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Emergency Arbitrator – The Proposed New Procedure of the SCC Rules

Fatima-Zahra Slaoui (Freshfields Bruckhaus Deringer LLP) · Monday, June 22nd, 2009 · YIAG

The [Arbitration Institute of the Stockholm Chamber of Commerce](#) (SCC) has recently proposed the inclusion of an “Emergency Arbitrator” procedure in the [SCC Rules](#) (see [Draft New Rules with Notes](#)). On 18 June 2009, the drafting committee for the Emergency Arbitrator proposal presented the main amendments gathered from the comments of the arbitration community to the Board of the Arbitration Institute of the SCC.

Since the announcement (see SCC website: [SCC strengthens its Arbitration Rules](#)) in April 2009, the details of the Draft Rules have been vividly discussed. At the hearing held on the SCC premises on 23 April 2009 (see [GAR: SCC to add new rule on interim measures](#)) members of the international and Swedish arbitration community provided comments on the Draft Rules. The SCC has since received a number of written comments as well. Overall, international practitioners have shown more enthusiasm than the domestic practitioners. Before setting out the procedure and comments on the proposal, it is worth noting that the Emergency Arbitrator procedure satisfies an important need in arbitration although it is not a complete novelty.

According to an SCC user survey conducted in 2008, 82% of counsel active in SCC arbitration believe that interim measures should be available from the initiation of the arbitration. It was to respond to this need that the SCC decided to introduce the facility of an Emergency Arbitrator. The SCC’s stated intention is to “further strengthen its rules and to enhance the parties’ rights to get a timely decision on interim measures”. The Emergency Arbitrator is to rule on interim measures before a request for arbitration is filed and therefore before any arbitral tribunal is in place. One of the main characteristics of the Emergency Arbitrator is that it is proposed to be integrated in the [SCC Rules](#) as an appendix to Article 32. Accordingly, should the parties to an arbitration agreement not wish the procedure to apply, they would have to “opt out”. This opt-out solution seems reasonable because it is a way to render the procedure efficient. Most parties to an arbitration agreement will not have envisaged the need for interim measures until a dispute starts building up. The Emergency Arbitrator procedure provides an efficient protection at a very early stage, short-circuiting the possibly lengthy phase of filing a request for arbitration and constituting an arbitral tribunal. The involvement of the Secretariat of the Arbitration Institute of the SCC in notifying the other party of the application (i.e. avoiding *ex parte* applications and granting of interim measures) is another efficient aspect. Interim measures typically include orders to preserve evidence or assets and other measures aimed at maintaining the *status quo* pending the outcome of an arbitration on the merits. The arbitration practice shows that there is a true need for interim

measures at an early stage, before any degrading, dissipation or destruction occurs. In that regard the proposal seems sensible and salutary.

As the arbitration community is familiar with three other similar procedures, the Emergency Arbitrator is not a complete novelty: 1) the arbitration rules of the Netherlands Arbitration Institute (Articles 42a-o) contain similar provisions; 2) the [Emergency Measures of Protection](#) (Article 37 of the ICDR Rules) of the American Arbitration Association has reportedly been successful; and 3) since 1990, the International Chamber of Commerce offered a procedure, the [Pre-Arbitral Referee](#), that allows parties to apply to a “referee” for urgent provisional measures in relation to a dispute. However, the Pre-Arbitral Referee is hardly ever used in practice, largely because of its opt-in nature. This stresses the competitive advantage of the SCC Emergency Arbitrator facility that is there to support all parties, unless they have expressly opted-out of it. If parties do opt out, they are more likely to make an active choice, and should therefore be duly informed of what they are ruling out. Parties tend to be more passive with opt-in solutions as they are often unaware of their options.

In short, the procedure consists in making it possible for parties to an SCC arbitration agreement to apply for the appointment of an Emergency Arbitrator whose power to make emergency decisions encompasses the period from the Emergency application until the moment the file is referred to an arbitral tribunal dealing with the case on the merits (Article 1). The Emergency Arbitrator should be appointed within 24 hours (Article 4(1)). The emergency decision should be issued within 5 days of the referral of the application (Article 8(1)). The emergency decision is binding on the parties until decided otherwise either by the Emergency Arbitrator or by the Arbitral Tribunal dealing with the case on the merits, or until the moment a final award has been rendered.

The time limits have been criticized as too short. It is argued that 24 hours is too short to allow for conflict checks, particularly during week-ends. The pool of available arbitrators would potentially be limited. Therefore, this time limit has received attention and is likely to be modified before the procedure is inserted in the SCC Rules. Another issue that is expected to find clarification at the SCC Board’s meeting on 18 June 2009, is the provision according to which an emergency decision is no longer valid if an arbitration on the merits is not initiated or if the case is not referred to an Arbitral Tribunal within a certain time from the date the decision was made (Article 9 (3)). Because of the risk of the expiry of the emergency decision, it is indeed sound to make it clear that the emergency decision may be renewed or altered by the Emergency Arbitrator.

General issues that could be raised are similar to those arising about any interim measures. Enforcement is one, jurisdiction is another: if the place of enforcement is Sweden, enforcement will presumably not be an issue if the courts become familiar with this procedure. Query if it is in another jurisdiction, one that does not recognize such an emergency order or decision? By comparison, it is interesting to note that the Netherlands Code of Civil Procedure (Article 1051(3)) actually qualifies an award rendered in summary arbitral proceedings as an arbitral *award* in the sense of the act, which can thus also be enforced internationally under the New York Convention. Do state courts maintain jurisdiction or does the Emergency Arbitrator’s jurisdiction exclude it? One can assume that the jurisdiction of state courts are not excluded but, in doubt, wouldn’t it be preferable to address this concern?

Time is of the essence for any party to a dispute, certainly early on in the proceedings when the fear of dissipation of the assets is perhaps at its peak. It is undeniable thus that the proposed Emergency Arbitrator procedure would encourage the early resolution of disputes in a


straightforward way, one that involves neither state courts nor arbitral tribunals. It is hoped that the procedure might even encourage settlement. The Draft Rules will be submitted to the full Board of the Arbitration Institute of the SCC in September and will then be finally approved by the Stockholm Chamber of Commerce itself. The Emergency Arbitrator procedure is expected to enter into force on 1 October 2009.

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