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# SCC PRACTICE NOTE

Emergency Arbitrator Decisions  
2017 - 2018

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## **SCC PRACTICE NOTE**

Emergency Arbitrator Decisions 2017 – 2018

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### **I. Introduction**

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The SCC was one of the first arbitration institutions in the world to provide for emergency arbitrator proceedings. In 2010, the new Appendix II was added to the SCC Arbitration Rules and the Rules for Expedited Arbitrations enabling parties to seek interim measures before a case is referred to the arbitral tribunal.

Ten years after the introduction of Appendix II, the SCC has seen a total of 47 applications<sup>2</sup> for appointment of an emergency arbitrator.

This article will summarize all emergency arbitrator decisions rendered in 2017 and 2018. It refers to commercial arbitration cases only.<sup>3</sup>

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<sup>2</sup> For the period 1 jan 2010 - 30 Nov 2020.

<sup>3</sup> For a report on decisions in investment arbitration cases, see Alexey Pirozhkin, *Emergency Arbitrators' Decisions in Investment Treaty Disputes at the SCC (2014-2019)*, available at <https://sccinstitute.com/media/1718853/emergency-arbitrators-decisions-in-investment-treaty-disputes-at-the-scc-2014-201.pdf>

## II. The Procedure

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Under Appendix II of the SCC Rules, a party may apply for the appointment of an emergency arbitrator before the case has been referred to an arbitral tribunal. The emergency arbitrator may, at the request of a party, grant any interim measures it deems appropriate. The interim measure is binding on the parties when rendered and takes the form of an order or an award.

The SCC must notify the Respondent as soon as the application has been received, and the SCC Board will seek to appoint an emergency arbitrator within 24 hours of receiving the application.<sup>4</sup>

When an appointment has been made, and the emergency arbitrator has signed a declaration of impartiality and independence, the SCC promptly refers the application to the emergency arbitrator. Under Article 7 of Appendix II, the arbitrator may conduct the emergency arbitration as he or she considers appropriate, “taking into account the urgency inherent in such proceedings.”

In accordance with Article 8 (1) of Appendix II, a decision on interim measures shall be made no later than 5 days from the date when the application was referred to the emergency arbitrator. The SCC may extend this time limit upon a reasoned request from the emergency arbitrator, or if otherwise deemed necessary.

The 2017 revision of the SCC Rules amended Article 8 of Appendix II, so that the emergency arbitrator may apportion the costs of the emergency proceedings between the parties, applying the same principles as in ordinary arbitral proceedings.

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4. Article 4 (1) Appendix II of the SCC Rules.

5. Emergency decisions are presented in chronological order. In keeping with the SCC’s strict confidentiality undertaking, the decisions have been anonymized, and some facts have been modified.

### **III. Emergency Arbitrator Decisions rendered 2017-2018**

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#### **1. SCC Emergency Arbitration 2017/173**

##### **Background**

The parties (two Swedish companies) entered into a System Delivery Agreement (the “SDA”) which was accompanied by two amendment agreements.

In connection with the amendment agreements, the respondent paid instalments for work performed. Payments were made by “on demand” bank guarantees.

According to the last amendment agreement, the parties had a specific deadline to reach a comprehensive solution to their future collaboration. A week before the deadline, the respondent sent a letter to the claimant stating that it was impossible to reach such a comprehensive solution and demanded repayment of the instalments, which the claimant then refunded.

In turn, the claimant requested the respondent to return the bank guarantees.

##### **Procedure**

The application for interim measures was received on a Friday afternoon and the SCC both served the respondent and appointed an emergency arbitrator the same day.

The following day, the case was referred to the emergency arbitrator, who shortly after referral established a timetable for the proceedings. The interim decision was rendered within five days from referral.

##### **Request for interim measures**

The claimant requested the emergency arbitrator to ban the respondent from claiming the bank guarantees under the SDA and to ban the respondent from actively publishing, spreading information or participating in spreading information regarding the dispute.

### **Analysis and decision**

The emergency arbitrator started by noting that the parties seemed to agree on the criteria for deciding the claimant's request for interim measures, those criteria being i) jurisdiction, ii) proportionality, iii) irreparable harm and iv) a reasonable possibility to succeed on the merits.

Neither party had any objection to the emergency arbitrator's jurisdiction over the dispute and, based on the parties' arbitration clause in the SDA, the emergency arbitrator was satisfied as regards jurisdiction to decide on the request for interim measures.

First dealing with the issue of the bank guarantees, the arbitrator established that the principle of "pay first, litigate later" is well recognized around the world. This, the emergency arbitrator found, should consequently require a very high threshold for banning a payment or a demand for payment.

The emergency arbitrator further elaborated that the agreement and the amendments were ambiguous as to the obligations the bank guarantees were intended to cover and that it would be a serious measure to base a decision banning a claim against the bank guarantees on alleged and uncertain counterclaims.

Based on the above reasoning, the emergency arbitrator concluded that the claimant had failed to prove that a possible claim could lead to irreparable harm for the claimant.

Secondly, the emergency arbitrator dealt with the issue of confidentiality. The emergency arbitrator quoted the parties' confidentiality clause and noted that it contained exceptions to the rule of confidentiality. Considering these exceptions and the fact that the dispute had already generated some outside interest, the arbitrator concluded that the claimant had failed to convince the emergency arbitrator that an acute need to limit the respondent's contacts outside of the dispute was present, and that compensation by way of damages due to a breach of the confidentiality clause was an insufficient sanction.

Based on the above criteria and reasoning, the emergency arbitrator denied the claimant's request for interim measures in its entirety.

## **2. SCC Emergency Arbitration 2017/184**

### **Background**

The claimant and the first respondent (both seated in Latvia) entered into a Share Purchase Agreement (the “Agreement”) where it was agreed that the claimant would acquire 10% of the shares in another company (the “Target company”), wholly owned by the first respondent.

Following one of the claimant’s financiers’ publication of information about the Target company on its website, the first respondent argued that the claimant was in breach of the Agreement’s confidentiality clause and a dispute arose. While discussing how to resolve the dispute, the first respondent initiated liquidation proceedings.

The claimant asserted that the second respondent had unlawfully breached the Agreement, the first respondent being under sole control of the second respondent.

### **Procedure**

The SCC appointed an emergency arbitrator the same day on which the application was submitted and the case was referred to the emergency arbitrator the next day, when the first procedural order was also issued. The respondents submitted a joint reply two days later.

The parties filed another three submissions and it was decided that no hearing was to be held. The emergency decision on interim measures was rendered five days after the referral.

### **Request for interim measures**

The claimant stated that it had incurred direct damage as a result of the first respondent’s unwillingness to perform its obligations and requested the emergency arbitrator to declare, amongst other things, that the first respondent had unlawfully rescinded the Agreement, order specific performance of the Agreement, order the first respondent to suspend the voluntary liquidation, join the second respondent to the arbitration and prevent the second respondent from selling, transferring, assigning or otherwise alienating its controlling shareholding in the first respondent.

### **Analysis and decision**

Before considering whether the claimant's application for interim measures met the requirements for granting such relief, the emergency arbitrator addressed the issue of jurisdiction.

It being undisputed that the first respondent was a party to the arbitration agreement, the emergency arbitrator found itself having jurisdiction to try requests for interim relief covered by the arbitration agreement and directed against the first respondent.

The emergency arbitrator found it undisputed that the second respondent was not a signatory to the Agreement containing the arbitration clause but pointed out that it is "generally accepted that parties can become bound by an arbitration agreement by other means than by signing the agreement" and that the burden of establishing its case on jurisdiction lay on the claimant.

Based on the submissions filed and the evidence submitted, the emergency arbitrator found the claimant unable to do so and found a lack of jurisdiction over the second respondent.

In the absence of any specific standards for granting interim measures in the SCC Arbitration Rules, the emergency arbitrator sought guidance in Article 17(A)(1)(a) and (b) of the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law"), stating that the claimant must establish (i) irreparable harm, (ii) proportionality, and (iii) a reasonable possibility to succeed on the merits.

Further, the emergency arbitrator found it appropriate to also consider "the special focus on urgency inherent in the Emergency Arbitrator procedure".

The emergency arbitrator found that the criteria of urgency and irreparable harm had not been met due to the claimant's own submission that liquidation of the first respondent was not expected to be completed before interim relief could be obtained from the arbitral tribunal and since there is no requirement in commercial law to the effect that a creditor's claim may not be covered by an arbitration agreement to be recognised

in the liquidation. The emergency arbitrator further concluded that since the first two criteria were not fulfilled, there was no need to assess the remaining requirements.

Based on the above argumentation, no interim measures were granted.

### **3. SCC Emergency Arbitration 2018/099**

#### **Background**

The claimant (a Finnish company) had entered into a distribution agreement with the Swedish respondent company, where the respondent was appointed to act as distributor of the claimant's products in certain, specified territories.

The agreement was concluded for an initial fixed term of five years. Two years into the agreement, the respondent publicly announced it was being acquired by a third company and during a period of three months, five employees of the respondent left the company to start another – according to the claimant – competing business.

Due to the change in ownership, the respondent sent a notice of termination which the claimant stated was groundless.

#### **Procedure**

The day following receipt of the application, the SCC appointed an emergency arbitrator. After conferring with the parties, the emergency arbitrator requested a one-day extension of time to render an interim decision, which was granted. The respondent submitted its reply two days after referral which the claimant commented on the following day. The respondent also submitted a rejoinder to the claimant's comments.

On the day of the interim decision, the parties jointly submitted a request for the emergency arbitrator to postpone rendering an interim decision due to the parties' settlement negotiations whereby the emergency arbitrator filed a new request for extension with the SCC. A three-day extension was granted.

Ten days after the application was submitted, it was withdrawn by the claimant and the emergency arbitrator rendered a decision, declaring the application for interim measures dismissed.



**Request for interim measures**

The claimant requested the emergency arbitrator to declare the notice of termination invalid and the respondent bound by the agreement and continuing to be so bound until the agreement was rightfully terminated according to its terms. The claimant further requested the emergency arbitrator to order the respondent to continue operating pursuant to the terms of the agreement and to prohibit the respondent from supplying its products to the competing company established by the respondent's former employees.

**Analysis and decision**

Due to the claimant's withdrawal, the application for interim measures was dismissed without review on the merits.

**4. SCC Emergency Arbitration 2018/140****Background**

In these proceedings, the Estonian claimant was the sole shareholder of a holding company and the German respondent was the managing partner of the holding company.

Certain assets of the holding company were mortgaged and when the parties started to negotiate re-structuring of the loan, the claimant's shares were transferred to the respondent with an obligation for the latter to return the shares once the loan had been re-structured.

**Procedure**

The day following receipt of the application, the SCC appointed an emergency arbitrator. The emergency arbitrator invited the respondent to submit its reply to the application within three days. A late reply was submitted after a telephone conference had been held.

The emergency decision was rendered five days after referral to the arbitrator.

**Request for interim measures**

In its application, the claimant asserted that the respondent, in breach of the parties' agreement, had entered into agreements with third parties for the sale of the assets. The claimant therefore sought from the emer-

gency arbitrator a decision prohibiting the respondent from executing the transactions and from taking any other steps regarding transfer of the title to the assets.

### **Analysis and decision**

Noting the discretion afforded by the SCC Rules, the emergency arbitrator held that an emergency decision should be based on the following criteria: i) irreparable harm, ii) imminence, iii) urgency, and iv) the possibility of success on the merits.

Assessing the claimant's application against these factors, the emergency arbitrator first found that the claimant had failed to present any documentation supporting the assumption that any company that "may have been nominated by" the respondent's company, or that "is to be nominated by" the respondent's company would find itself in a critical financial situation. Such a circumstance would have brought the claimant into competition with other creditors of the insolvent estate which normally leads to a substantial loss of the claim.

Therefore, the emergency arbitrator noted that it could not be concluded that the consummation of any sales transaction causing transfer of funds to any legal entity nominated by the respondent's company would be susceptible of causing irreparable harm to the claimant.

Second, the emergency arbitrator found that the sales transaction with respect to one of the assets appeared to be not yet concluded and thereby could testify to the urgency of the application and to support the claimant's assertion of imminent harm following unavailability of emergency relief. The sales transactions for the other two vessels had, as noted by the emergency arbitrator, already taken place.

Third, regarding the urgency requirement, the emergency arbitrator stated: "The concept of urgency is interdependent on the existence of imminence of a threat: if the threat of grave harm is imminent, there is a need for urgent relief." and concluded that, based on the observations in the case, no urgency was present.

Finally, the emergency arbitrator concluded that the claimant's request for interim relief directed against the three third parties was dismissed due to lack of jurisdiction.

The claimant's request for interim relief directed against the respondent was denied for lack of a prima facie case.

## **5. SCC Emergency Arbitration 2018/146**

### **Background**

The parties (two Canadian companies as claimants and a Dutch respondent company) had entered into a settlement agreement (the "SA") to settle a then pending arbitration regarding termination of a licensing and distribution agreement. As part of the settlement, the parties agreed to a moratorium during which the respondent would refrain from executing any business related to the licensing and distribution agreement.

In addition, the SA contained provisions relating to an IP statement and the moratorium could either be extended or reduced by 10 days per day late depending on which party did not produce the IP statement by the agreed-upon date.

### **Procedure**

An emergency arbitrator was appointed within the stipulated 24 hours and the case was referred to the emergency arbitrator the day after the application was submitted.

A procedural order was agreed on the same day and the respondent submitted its reply the following day. The day after that, the parties jointly informed the emergency arbitrator that they had settled the dispute. A consent order was rendered by the emergency arbitrator three days following referral.

### **Request for interim measures**

The claimants claimed the respondent had taken the position that the moratorium had expired and had not agreed to a standstill pending adjudication of the parties' dispute. The claimants wanted an injunction by way of interim relief to order the respondent to comply with the moratorium as agreed between the parties and requested a penalty of EUR 1 000 000 for each day that the respondent was in breach of such an order.

**Analysis and decision**

Since all parties had agreed to terminate the proceedings, the emergency arbitrator found no reason to oppose the request for termination and rendered a consent order in which the emergency arbitrator terminated the proceedings without review of the merits.

## IV. Conclusions

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Between January 2017 and December 2018, the SCC received seven applications for the appointment of an emergency arbitrator. One request for interim relief was granted, one was partially granted and the remaining five were either denied or dismissed. All appointments have been made within the 24 hour time limit.

The SCC Rules leave it to the emergency arbitrator to decide which interim measures are suitable in the specific case at hand. Indeed, the emergency arbitrator has the power to “grant any interim measures it deems appropriate”, wording that confirms the emergency arbitrator’s broad authority to grant interim measures and does not establish a set standard for when that authority should be recognized.

Most, but not all, emergency arbitrators refer to Article 17 of the UNCITRAL Model Law, the *lex arbitri*, as well as previously published decisions on interim relief.

A set of criteria have been formed, commonly accepted as prerequisites for granting interim relief. These criteria are: i) jurisdiction, ii) prospect of success on the merits, iii) urgency, iv) irreparable harm, and v) proportionality.

Historically, the most difficult criterion to meet appears to be the criterion of urgency. Looking at the applications that were denied between the years 2017-2018, urgency and irreparable harm remain difficult for the claimant to prove.

However, none of the emergency arbitrators appointed found that the claimants lacked a reasonable possibility to succeed on the merits.

It can be concluded that even though emergency arbitrator proceedings may be burdensome for the parties involved due to the limited timeframe, each party is given an equal and reasonable opportunity to present its case.

Where an extension of time has been granted to render an interim decision, this has been allowed in order to see to it that the above is ensured.

According to Article 9 of Appendix II, an interim decision is binding on the parties when rendered.

Occasionally, the SCC receives information about compliance with and enforcement of interim decisions rendered under Appendix II. Based on this informal evidence, it appears that the degree of voluntary compliance is relatively high.

Further, according to Article 9(4)(iii), an interim decision ceases to be binding on the parties if arbitration proceedings are not commenced within 30 days from the date of the interim decision.

All emergency applications submitted between the years 2017-2018 were followed by a request for arbitration. Three of them were submitted within the 30 days.