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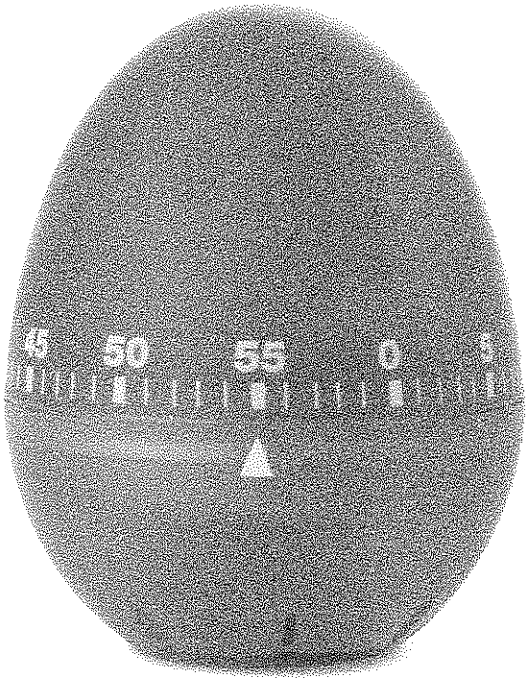


**Jakob Ragnwaldh**, **Niklas Åstenius** and **Aron Skogman** of **Mannheimer Swartling** provide early reflections on the Stockholm Chamber of Commerce emergency arbitrator rules

On 1 January 2010, emergency arbitrator ("EA") provisions were introduced into the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC Rules"). As a dispute resolution mechanism, the EA allows parties to an SCC arbitration agreement to seek interim measures within the arbitral context as an alternative to seeking such relief before national courts. Similar mechanisms have subsequently been introduced by a number of other arbitral institutions, such as the ICC, HKIAC and SIAC.

This article aims to provide a brief overview of the EA mechanism within the SCC Rules and some early reflections on the cases where a party has made use of the EA provisions.[1]

## The emergency arbitrator framework under the SCC Rules

Under the EA provisions set out in Appendix II to the SCC Rules, a party to an SCC arbitration agreement may apply for the appointment of an EA up until the case has been referred to an arbitral tribunal. As opposed to some other institutional rules, the SCC Rules allow for an application to be submitted even *before* a request for arbitration has been filed.

An EA has the power to grant any interim measure it deems appropriate, order the party requesting an interim measure to provide appropriate security and issue the decision in the form of either an order or an award. The powers of the EA terminate when the case has been referred to an arbitral tribunal or when an emergency decision ceases to be binding.

When the SCC receives an application, the secretariat forwards the application to the respondent. The SCC Board shall then seek to appoint an EA within 24 hours of receipt of the application. The SCC has been successful in doing so for all applications it has received to appoint an EA.[2]

It should be noted that the EA provisions are applicable to all arbitrations commenced on or after 1 January 2010. It is therefore irrelevant for the purpose of the application of the EA provisions whether the arbitration agreement was concluded before they entered into force.

As soon as the appointment has been made, the SCC refers the application to the EA. Soon thereafter, the EA decides on the procedure of the emergency arbitration since the SCC Rules contain no specific ▸

1 The review of these cases is based on an SCC report entitled *SCC Practice: Emergency Arbitrator Decisions 1 January 2010 – 31 December 2013*, authored by Johan Lundstedt and published in the SCC newsletter 1/2014.
2 Lundstedt, Johan, *SCC Practice: Emergency Arbitrator Decisions 1 January 2010 – 31 December 2013*, pp. 3-22. SCC newsletter, 1/2014.

requirement in this respect,[3] other than providing that the emergency decision shall be rendered within five days from when the application was referred to the EA.

The EA's decision is binding on the parties when rendered. However, the decision ceases to be binding if: (i) it is amended or revoked by the EA upon the request of a party; (ii) the EA or an arbitral tribunal so decides; (iii) an arbitral tribunal makes a final award; (iv) an arbitration is not commenced within 30 days from the date of the emergency decision, or; (v) the case is not referred to an arbitral tribunal within 90 days from the date of the emergency decision. An arbitral tribunal is not bound by a decision of the EA.

With respect to the 90-day time limit, there is a possible risk that a respondent may attempt to obstruct the proceedings, for example by not participating in the appointment of an arbitrator or by refusing to pay its share of the advance on costs, in the hope that the emergency decision will cease to be binding before the case is referred to an arbitral tribunal.

The matter of extending the 90-day time limit arose in an SCC emergency arbitration (case no. 187/2010) where the claimant's application for extension was denied since the EA held that he did not have the power to grant such an extension. A member of the committee that drafted the SCC EA provisions has expressed the opposite view when explaining the drafters' intention that the binding effect of an emergency decision *could* in fact be extended.[4] Accordingly, this may be an aspect of the EA rules which might benefit from further clarification in the future.

The costs of the proceedings normally amount to EUR 15,000, but may be adjusted by the SCC Board. The applicant must pay for the procedure regardless of the outcome. However, the costs may be allocated between the parties in the final award by the arbitral tribunal, if so requested by a party.

## Common features of the emergency arbitrator cases heard before the SCC

During the first four years of the EA rules, the SCC received nine applications in total for emergency arbitration.[5] The amount in dispute has greatly varied in the cases thus far, ranging from around EUR 500,000 up to USD 145 million.[6] Therefore, there is no noticeable correlation between the amount in dispute and cases in which parties have applied for emergency arbitration.

A common feature that does exist, however, is that the cases have all been international. A plausible explanation for this may be that parties to a domestic dispute are more inclined to seek interim relief before national courts (which is expressly permitted under the SCC Rules).

Even though the SCC Rules merely state that the EA has the power to *"grant any interim measures it deems appropriate"*,[7] another commonality of SCC emergency arbitrations are the standards applied by EAs in assessing the interim relief sought. As stated by the EA in the SCC emergency arbitration (070/2011), an arbitrator is entitled to order measures which *"extend [...] beyond the mere conservation or disposal of goods"*, such as *"injunctions of all kinds"*, *"[to] enjoin any particular course of conduct"*, *"to eliminate or reduce economic loss or other impairment of valuable rights and to provide reasonable safeguards for the preservation of the relief sought against improper unwarranted conduct."*

Having referred to this very broadly defined power, the EA concluded, with reference to both Swedish law (the *lex arbitri* in the case) and a *"universal consensus with regard to the requirements that need to be present when granting interim measures"*, that the following requirements should be met:

1. *Prima facie* establishment of the case;
2. Urgency; and
3. Irreparable harm.

Considering the nine emergency arbitrations administered by the SCC so far, one can conclude that the EAs have applied

3 The ICC Rules stipulate that a procedural timetable must be established, normally within two days of referring the file to the EA.
4 Shaughnessy, Patricia, *Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules*, p. 343. Journal of International Arbitration, 2010, Volume 27 Issue 4: *"A party may request the emergency arbitrator to extend the decision if the request for the extension is made prior to the lapse of the decision. This might then trigger a new lapse period, thereby allowing the decision to survive past the original lapse period, although this situation is not explicitly dealt with in the EA Rules."*
5 Lundstedt, Johan, *SCC Practice: Emergency Arbitrator Decisions 1 January 2010 – 31 December 2013*. SCC newsletter, 1/2014.
6 *Ibid.*, pp. 3-22.
7 The SCC Rules, Art. 32(1).

(photo: eGuide Travel)

similar standards, although with differing terminology and reasoning. By applying such similar standards, the EAs have denied applications for emergency interim relief under the following circumstances:

- Where the claimant had failed to establish a risk that the respondent, absent an interim measure, would transfer certain assets beyond the reach of the claimant (no irreparable harm);[8]
- Where any loss attributable to the conduct of the respondent, which the interim relief sought to prevent (payment under a certain bank guarantee), could have been satisfied by means of damages in the final award (no urgency, no irreparable harm);[9]
- Where, in a case concerning damages due to an alleged breach of contract, the claimant could not establish the probability that the respondent would dispose of its assets in an attempt to frustrate enforcement (no urgency, no irreparable harm);[10] and,
- Where, even though substantial damages would likely be suffered by the claimant absent the interim measure sought (delivery of products under an agreement with the respondent), the harm would not be irreparable since the claimant could be fully compensated through damages.[11]

Other requests have been denied because of more fundamental deficiencies:

- Where the application sought to obtain an order against non-parties to the arbitration agreement;[12]
- Where the application sought to obtain an order forcing the respondent to deliver certain products, which according to the EA would risk rendering a subsequent award wholly or partly superfluous;[13] and,
- Where the application sought to safeguard the rights of a third party and did not at all seek protection through interim relief, but rather a declaratory relief.[14]

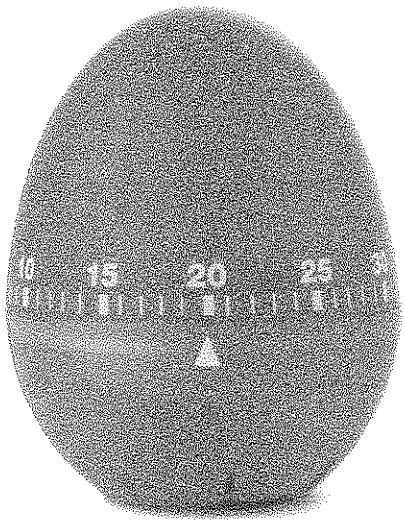
The applications for emergency interim relief were granted in two cases:

1. Where the EA was requested to prevent the respondent from selling, assigning, transferring, pledging or otherwise disposing of any of its shares in a company, shares which the claimant was entitled to redeem in order to maintain an agreed minimum percentage of shareholding. In that case, it was not disputed that the respondent had submitted an offer for the sale of the shares to third parties;[15] and,
2. Where a party requested the EA to order the return of certain goods, which had been leased by the respondent and were to be delivered by the claimant to a third party one month after the expiry of the lease.[16]

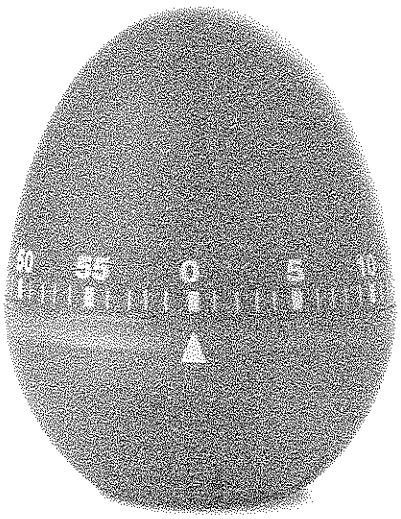
## Compliance with decisions granting emergency interim relief

The success of the EA concept will, to a certain extent, depend on whether respondents will comply with an interim measure which has been granted. Although the SCC Rules are clear on the point that the emergency decision is binding on the parties, the question of enforceability has been subject to debate.

As noted by one commentator, *"the mere designation 'award' [which is possible under the SCC EA rules] will not convert a decision having the character of an order into an award"* within the meaning of the New York Convention. Arguments have been presented both in support of and against enforceability of EA decisions. When tried in court, the outcomes have varied.[17] Consequently, successful claimants in emergency arbitrations cannot fully rely on enforcement as a means to ensure that a decision will be complied with, although the risk of enforcement might be considered a strong incentive in and of itself. ▹




8 SCC Emergency Arbitration (064/2010).
9 SCC Emergency Arbitration (139/2010).
10 SCC Emergency Arbitration (070/2011).
11 SCC Emergency Arbitration (010/2012).
12 SCC Emergency Arbitrations (064/2010) and (087/2012).
13 SCC Emergency Arbitration (144/2010). In the EA's view, such an interim award would only be possible provided that the respondent had engaged in manifest obstruction or obvious misconduct in business.
14 SCC Emergency Arbitration (087/2012). The EA also found that the requirement of urgency had not been met in the case.
15 SCC Emergency Arbitration (187/2010).
16 SCC Emergency Arbitration (057/2013).
17 "Shaughnessy, Patricia, *Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules*, p. 345. *Journal of International Arbitration*, 2010, Volume 27 Issue 4. The outcomes in US courts have varied in this respect although recent authorities have been more inclined to enforce interim measures granted by arbitral tribunals. Other jurisdictions, such as Hong Kong, Germany and England, have adopted statutory provisions expressly providing for the parties to seek enforcement (Born, Gary, *International Commercial Arbitration*, Volume II, pp. 2020-2025, 2009). However, as noted by one commentator, in most legal systems – including Sweden – tribunal orders on interim measures are not considered to be enforceable since such an order does not finally resolve a dispute (Hobér, Kaj, *International Commercial Arbitration in Sweden*, p. 249, 2011)."




There are, however, other strong incentives for respondents to comply with an emergency decision. For example, failure to comply with the emergency decision has been argued to constitute a breach of contract, since it is stated in the SCC Rules, App. II, Art. 9(3) that *"[b]y agreeing to arbitration under the [SCC Rules], the parties undertake to comply with any emergency decision without delay."*[18] Moreover, it is likely that the arbitral tribunal would be entitled to draw negative inferences[19] based on a party's failure to comply with an emergency decision.[20]

Most important, however, is the likely psychological effect on the non-complying party, which will be aware that the EA procedure will be followed (if not yet commenced) by an arbitration concerning the same or similar issues that were the subject of the EA procedure. Although the arbitral tribunal is not bound by any decision of the EA, a party which has not complied with an emergency decision may, depending on the circumstances, run the risk of losing some credibility with the arbitral tribunal.

## Balancing urgency against the parties' right to present their case

An inherent difficulty with EA proceedings is the potential imbalance between the parties at the early stages of the process. Often, the claimant and its counsel will have had time to prepare for an upcoming application for an emergency arbitration and will initially have a considerable advantage in terms of the knowledge of the relevant facts and circumstances of the case.

In the cases handled thus far, the EAs and the SCC Board seem to have succeeded in taking into account this potential imbalance. In two of the cases, the respondent requested an extension of the time limit for rendering the decision in order to be able to finalise a reply to the claimant's application. In both cases, the EA accepted and passed on the request to the SCC Board, which ultimately granted the extensions.

In one of the cases, counsel for the respondent was involved only on day seven of the proceedings, but managed to file a reply on day eight, after which the decision was rendered on day twelve. In the second of the two cases, the respondent was granted an extension of two days, but the EA nevertheless managed to render the decision on day six.

Although having granted all requests for extension in the cases handled so far, the average time for a decision is less than seven days starting from the time the application has been submitted to the SCC.[21]

It should be noted that in one of the cases, the respondent chose not to participate at all. Since emergency arbitration is not available *ex parte* under the SCC Rules, the EA assessed the application for emergency interim relief on its merits and ultimately denied the claimant's application.[22]

It is difficult to draw any far-reaching conclusions based on the limited number of requests for emergency interim relief received during the first four years of the application of the EA provisions under the SCC Rules. However, a number of aspects of the EA concept under the SCC rules provide great promise, such as the apparent success in safeguarding the respondent's right to be heard while at the same time being fully committed to ensuring and supporting the urgency and efficiency of the proceedings.

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18 Ehle, Bernd, *Emergency Arbitration in Practice*, p. 101. New Developments in International Commercial Arbitration 2013, 2013.
19 The SCC Rules, Art. 30(3).
20 Shaughnessy, Patricia, *Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules*, p. 345. Journal of International Arbitration, 2010, Volume 27 Issue 4.
21 This may be compared, for example, with the three-week average under the ICDR Rules. Hosking, James and Valentine, Erin, *Pre-Arbitral Emergency Measures of Protection: New Tools for an Old Problem*, p. 5. Commercial Arbitration 2011: New Developments and Strategies for Efficient, Cost-Effective Dispute Resolution.
22 SCC Emergency Arbitration (087/2012).