Ian Meredith, Emergency Arbitration Procedures: A Comparative Analysis, International Arbitration Law Review (2012) 5, 189; Johan Lundstedt, SCC Practice: Emergency Arbitrator Decisions, Stockholm 2014, 2, available at http://www.sccinstitute.com/filearchive/4/46698/SCC%20practice%202010%20-%202013%20emergency%20arbitrator_FINAL.pdf (20 November 2014).

117 Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 306.

relief sought since the applicant had shown probable cause for its case.[118] In particular, the applicant had listed a number of alleged breaches of contract by the other party and the latter did not file a reply for those allegations, apart from a general denial of wrongdoing.[119]

Irreparable harm suffered or likely to be suffered by the applicant. An applicant for urgent relief shall show with a same degree of evidence as in front of an arbitral tribunal, the substantial harm or risk of harm likely to be suffered and the impossibility to repair such harm with a final award. In a case under the SCC Rules 2010, the applicant requested an injunction prohibiting the respondent to alienate, pledge, charge, sell or otherwise disposed of the shares of a company sold to the respondent and whose full payment remained outstanding.[120] The emergency arbitrator denied this request for urgent relief since the applicant did not establish that the harm which was to be prevented by the emergency arbitrator was irreparable or of urgent nature.[121] In the case at hand, the applying party did not establish that any sale or disposal of the shares in dispute would be too detrimental for the claimant as a creditor of the respondent in the sense that the proceeds from such sale or disposal could not come to all creditors' benefit.[122] In a different case, an emergency arbitrator rejected the request since there was no evidence of irreparable harm which could not be compensated with an award.[123] In particular, the emergency arbitrator pointed out that given the size and reputation of the respondent's parent company, an award in favour of the applicant, even in a substantial amount, would most likely to be honoured by or successfully enforced against the respondent.[124]

Urgency. Most institutional rules provide that in considering an application for urgent relief, emergency arbitrators shall take into account the urgency inherent in such proceedings.[125] The standard of urgency required in order to admit an urgent interim measure is intrinsically higher in front of an emergency arbitrator. It regards measures that are so urgent that cannot wait the constitution of the arbitral tribunal, not to say the making of a final award.[126] Therefore, the applicant for urgent relief shall show that it is unwise to wait until the constitution of the arbitral tribunal to obtain interim relief in light of the evidence of the risk to suffer irreparable harm or increased injury. The standard is one of high urgency to take immediate steps to stop or prevent future harm. In a case concerning special goods to be manufactured by the seller, an emergency arbitrator has

118 SCC Emergency Arbitration 187/2010 Johan Lundstedt, SCC Practice: Emergency Arbitrator Decisions, Stockholm 2014, 10-12, available at http://www.sccinstitute.com/filearchive/4/46698/SCC%20practice%202010%20-%202013%20emergency%20arbitrator_FINAL.pdf (20 November 2014).

119 SCC Emergency Arbitration 187/2010 in ibid.

120 SCC Emergency Arbitration 064/2010 in ibid., 3-5.

121 SCC Emergency Arbitration 064/2010 in ibid.

122 SCC Emergency Arbitration 064/2010 in ibid.

123 SCC Emergency Arbitration 10/2012 in ibid., 16-19.

124 SCC Emergency Arbitration 10/2012 in ibid.

125 Art. 43 (6) SIAC Rules 2012; Art. 5 (2) of Appendix V ICC Rules 2012; Art. 7 of Appendix II SCC Rules 2010; Art. 11 of Schedule 4 HKIAC Rules 2008.

126 Gary B. Born, International Commercial Arbitration, 2nd ed., Alphen aan den Rijn 2014, 2451; Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 294.

found that the measure requested, consisting in an order to the seller to deliver the goods, was urgent in view of the fact that there was no alternative source of supply available to the applicant (buyer) and its own deadline for delivery under an agreement with a third party.[127]

In a different case, an emergency arbitrator has pointed out that the requirements of irreparable harm and urgency are frequently interconnected and that this interconnection particularly applies in situations where there is reason to assume that the other party is actively undertaking measures to dissipate or otherwise make assets unavailable for enforcement in case of an adverse award.[128] 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.[129]

In an arbitration under the SCC Rules 2010, the emergency arbitrator dismissed the claimant's request since he was not persuaded that such request was of urgent nature or that there was a risk of suffering irreparable harm.[130] The claimant had requested the emergency arbitrator to make an interim injunction ordering the respondent to refrain from collecting any amounts under the bank guarantees that the claimant had provided as collateral of its undertaking to complete a building project. In particular, the emergency arbitrator found that even if it were to be proven that the respondent's decision to call the bank guarantee was incorrect, there was no urgency under the circumstances since the claimant, if succeeding on the merits, could later be able to recover damages in a final award.[131]

Balance of convenience/proportionality in the context of emergency relief. This doctrine, widely developed in Sports arbitration,[132] should help the emergency arbitrator to lower the high standard required in order to show urgency to stop or prevent irreparable harm, in some circumstances. In particular, where the inconvenience of the applicant in awaiting for the constitution of the arbitral to request the same measure is greater compared to the inconvenience of the other party in being called to comply with the emergency arbitrator's

127 SCC Emergency Arbitration 10/2012 in Johan Lundstedt, SCC Practice: Emergency Arbitrator Decisions, Stockholm 2014, 16-19, available at http://www.sccinstitute.com/filearchive/4/46698/SCC%20practice%202010%20-%202013%20emergency%20arbitrator_FINAL.pdf (20 November 2014).

128 SCC Emergency Arbitration 70/2011 in ibid., 12-15.

129 SCC Emergency Arbitration 70/2011 in ibid.: "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."

130 SCC Emergency Arbitration 0139/2010 in ibid., 6-8.

131 SCC Emergency Arbitration 0139/2010 in ibid.

132 See Court of Arbitration for Sports (CAS) awards: CAS, *AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA)*, Award of 20 August 1999, CAS Award 98/200, p. 38-41; CAS, *Christian Maicon Henning v. Prudentopolis Esporte Clube & Fédération Internationale de Football Association (FIFA),* Order of 6 January 2005, CAS Award 2004/A/780 SD, p. 1, 7, 8; CAS, *AS Roma c. Fédération Internationale de Football Association (FIFA)*, ordonnance sur requête d'effet suspensif du 25 juillet 2005, CAS Award 2005/A/916 ES1, p. 1, 2. To access these awards please visit the CAS Jurisprudence Database at http://jurisprudence.tas-cas.org/sites/search/advanced.aspx (25 November 2014).

measure. In this regard, the interaction between the emergency arbitrator and the arbitral tribunal is very important. If the time or other circumstances modifies the status of convenience considered by the emergency arbitrator, the arbitral tribunal shall be able to adapt or revoke the emergency measures taking into account such circumstances. In a dispute arising out of a shareholders agreement submitted to arbitration under the SCC Rules 2010, the emergency arbitrator upheld that the only requirement for granting interim relief was that such was deemed to be appropriate.[133] In the emergency arbitrator's view, that entailed that the applicant should establish a probable cause for its case and that the measure was necessary to safeguard its substantive rights.[134] The emergency arbitrator found that the respondent's offer to sell shares to other shareholders in a *prima facie* breach of the contract was sufficient proof of a need for emergency relief to protect the applicant's position.[135]

In a different case, an applicant requested an emergency arbitrator to order the respondent to fulfil its contractual obligations under a sale and purchase agreement.[136] 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 of the agreement was legally justified. Looking at the principle of proportionality, the emergency arbitrator pointed out the risk that such order could expose the respondent to civil and criminal liability under the laws of countries Y and Z and therefore rejected the application for urgent relief.[137]

VI *Ex parte* Measures by Emergency Arbitrators

According to the White & Case 2012 Survey, there is no consensus among participants as to whether arbitrators should have the power to order interim measures *ex parte*. That means based upon the request of one party and without hearing the other party prior to granting the provisional measure. Just over half of participants (51%) believe that arbitrators should have such a power, while 43% believe they should not (6% were unsure).[138]

The result of this survey may have been different had participants been asked about whether emergency arbitrators in particular should have such power. Existence of urgency under the circumstances is often considered by State courts and arbitral tribunals when *ex parte* measures are granted;[139] a require-

133 SCC Emergency Arbitration 187/2010 in Johan Lundstedt, SCC Practice: Emergency Arbitrator Decisions, Stockholm 2014, 10-12, available at http://www.sccinstitute.com/filearchive/4/46698/SCC%20practice%202010%20-%202013%20emergency%20arbitrator_FINAL.pdf (20 November 2014).

134 SCC Emergency Arbitration 187/2010 in ibid.

135 SCC Emergency Arbitration 187/2010 in ibid.

136 SCC Emergency Arbitration 10/2012 in ibid., 16-19.

137 SCC Emergency Arbitration 10/2012 in ibid.

138 White and Case, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, London 2012, 18-19, available at http://annualreview2012.whitecase.com/International_Arbitration_Survey_2012.pdf (20 November 2014).

139 Ali Yesilirmak, Provisional Measures in International Commercial Arbitration, The Hague 2005, 223.

ment subject to a high standard that shall in anyway be considered for the granting of urgent relief by emergency arbitrators.[140]

The issue whether emergency arbitrators have the power to order *ex parte* measures can be determined from two perspectives. *Ex parte* interim measures could be understood as an additional power conferred to arbitrators by the parties or, alternatively, as a type of measure generally allow under the *lex arbitri*. In the first instance, the *lex arbitri* would not forbid them, but may require the parties' mutual intent to vest an arbitrator with the power to grant interim or emergency relief *ex parte*. An arbitrator could be empowered with such faculty by the choice of some institutional rules. The SWISS Rules contain a provision dealing with provisional measures requested *ex parte*.[141]

From a second perspective, no agreement by the parties would be required under the *lex arbitri* for an arbitrator be empowered to grant interim or emergency relief *ex parte*. Most arbitration laws neither allow nor prohibit arbitrators to grant provisional measures *ex parte*.[142] In this context, an arbitrator may grant such measures if deemed appropriate or necessary, *i.e.* when the urgency and the circumstances so require; unless the parties have made an exclusion of such power by choosing a set of arbitration rules prohibiting *ex parte* applications.[143]

In the author's view, emergency arbitrators shall have the power to grant urgent relief *ex parte* not only in instances where the parties' agreement confers them such power, but as a general power to grant any type of measure which is deemed necessary or appropriate under the circumstances, unless otherwise established by the *lex arbitri* or the parties' agreement.[144] The main concern about *ex parte* measures is due process, that is to say, the principle that arbitrators should give both parties a fair opportunity to put their cases on whether the matter is suitable for provisional relief and whether the actual relief sought is appropriate.[145] However, it may be necessary or appropriate for the emergency arbitrator only to hear one side in cases of urgency or risk that the other side

140 Art. 43 (6) SWISS Rules 2012; Art. 5 (2) of Appendix V ICC Rules 2012; Art. 17 (2) of Appendix II SCC Rules 2010; Art. 11 of Schedule 4 HKIAC Rules 2008; Art. 9.7 LCIA Rules 2014.

141 Art. 26 (3) SWISS Rules 2012.

142 Notable exceptions are, on the one hand, Article 17C UNCITRAL MAL stating that a preliminary order may be granted on an ex parte basis by the arbitral tribunal within a twenty-day time limit and, on the other hand, section 18B Australian International Arbitration Act which expressly prohibits the issuance of ex parte measures by arbitrators.

143 ICC Rules 2102 forbids the granting of ex parte measures, see Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 291.

144 Arbitration rules expressly require that the emergency arbitrator makes sure that each party has a reasonable opportunity to be heard on the application: Art. 43 (6) SWISS Rules 2012; Art. 5 (2) of Appendix V ICC Rules 2012; Art.17 (2) of Appendix II SCC Rules 2010; Art. 11 of Schedule 4 HKIAC Rules 2008. However, in the author's view this may not be constructed as an exclusion of the emergency arbitrator's power to issue urgent relief *ex parte*. Sharing the author's view regarding the ICC Rules 2012, see ibid., 298: "Depending on the circumstances, granting the responding party an opportunity to comment after the initial order has been rendered might still be considered as reasonable within the meaning of Article 5(2) of Appendix V".

145 Jeff Waincymer, Procedure and Evidence in International Arbitration, The Hague 2012, 628.

takes steps to frustrate the measure in the meantime.[146] As the urgent relief granted by an emergency arbitrator is neither final nor binding on the arbitral tribunal subsequently formed, any order granted by an emergency arbitrator *ex parte* shall be in line with the principle of due process; so long as the respondent is given a reasonable chance to seek the lifting of the relevant order within a reasonably brief period of time after the granting of the emergency relief either in front of the emergency arbitrator or the arbitral tribunal.[147]

VII Use of Emergency Relief in the Context of International Sales Contracts

Since their enactment, various authors have contributed to the dissemination and understanding of the emergency arbitrator rules and, in particular, have explored specific situations[148] or industries[149] where urgent relief is expected to be useful. In the next paragraphs, the author attempts to contribute to this debate with a specific case scenario where emergency arbitrators may add imminent value to the process of arbitration in the context of international sales disputes.

The hypothetical case involves a buyer who refuses to make payment of the agreed price or who intends to call a bank guarantee provided by the seller on the basis of an alleged delivery of non-conforming goods under the applicable law or contract. The buyer has given notice of nonconformity but has not examined the goods or at least the seller considers that the examination carried out by the buyer was not proper. The allegations of non-conformity lack any factual evidence in the seller's view. In such a case scenario, the seller will have an interest in having the buyer or a third party examine the goods as soon as possible and in accordance with a proper examination method. A buyer's obligation to examine the goods is set forth in the UN Convention on Contracts for the International Sale of Goods of 1980 (CISG)[150] and many other domestic contract

146 Art. 9.7 LCIA Rules 2014 endorses the possibility to issue *ex parte* measures stating that the "Emergency Arbitrator may conduct the emergency proceedings in any manner determined by the Emergency Arbitrator to be appropriate in the circumstances, taking account of the nature of such emergency proceedings, the need to afford to each party, **if possible**, an opportunity to be consulted on the claim for emergency relief" [emphasis added].

147 Agreeing with this view in spite of the fact that Art. 5 (2) of Appendix V ICC Rules 2012 expressly requires that the emergency arbitrator make sure that each party has a reasonable opportunity to be heard on the application, see Jason Fry/Simon Greenberg/Francesca Mazza, The Secretariat's Guide to ICC Arbitration, Paris 2012, 298: "While no expressly mentioned in the Rules, it is conceivable that the emergency arbitrator might issue an initial order (e.g. freezing order or an order otherwise maintaining the status quo) before the responding party has filed its response. Depending on the circumstances, granting the responding party an opportunity to comment after the initial order has been rendered might still be considered as reasonable within the meaning of Article 5 (2) of Appendix V".

148 Christian Aschauer, Use of the Icc Emergency Arbitrator to Protect the Arbitral Proceedings, ICC International Court of Arbitration Bulletin*,* 2 (2012) 23, 5-6.

149 Louise Barrington, Emergency Arbitrators: Can They Be Useful to the Construction Industry?, Construction Law International*,* 7 (2012) 2, 39.

150 Art. 38 CISG. This Convention has been signed and ratified by over 80 nations. See the status of Contracting States at www.uncitral.org.

laws.[151] Although the duty to examine the goods is considered under most laws a non-actionable duty which does not result in liability for damages (because it rather entails the loss of remedies for the buyer),[152] complying with such duty is in the interest of both parties and in line with the need to promote the observance of good faith in international trade.[153] The obligation to examine the goods, and to notify any non-conformity discovered after a proper examination, aims at placing the seller in a position in which it may, if possible, remedy the lack of conformity by, for example delivering missing goods or substitute goods, by repair, or by reducing the buyer's loss and its own loss in some other way.[154] The buyer's proper examination of the goods (and notice of any non-conformity thereof) is also intended to give the seller an opportunity to prepare for any negotiation or dispute with the buyer concerning the lack of conformity and to take the necessary steps in that regard, for example, by securing evidence.[155] Furthermore, the seller may need to prepare a claim against his own supplier.

Should such an international sales contract include an arbitration agreement under the above rules the seller may file an application for urgent relief to pursue its objective. The emergency arbitrator could therefore decide whether to grant urgent relief by means of an injunction ordering the buyer to examine the goods in dispute. The emergency arbitrator could be asked to order the buyer to examine, or to have a third party examine, the goods within a period of time fixed by the emergency arbitrator. The latter may also order examination under a specific method that he deems appropriate to protect the seller's interests*, i.e.* establishing the scope of goods or samples to be examined, a permission to manipulate the goods or perform random tests.

Should the formal requirements be met by the applicant (see Part IV above), the emergency arbitrator will proceed to determine whether the substantive requirements under the advocated standards are met (see Part V above). With regard to his or her jurisdiction, the emergency arbitrator will review the *prima facie* existence of an arbitration agreement under one of the above institutional rules. The requirement of showing likelihood of success on the merits is not really relevant in this case. The emergency arbitrator will not assess the merits, *i.e.* whether the goods are conforming or not, rather will order the buyer to comply with a statutory duty to examine the goods, to mitigate damages or to act in good faith.

In terms of establishing urgency and need to stop or prevent a substantial harm, the high standard could be met easily if the goods are perishable or subject to market price fluctuations. In which case, an urgent relief ordering the

151 Ingeborg Schwenzer/Pascal Hachem/Christopher Kee, Global Sales and Contract Law, London 2011, 428-30; Ingeborg Schwenzer/Christiana Fountoulakis/Mariel Dimsey, International Sales Law, A Guide to the Cisg, Oxford 2012, 294-96.

152 Ingeborg Schwenzer, Article 74, in Ingeborg Schwenzer (ed.), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods, München 2010, 1003; Ingeborg Schwenzer/Pascal Hachem/Christopher Kee, Global Sales and Contract Law, London 2011, 440-42.

153 As required under Art. 7 (1) CISG.

154 Ingeborg Schwenzer, Article 38, in Ingeborg Schwenzer (ed.), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods, München 2010, 609.

155 Ibid.

examination of the goods within short a period as is practicable in the circumstances should be deemed necessary. Urgency will also be established and relief will also be appropriate when its purpose is to preserve evidence of the goods' quality or condition on the days following their delivery to the buyer.

With regard to the principle of balance of convenience, it seems most likely than not that the right and interest of the seller of knowing whether the goods conform to the contract at the relevant time outweighs the costs that the buyer may incur in complying with an emergency arbitrator's order to examine the goods.

VIII Conclusion

The adoption of the urgent relief rules is an attempt to improve the functioning and practical benefits of institutional arbitration rules. Provisions on emergency relief are aimed at responding to the parties' demand to have the choice to avoid approaching State courts with interim relief requests before the formation of the arbitral tribunal. These provisions entail that concurrent jurisdiction of arbitrators and State judges to issue interim measures has no time restrictions any longer. Parties may seek provisional measures from emergency arbitrators or from a State court until an arbitral tribunal is constituted.

A decision of the emergency arbitrator has the same provisional nature as a decision on interim measures made by an arbitral tribunal. Emergency arbitrators are entitled to grant any provisional measures that an arbitral tribunal would also be entitled to grant. Within only few years of practice, case law shows that emergency arbitrators are approached to consider (but with different eyes) the same type of requests for measures submitted in front of arbitral tribunals.

Arbitrators have subjected the granting of provisional measures to the same substantive requirements that are broadly applied in court proceedings in most jurisdictions, i.e. jurisdiction, possibility of success on the merits, substantial harm or risk thereof, urgency and balance of convenience (or proportionality). These requirements are also considered by emergency arbitrators. However, their application by an emergency arbitrator might be different to the application of these same requirements by an arbitral tribunal. In particular, with regard to the standard required to meet each requirement. For instance, the standard of probability or likelihood that the applicant will succeed on the merits of its case might be, in most cases, intrinsically lower in an application for emergency measures than in an application in front of an arbitral tribunal. In contrast, the standard of urgency required in order to admit an urgent interim measure is intrinsically higher in front of an emergency arbitrator. Lastly, the balance of convenience principle, should help the emergency arbitrator to lower the high standard required in order to show urgency to stop or prevent irreparable harm, in some circumstances.

Last but not least, emergency arbitrators shall have the power to grant urgent relief *ex parte* not only in instances where the parties' agreement confers them such power, but as a general power to grant any type of measure which is deemed necessary or appropriate under the circumstances, unless otherwise established by the *lex arbitri* or the parties' agreement.

Edgardo MUÑOZ[1]

The Swiss International Law School's LL.M. in International Commercial Law and Dispute Resolution – a fascinating journey towards the global lawyer[2]

It has been said that arguing against globalization is like arguing against the law of gravity. But that does not mean we should accept a law that allows only heavyweights to survive. On the contrary: we must make globalization an engine that lifts people ...[3]

Table of contents

Abstract

Despite the everyday effect of globalisation in society and the exponential growth experienced in international trade, legal education continues to focus on the study of domestic law and on events occurring within one country's territorial borders. The author describes how the Swiss International Law School (SiLS), customizes legal education to the current globalised reality. The author introduces the four core areas of international commercial law covered by SiLS LL.M. program and its truly comparative and international learning method. The author finally explains why enrolling at SiLS LL.M program is a tremendously valuable and unique experience which allows graduates to make the most of globalisation and become fluent in "speaking international".

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1 The author thanks Dr. Alissa Palumbo, a course leader in the Swiss International Law School LL.M. Program, for her valuable comments on this review.

2 For more information about the Swiss International Law School (SiLS) and its LL.M. Program please visit http://www.swissintlawschool.org/ and the YouTube video channel http://www.youtube.com/channel/UC-fkWcjp5fpy6TvwCKTFJIg (20 October 2014).

3 UN Secretary-General Kofi Annan's opening address to the fifty-third annual DPI/NGO Conference, 28 August 2000.

Keywords

LL.M. program, Master of Laws, International Commercial Law, Dispute Resolution, Intellectual Property, Comparative Law, Corporate Law, Sales and Transport Law, On-line degree

I Introduction – the globalisation challenge for lawyers

For the last decades, globalisation has spread to the world continents on internet time. Developments in means of communication and technology have transformed people's lives. Internet and smart phones allow people to establish faster and stronger relationships with others despite distance and to react to queries with immediacy. In addition, companies and financial institutions increasingly have removed the boundaries of their markets to cross national borders. This recent change in life and commerce has had an extraordinary effect on the type of matters and mandates handled by lawyers. Everyday more lawyers are more often instructed to intervene in transactions involving one or various foreign elements. Either because such transaction was entered into with a foreign party, or abroad, or because it ought to be performed or had effects overseas, etc. Despite this everyday effect of globalisation in society and the exponential growth experienced in international trade, legal education continues to focus on the study of our own country's domestic law and on events occurring within our own country's territorial borders.

In spite of this, only a few law schools are fully aware of the inadequacies of traditional legal education. One of them, the Swiss International Law School (SiLS), customizes legal education to the current globalised reality. SiLS prepares students to meet the global challenges by helping them to obtain what has been called "the necessary ingredients for global literacy for lawyers"[4], namely, language, cultural fluency, appreciation for the role of lawyers abroad and understanding of foreign and international law.[5]

SiLS is a charitable foundation registered in Basel, Switzerland. One of its funders and its Dean is Professor Dr. Ingeborg Schwenzer, LL.M. (Berkeley) of Basel University. She is an acclaimed international private law scholar and practitioner with more than 35 years of experience. Professor Schwenzer is mainly known as the editor and author of the leading commentary on the UN Sales Convention: a commentary that has been published in English[6], Spanish,[7] Ger-

4 "Global literacy for lawyers" is a term first used by Carole Silver, Educating Lawyers for the Global Economy: National Challenges, Kyung Hee University Law Review, (2009), p. 4, available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1029&context=facpub (20 October 2014). It regards a state of knowledge and behavior developed by lawyers who deal international matters and are at the front line of globalization.

5 Ibid.

6 Peter Schlechtriem/Ingeborg Schwenzer (eds.), Commentary on the UN Convention on the International Sale of Goods (CISG), Oxford 2010.

7 Ingeborg Schwenzer/Edgardo Muñoz (eds.), Schlechtriem & Schwenzer: Comentario sobre la Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías, Aranzadi 2011.

man[8] and Portuguese.[9] Professor Schwenzer is not only a prolific commentator of international private law. She is also a true field researcher and comparativist of domestic private laws. During four years, Professor Schwenzer led the research work of a multicultural team of lawyers representing the world's legal families and cultures. The result of this ambitious and successful research project conducted at Basel University is the handbook *Global Sales and Contract Law* published by Oxford University Press in 2012. Professor Schwenzer co-authored this landmark study with Dr. Christopher Kee and Dr. Pascal Hachem.[10] In addition, Professor Schwenzer has been a much solicited international arbitrator for the last decade. Her experience in arbitration proceedings has allowed her to stay in touch with the practical and real life issues arising out of international transactions.[11]

In this brief review of the SiLS LL.M., I will first introduce the four prominent scholars involved in SiLS and the four core areas of international commercial law covered by the program (II). Next, I will present the SiLS' truly comparative and international learning method (III). Lastly, I will give my personal opinion about what makes the SiLS LL.M. program a fascinating journey towards the Global Lawyer (IV).

II The four core areas of international commercial law taught by four world leading experts

The SiLS LL.M. in International Commercial Law and Dispute Resolution is organized in four modules; Sales and Transport Law, Intellectual Property Law, Dispute Resolution and Corporate Law. Each of these modules is led by a prominent legal scholar in the respective field. The module Sales and Transport Law is designed and directed by Professor Schwenzer, whose remarkable profile has been mentioned above. In this module, Professor Schwenzer walks students through the core areas of contract, sales and transport law on a comparative basis.

Professor Dr. William Van Caenegem, LL.M. (Cambridge) leads the module Intellectual Property Law. A notable scholar in his field, Professor Van Caenegem is a dual civil law and common law educated and trained lawyer.[12] He

8 Ingeborg Schwenzer (ed.), Kommentar zum einheitlichen UN-Kaufrecht: das Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf, 5th ed., München 2008.

9 New language versions of the Schlechtriem & Schwenzer Commentary on the CISG are currently been prepared in Chinese and Turkish.

10 For more information about the Global Sales & Contract Law handbook please visit http://ukcatalogue.oup.com/product/9780199572984.do or http://www.globalsaleslaw.org/index.cfm?pageID=4 (20 October 2014).

11 Professor Schwenzer arbitration profile may be consulted at the Swiss Arbitration Association data base of arbitrators available at http://www.arbitration-ch.org/pages/en/find-counsel-arbitrator/member-profile/729.ingeborg.schwenzer.html or at the German Arbitration Institute available at http://www.dis-arb.de/de/15/mitglieder/selbstdarstellung/ingeborg-schwenzer-id851 (20 October 2014).

12 Professor Van Caenegem studied at Antwerp and Leuven in Belgium and obtained an LL.M. and PhD at Cambridge, UK.

is professor of law at the Faculty of Law of Bond University in Gold Coast/Australia. Professor Van Caenegem is the author of a number of books on intellectual property law and comparative law.[13] He is currently involved in a research project concerning geographical indications of origin, and completing research on comparative trade secrets law. Professor Van Caenegem also has a foot in law practice as a listed arbitrator at WIPO Mediation and Arbitration Center. In his module, Professor Van Caenegem teaches students the way to develop a practical strategic focus for the protection of intellectual capital and goodwill, which goes beyond reliance on IP law alone. This module covers the international IP treaty system and analyses key issues of different domestic laws.

The module Dispute Resolution is directed by Professor Jeff Waincymer from the Faculty of Law of Monash University in Melbourne/Australia. One of his core areas of research and teaching is international arbitration and litigation. He is the author of multiple books and articles in this field. Professor Waincymer has a remarkable career as qualified legal practitioner, arbitrator and mediator, practicing exclusively in international trade and investment, arbitration and ADR matters. He is an Australian Government Nominee for ICSID and WTO panels and has acted as a panellist in WTO cases. He is a Fellow of ACICA and has acted as arbitrator in ICDR, SIAC, HKIAC and KLRC arbitration proceedings.[14] The module Dispute Resolution designed by Professor Waincymer introduces students to the theory and the legal framework of international arbitration and enforcement proceedings of foreign arbitral awards in a comparative basis. In addition, the features of most popular institutional and ad hoc rules of international arbitration are analysed in this module.

Last but not least, Professor Dr. Katharina Pistor from the Law School of Columbia University in New York/US leads the module Corporate Law. Professor Pistor hardly needs a presentation. As accomplished scholar and comparatist of law, institutions and systems, Professor Pistor is widely known for her contributions to legal and economic science, namely, in the field of the transformation of legal systems and their capacity to adjust to new market or social conditions.[15] Professor Pistor has been the receipt of multiple awards and research grants, including the Max Planck Research Award on International Financial Regulation in 2012. In her module, Professor Pistor teaches the characteristics of selected corporate law regimes and their effects on cross-border corporate activity. This module gets students to understand the legal challenges for companies that operate globally, list their shares in different countries' exchange markets and engage in cross-border mergers and acquisitions. Her teaching approach is a comparative one, since corporate law is domestic in substance and the examples of international standardised or harmonised corporate law are few.[16]

No other LL.M. program in the world places at its students' disposal the knowledge and expertise of these four authorities in the four core areas of modern international commercial law.

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13 For more about Professor Van Caenegem publications and research projects please visit http://apps.bond.edu.au/staff/profile.asp?s_id=340 (20 October 2014).

14 See more about Professor Jeff Waincymer's arbitration career at http://monash.edu/research/people/profiles/profile.html?sid=3842&pid=3510 (20 October 2014).

15 See more about Professor Pistor's professional achievements at http://www.law.columbia.edu/fac/Katharina_Pistor (20 October 2014).

16 European Law being a partial exception.

III Law learning on a truly comparative and intercultural level

The SiLS LL.M. program applies a unique teaching and learning method, which emulates the best flight training schools in the world. On the one hand, students learn the core principles of "piloting" in the international legal arena from the module leaders; the four top world experts above mentioned. On the other hand, students acquire the skills and cultural diversity of the Global Lawyer through the most sophisticated and effective "flight simulators" or mock cases. In particular, effective learning is achieved as follows.

All students are provided with a comprehensive and clear SiLS student handbook, which guides them through the SiLS learning platform and the different levels of the LL.M. program. Accessing the SiLS learning platform resembles entering into a virtual boutique: the spaces are spotless and carefully designed, attention to detail is the rule, the information posted is clear and free of ambiguity. Courtesy and politeness is the standard of treatment. There is always someone available to meet the students' technical enquiries 24 hours / 7 days a week. The SiLS learning management system combines the flexibility of cutting-edge online technology with the intimacy of small classes and the personalised attention of a tutor. Perhaps the SiLS could rightly be described as a boutique law school and its LL.M. in international commercial law and dispute resolution as its flagship jewel.

In addition, students are provided with module handbooks, which introduce them to the specific module's materials and activities. Each module is 20 weeks long and requires 20 hours of study per week, which equals 15 European Credit Transfer System Credits (ECTS). SiLS recognises that the learning of a foreign or international system of law can be challenging and stressful for some at the beginning. With that in mind, the SiLS team makes sure that students feel relaxed and happy with each course content and methods by anticipating and meeting their students' needs. This is accomplished by means of constant monitoring of each and all student activities and progress.

Moreover, the SiLS LL.M. is designed to make the learning of foreign and international law an enjoyable experience, as the program is highly practical and takes a truly international and comparative approach. As part of SiLS's unique concept, each LL.M. module brings together students from different legal systems and cultures to work in teams on mock cases. In the module Sales and Transport Law, for instance, students in one team are asked to adopt the role of sellers while students in another team adopt the role of buyers. These same teams meet on a weekly basis to discuss open questions and negotiate contract clauses. In order to stick to the rules of a real life contract negotiation among teams of lawyers representing their clients' interests, results of team discussions are not communicated between sellers and buyers. Moreover, and for the same reason, some teams may receive additional information not included in the moot case and thus ignored by the opposing team.

The same learning method is applied in the other three modules. In the module Intellectual Property Law students are coupled in teams to develop IP strategies, structure collaborative IP-based projects in cross-border situations, and resolve contractual disputes through ADR, including arbitration against other students' teams.

In the module Dispute Resolution, classes are problem based and often involve drafting arbitration agreements. Teams then are called to participate in various stages of the arbitral proceedings, giving each team member the opportunity to improve her or his advocacy skills and have a truthful inter-cultural experience.

In the module Corporate Law, students are also organised in teams to negotiate and draft a cross-border merger agreement. Intense teamwork with students from around the world enables a realistic inter-cultural experience and helps students to improve their ability to work in multicultural corporate transactions.

With this learning outcome in mind, SiLS makes a remarkable logistic and technological effort, which permits students and course leaders in different time zones to meet online throughout the year. At the end of the day, students are able to make true comparison of the legal solutions given by common law, civil law or international law to the same matter and to react correctly in any cross-border or inter-cultural collaboration or dispute.

In addition, the SiLS' LL.M. program offers students four extra-modular tutorials covering important aspects of legal work. The tutorial Legal Research and Writing is prepared by Dr. Benjamin Leisinger, LL.M. (Chicago) – a prominent lawyer in the Zurich based law firm Homburger AG. In this tutorial, students learn how to draft professional legal documents in a formally correct manner and correctly cite the sources used when drafting such documents. The tutorial Presentation Techniques is designed by Dr. Christopher Kee, Adjunct Professor at Aberdeen University Law School and author of many important works, *inter alia*, the book the Art of Argument - A Guide to Mooting, which has been sold worldwide. In this tutorial, Dr. Kee teaches students the various techniques and processes to properly structure an argument and to make the physical environment around them work to their advantage. The tutorial Legal Professionalism and Ethics is led by Dr. Mariel Dimsey, LL.M. (Cologne). A practitioner and scholar with a remarkable international background, she is based in the Cologne office of Cleary Gottlieb Steen & Hamilton LLP. In this tutorial, students explore the professional responsibility systems of both common law and civil law jurisdictions from a comparative perspective and identify the core features shared by most systems in terms of lawyers' obligations, ethical considerations, including conflicts of interest, compliance, billing practices, dealing with trust accounts and unqualified practice. The tutorial Features of Common Law and Civil Law Systems is prepared by Professor Dr. Thomas Lundmark, a dual civil law and common law educated and trained lawyer, who is the Chair in Common Law and Comparative Jurisprudence at the University of Münster, Germany. This tutorial provides a historical introduction to common law and civil law traditions and explains the differences and similarities in the approaches to statutory interpretation, and the use of judicial decisions (*stare decisis*).

Moreover, students receive personalized training and support from the course leaders. The cyber classrooms are small. There are 16 to 20 students per class, supervised by two course leaders, one from a common law the other from a civil law background. Sessions are highly interactive thanks to the guidance afforded by the course leaders.

The SiLS body of course leaders is also remarkable for its diversity and individual credentials. It is composed of young law professors and practitioners, all specialized in one of the four core areas of the program. Their dual civil law and

common law practice and education is their main feature. Among the current team of course leaders representing more than a dozen of nationalities from all continents are:

- Dr. Orkun Askeli, educated in Turkey and England, who currently works as Senior Lecturer at Durham University Law School in the United Kingdom;
- Dr. Camilla Baasch Andersen, who received her legal education in Denmark, started her teaching career in England and currently holds a position as Professor of Law at University of Western Australia;
- Dr. Petra Butler, who graduated in Germany and New Zealand, clerked at the South African Constitutional Court and is currently Associate Professor at the University of Wellington in New Zealand;
- Dr. Erika Sondahl Levin, who attended law school in the United States and currently works as senior associate at the firm Stone & Magnanini LLP and as Adjunct Professor at Rutgers University School of Law, in the United States;
- Dr. Dalma Demeter, who studied law in Romania, Hungary and Australia, and now holds the position of Assistant Professor at the University of Canberra, Australia;
- Arno L. Eisen, who received his graduate and post-graduate legal education in Germany, the United States and Singapore and is now a Partner at NEEF LEGAL in Berlin;
- Gustavo Meira Moser, who studied law in Brazil and Switzerland and is an Associate Legal Officer at the World Intellectual Property Organization in Switzerland;
- Dr. Alissa Palumbo, who studied law in the United States and Switzerland and is an attorney licensed to practice law in New York;
- Dr. Paulo Nalin, who received his legal education in Brazil and is founding name partner of Popp & Nalin Associates and Professor at the Federal University of Paraná;
- Dr. Rajesh Sharma, who is Assistant Professor at City University of Hong Kong and received his graduate education in India and holds postgraduate degrees in China, Australia and Hong Kong;
- Dr. Cesar Pereira, who studied in Brazil and was visitor scholar in the United States and is a Fellow of the Chartered Institute of Arbitrators (FCIArb), the president of CAM-FIEP an Arbitration Center in Curitiba, Brazil, and partner at the firm Justen, Pereira, Oliveira & Talamini;
- Dr. Lisa Spagnolo, who was educated and trained in Australia and is Senior Law Lecturer at Monash University in Australia, a published author in law international journals and an expert advisor for overseas legislative bodies;
- Glenys Spence, who is Assistant Professor at Arizona Summit Law School in the United States. As a native of the island nation of St. Vincent and the Grenadines, she studied law in the United States and is licensed to practice law in Pennsylvania and New Jersey;
- Therese Wilson, who is a senior lecturer at the Griffith University and an admitted solicitor to the Supreme Court of Queensland in Australia.
- Finally, Dr. Edgardo Muñoz, who received his legal education in Mexico, France, England, Switzerland and the United States and is currently Professor of Law at Panamericana University in Guadalajara, Mexico.[17]

17 The author of this review.

IV Why do I find the SiLS LL.M. program fascinating?

In a recent publication, American Law Professor Carole Silver analysed the profiles of a number of American lawyers at the frontline of globalisation. The lawyers under scrutiny were selected based on their daily interaction with business executives and professionals educated in different countries. Professor Silver concludes that many of these lawyers had obtained through their legal education and careers the ingredients for the global literacy that lawyers need to meet the globalisation challenge. Accordingly, Professor Silver recommends a legal education and training, which supports law students in acquiring the following key elements of global literacy: language, cultural fluency, an appreciation for the role of lawyers, and the law itself.[18]

After reading Professor Silver's analysis and conclusions, I confirmed my view that studying at SiLS is indeed a tremendously valuable and unique experience because it effectively allows graduates to make the most of globalisation and become fluent in "speaking international".

In terms of language, the SiLS LL.M.'s videos and materials are in English and have been prepared by native English speakers or lawyers with full professional proficiency in English. All tutors and course leaders are also either native English speakers or fluent in English. Weekly discussions and negotiations against other teams are always held in English. Thus, the SiLS LL.M. gives students the tools and opportunity to develop strong professional English language skills, which are a key component for lawyers working in international matters.

With regard to cultural fluency and the appreciation for the role of lawyers in other countries, this is achieved through the setup of teams composed by members from diverse legal backgrounds. Course leaders guide students through the intricacies of negotiating a contract or litigating a dispute against opposing lawyers from different legal cultures. Students admitted into the SiLS LL.M. program come from various legal traditions, systems and all continents. They are selected after a rigorous review of applications and on the basis of their intellectual and leadership abilities, as well as their capacity to participate effectively in a global community of legal practitioners. The interaction among these individual talents guarantees a truly cultural cross-penetration. Students in a regular LL.M. do not often have the opportunity to learn by simulating the work of real multicultural teams of lawyers. SiLS gives students the opportunity to meet this challenge. A challenge, which is comparable to that faced by students participating in international moot court competitions such as the Willem C. Vis Moot, but amplified by the wider scope of the SiLS LL.M. program.

In terms of understanding and effectively applying the law, students in the SiLS LL.M. are taught by the four top world experts in their respective fields, i.e. the module leaders. Students are also guided by experienced and always available course leaders. SiLS has the required level of sophistication in its online technology and human capital to accomplish effective law learning by all students. In conclusion, the LL.M. is a unique opportunity for young lawyers who are, or will be soon in their careers, asked to handle legal issues with foreign or

18 Carole Silver, Educating Lawyers for the Global Economy: National Challenges, Kyung Hee University Law Review, (2009), p. 4, available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1029&context=facpub (20 October 2014).

international elements. In a globalised society like ours, it makes sense that students should not necessarily leave their countries in order to learn from the top experts or specialists in a given field of law. At SiLS this is possible. Moreover, what makes the SiLS LL.M. specifically attractive is the possibility to study it part time and thus accommodate it with the student's other professional or private obligations. Students are able to enrol in one of the best LL.M. programs focused on international commercial law under the state of the art technology according to their own needs and possibilities.