

# Emergency Arbitrators under the ACICA

## Kluwer Arbitration Blog

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The recent global financial crisis has had a significant effect on the types of disputes submitted to arbitration in the major Asia-Pacific financial centres. Arbitration centres have responded with various measures to cater to more cost conscious clients, and to increase the efficiency of proceedings and to speed up the way proceedings are conducted. Governments have introduced legislative, regulatory and procedural changes affecting arbitration.

One of the greatest concerns voiced by the international business community is that arbitration needs to provide means of granting protective measures, which are often needed urgently. At any stage of the arbitral proceedings, a party to a dispute may need to ensure that the other party takes or refrains from taking certain actions before the dispute has been heard. For instance, one party may wish to prevent the other party from dissipating its assets or destroying evidence, or it may seek to ensure that the other party continues to perform its obligations under an ongoing contract.

These measures may be necessary to ensure that the final outcome of the dispute process is not prejudiced or rendered ineffective because of the way a party behaves. Interim measures provide a remedy or relief aimed at safeguarding the rights of parties to a dispute pending its final resolution. The underlying principle is that no party's rights should be prejudiced or affected by the duration of adjudication and protection is available through the right to seek interim measures

of protection from the arbitral tribunal itself or from the courts.

In international arbitration, arbitral tribunals are generally empowered to grant interim measures of protection. However there are times when parties to arbitration require interim measures on an urgent basis, before the Arbitral Tribunal has been constituted. The constitution of an arbitral tribunal can take some time and during this time the status of things may change substantially and it cannot be taken for granted that disputed assets will not be dissipated. Although ordinarily the rules of arbitral institutions do not prevent a party from requesting an interim measure in court, parties that have agreed on arbitration are often hesitant to go to court, especially in a foreign jurisdiction. Thus, there is a need to provide parties with the option of having such a procedure available during the course of the arbitration, as well as before the constitution of the arbitral tribunal.

In response to this need, the ACICA has updated its Arbitration Rules to include a set of Emergency Arbitrator provisions. The emergency rules, which establish a regime for emergency proceedings, are incorporated into the ACICA Rules, which refers to Schedule 2 where the emergency rules are to be found. These new provisions enable the appointment of an Emergency Arbitrator in arbitrations commenced under the ACICA Rules but before the case is referred to an arbitral tribunal. It is hoped that they will provide businesses with a prompt and efficient option for obtaining urgent interlocutory relief in their cross-border disputes.

The latest version of the ACICA Emergency Arbitrator provisions comes into force on 1 August 2011. By accepting ACICA arbitration, parties accept not only arbitration according to the ACICA Rules, but also to be bound by any decision of an Emergency Arbitrator. By referring to the ACICA Rules, parties also adopt the emergency rules. The power of the Emergency Arbitrator applies to all arbitrations conducted under new ACICA Rules, unless the parties expressly opt out of it in writing. The ACICA Rules do not prejudice a party's right to apply to any competent court for interim measures.

The ACICA emergency arbitrator rules are designed to be an effective alternative to seeking pre-arbitration emergency relief in court, prior to and after the commencement of arbitration, but before the constitution of the arbitral tribunal.

A request for emergency relief must be made concurrently with or following the filing of the Notice of Arbitration and be communicated to all other parties prior to

or at the same time as making application. The party applying must include a statement certifying that all other parties have been notified, or explain the steps taken in good faith to notify the other parties of the application.

In addition to these threshold preconditions, the emergency procedure requires the application to indicate in writing the nature of the relief sought, the reasons why such relief is required on an emergency basis and why the party is entitled to such relief.

The party making the application is also required to pay ACICA's Emergency Arbitrator Fee upon filing the application, together with the ACICA case registration fee. Payment is a condition for the appointment of an Emergency Arbitrator. ACICA may decide to reduce or increase the costs having regard to the nature of the case, the work performed by the Emergency Arbitrator and ACICA and other relevant circumstances.

The emergency procedure calls for ACICA to use its best endeavours to appoint the emergency arbitrator within one business day of its receipt of an application for emergency relief. The arbitrator will be selected to the extent possible from ACICA's panel of arbitrators, based on his or her expertise and immediate availability. While the Rules make no provision for the parties themselves to choose the Emergency Arbitrator, they do not preclude ACICA from appointing a person selected by the parties. If the parties agree on an emergency arbitrator, there is no reason for ACICA not to appoint that person subject to that person being suitably qualified and available and able to act in accordance with the Rules.

The ACICA emergency provisions also deal expressly with challenge procedures. A prospective Emergency Arbitrator shall immediately in writing disclose to ACICA any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A party who intends to challenge an Emergency Arbitrator shall send notice of its challenge within one business day after being notified of the appointment of that arbitrator and the circumstances disclosed.

An Emergency Arbitrator shall not act as an arbitrator in any future arbitration relating to the dispute, unless otherwise agreed by the parties in writing. As a person has acted as Emergency Arbitrator may be considered biased in any ensuing arbitration, the ACICA Rules contain an express provision in this regard.

When the Emergency Arbitrator has been appointed, ACICA refers the application

for interim relief to that Emergency Arbitrator. ACICA does not expressly provide rules about the conduct of the emergency proceedings but, the relevant ACICA Arbitration Rules could be applied to the emergency proceedings, taking into account the urgency inherent in such proceedings. The Emergency Arbitrator should conduct the proceedings in such manner as he or she considers appropriate in the circumstances, provided that the parties are treated equally, which will also cover the resisting party making submissions as and where appropriate as to why emergency relief should not be granted. Each party should be able to present its case as circumstances (and urgency) allow.

The ACICA emergency procedure provides for a time limit within which the decision must be made: any decision on an application for emergency interim relief must be made not later five business days from the date upon which the application was referred to the Emergency Arbitrator. ACICA may extend this time limit upon request by the Emergency Arbitrator.

The Emergency Arbitrator may grant any interim measures of protection on an emergency basis that he or she deems necessary and on such terms as he or she deems appropriate and it may take the form of an award or of an order and must be made in writing and contain the date when it was made and reasons for the decision.

The ACICA emergency procedure generally following the same approach as the ACICA Rules on interim measures.

The Emergency Arbitrator can order a party to:

- (a) maintain or restore the status quo pending determination of the dispute;
- (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm;
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied;
- (d) preserve evidence that may be relevant and material to the resolution of the dispute;
- (e) provide security for legal or other costs of any party.

The Emergency Rules also require that the party requesting any Emergency Interim Measure satisfy the Emergency Arbitrator that:

- (a) irreparable harm is likely to result if the Emergency Interim Measure is not ordered;

(b) such harm substantially outweighs the harm that is likely to result to the party affected by the Emergency Interim Measure if the Emergency Interim Measure is granted; and

(c) there is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the liberty of decision of the Arbitral Tribunal in making any subsequent determination. This provision requires a three-stage test which an applicant must pass in order for the relevant emergency interim measures to be granted. The elements of a successful emergency application for interim measures are compound, meaning that if an applicant fails to establish one element, the Emergency Arbitrator must refuse to grant the emergency interim measure.

The Emergency Arbitrator can also require a party to provide appropriate security as a condition for granting any Emergency Interim Measure. This provision ensures that a respondent does not suffer irreparable harm as a result of the interim measures. It contemplates tribunal-ordered undertakings as to costs and damages, given by the party seeking interim relief in favour of a respondent at the direction of the arbitrator.

Emergency Arbitrator must also promptly deliver a copy of the decision on emergency interim measures of protection to each of the parties and ACICA.

The emergency decision is binding on the parties until the Emergency Arbitrator decides otherwise, a final award has been rendered or the Arbitral Tribunal once constituted, reconsiders, vacates or modifies it. The parties are contractually bound by the Emergency Arbitrator's decision as long as it stands. As a practical matter, the Arbitral Tribunal subsequently appointed is in any event unlikely to look favorably upon a party that has failed to comply with any prior order or award granted by an Emergency Arbitrator.

After an emergency decision has been issued, the Emergency Arbitrator retains the power to modify or vacate the Emergency Interim Measure for good cause until the constitution of the Arbitral Tribunal. This provision could be significant because it potentially allows for sua sponte modification or vacation of any emergency interim measure ordered by the Emergency Arbitrator.

An Emergency Arbitrator will have no further power to act after the Arbitral Tribunal is constituted. The Emergency Arbitrator's jurisdiction and powers cease

forthwith on the appointment of the Arbitral Tribunal which is not bound by any decision or the reasons of the Emergency Arbitrator. As the Emergency Arbitrator has preliminary powers only, his or her award is contractually binding only as long as the Arbitral Tribunal does not decide otherwise.

Any Emergency Interim Measures issued by the Emergency Arbitrator cease to be binding if the Arbitral Tribunal is not appointed within 90 days from the date of the emergency decision, or the Arbitral Tribunal makes a final award, or the claim is withdrawn, or the Emergency Arbitrator or the Arbitral Tribunal so decides.

The ACICA Emergency Arbitration Rules offer an effective and efficient alternative to a court for the granting of interim measures before an Arbitral Tribunal has been constituted. Despite these new Rules, parties to ACICA arbitral proceedings will inevitably need to continue applying to courts for certain types of interim relief, such as orders against third parties, or where it is necessary for the application to be made ex parte without communication to other parties, for example to freeze funds in a bank account which might otherwise be dispersed. It is undeniable that these new rules will be useful for applicants in other cases, particularly if the courts where the same interim measures would otherwise need to be sought or if its judges are not known to be supportive of arbitration.

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