

Urgency, Irreparable Harm and Proportionality: Seven Years of SCC Emergency Proceedings

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SCC was one of the first institutions to provide for emergency arbitrator proceedings in its rules. In 2010, the new Appendix II was added to the SCC Arbitration Rules and the Rules for Expedited Arbitrations ("SCC Rules"), allowing a party in need of prompt interim relief to receive a decision from an emergency arbitrator where no tribunal had yet been constituted. In the seven years that have passed since the introduction of Appendix II, the SCC has seen almost 30 applications for the appointment of an emergency arbitrator, with 13 of those received in 2016 alone. A recently published SCC Practice Note summarizes the 2015-2016 emergency arbitrator proceedings, and draws some conclusions based on all decisions rendered to date.

In all emergency proceedings that took place in 2015 and 2016, the SCC appointed and referred the dispute to an emergency arbitrator within 24 hours of the claimant submitting its application. Under the SCC Rules, the emergency arbitrator should render a decision on interim measures within five days from the date when the application was referred to him or her. A brief extension may be necessary for both parties to have an opportunity to be heard. In 2015 and 2016, half of the emergency arbitrator decisions were rendered within the five-day deadline, and the remaining half were rendered within seven days.

The SCC Rules do not specify the grounds or conditions for interim relief, but rather give the emergency arbitrator broad discretion to "grant any interim measures it deems appropriate". The decisions rendered in SCC emergency arbitrations now make up a significant body of jurisprudence with regard to that discretion. Most, but not all, emergency arbitrators refer to Article 17 of the UNCITRAL Model Law, as well as the *lex arbitri* and previously published decisions on interim relief. A set of factors have crystallized and are now commonly accepted as prerequisites for granting interim relief. These factors are: (1) jurisdiction, (2) chance of success on the merits, (3) urgency, (4) irreparable harm, and (5) proportionality.

- The first factor, *prima facie* jurisdiction, has rarely been a contested issue in SCC emergency proceedings. That said, some respondents have argued that because the emergency arbitrator provisions were not part of the SCC Rules when the arbitration agreement was signed, they had not consented to submit to emergency proceedings. This argument does not succeed, however, as it is generally accepted that an arbitration clause is deemed to reference the version of the rules in force when the arbitration is initiated. Other respondents have argued that they are not bound by the arbitration agreement. In such cases, the arbitrator makes a preliminary

jurisdictional finding based on the limited submissions available within the scope of the emergency proceedings; the definitive jurisdictional determination becomes an issue for the tribunal.

- The second factor, chance of success on the merits, has been framed in different ways by emergency arbitrators. Some are satisfied if a claimant presents a *prima facie* case on the merits – a mere showing that the elements of a claim are present. Most arbitrators, however, set a somewhat higher threshold; they require claimant to demonstrate a reasonable possibility of success on the merits. This means that, based on the limited submissions before the emergency arbitrator, the claimant must appear more likely than respondent to succeed on the merits of the claim. For example, if the decision turns on an issue of contract interpretation, the claimant must show that its interpretation is somehow more plausible or more likely to prevail than the interpretation proposed by the respondent.
- The urgency and irreparable harm requirements are frequently discussed together. Some arbitrators do not consider urgency to be a separate factor, but rather that it is inherent in the requirement that the interim measures are necessary to avoid irreparable harm. Another way of framing this is that irreparable harm is a measure of urgency; if the claimant is likely to suffer irreparable harm before a final award is issued, the request for interim measures is necessarily urgent. Most emergency arbitrators, in measuring urgency or risk of irreparable harm, analyze whether the harm may be compensable by way of damages. If the harm that claimant seeks to avoid can be adequately compensated by an award of damages, most arbitrators find that interim relief is not warranted.
- Lastly, proportionality. Where all other factors are met, emergency arbitrators consider the proportionality of the interim relief by weighing the harm avoided against the potential harm inflicted upon the respondent. If granting the interim measure would cause significant harm to the respondent, the emergency arbitrator is unlikely to grant the applicant's request.

All emergency arbitrators appointed in 2015-2016 applied some or all of these factors in their analysis of the claimant's request. This resulted in four requests being granted in full, six being dismissed, and three granted in part.

Not all emergency proceedings lead to regular arbitral proceedings. In some cases, the parties appear to settle the dispute after the emergency decision is rendered; or perhaps the claimant chooses not to pursue the claims in light of the emergency arbitrator's findings. Without speculating as to the intentions of the claimants that apply for emergency measures, it appears that the emergency arbitrator proceeding provides a procedural tool that can be used for a variety of purposes.

Finally, a few words about enforcement. The SCC occasionally receives information about the compliance with and enforcement of SCC emergency decisions. Based on this anecdotal evidence, it appears that the degree of voluntary compliance with emergency decisions is relatively high. This hypothesis is also supported by the fact that the number of applications for emergency relief has steadily increased in recent years, even though decisions on interim measures remain unenforceable in many jurisdictions.

More information about SCC emergency arbitrator proceedings, and summaries of 14 recent emergency decisions, is available in the recently published [SCC Practice Note: Emergency Arbitrator Decisions Rendered 2015-2016](#).