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Prima Facie Case on the Merits in Emergency Arbitrator Procedure

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Introduction

It has been almost seven years since the introduction of the concept of emergency arbitrator procedure by major arbitral institutions, and the procedure has become an invaluable option for arbitration users who seek protection and preservation of their rights before the constitution of a full tribunal. However, most arbitral institution rules that include rules on emergency arbitrator procedure fail to set out clear requirements for the issuance of emergency measures, creating confusion among arbitration community. Referring to various sources for the elements for granting emergency relief, emergency arbitrators generally require a showing of (1) *prima facie* jurisdiction, (2) urgency, (3) *prima facie* case on the merits, and (4) a risk of serious or irreparable harm. Among the requirements, this article focuses on whether some form of merits review is necessary prior to the issuance of an emergency measure, and if so, what the most appropriate standard is, considering the purpose and nature of the emergency arbitrator procedure.

Rules and Precedents of Emergency Arbitrator Procedure

A recent report on emergency arbitrator decisions in 2015–2016 issued by the Stockholm Chamber of Commerce ("SCC") reveals mixed interpretations of the meaning of *prima facie* case on the merits standard even among SCC emergency arbitrators. On the one hand, in SCC Case No. EA 2016/046, the emergency arbitrator stated that, although described as a *prima facie* test, the standard of "reasonable prospect of success on the merits" should be a "colorable claim," which is "more than a *prima facie* showing, which requires no evidence at all."[1] On the other hand, the emergency arbitrator, in SCC Case No. EA 2016/142, found that the reasonable possibility of success on the merits should be assessed on a "*prima facie* basis and should not be set too high." [2]

The recent SCC report on emergency arbitrator decisions clearly shows that two different frameworks are emerging as to the standard of the merits review in the emergency arbitrator procedure: (1) a *prima facie*, "showing that the elements of a claim are present," and (2) a higher threshold of requiring a finding by the arbitrator

that the claimant's claim is "more plausible" or that the claimant appears "more likely than respondent to succeed on the merits."[3)]

The divergence of views arises from the fact that most of the rules on emergency arbitrator procedure are silent as to the requirements for the determination of an emergency measure. [4)] The rules grant broad discretion to an emergency arbitrator to issue such measure,[5)] but lack specific mention of the elements or conditions for granting emergency relief.

Although tribunals seem to agree that some type of merits review should be conducted, there appears to be no agreed standard. Emergency arbitrators of the SCC, therefore, took guidance from the following sources: *lex arbitri*, the UNCITRAL Model Law on International Commercial Arbitration 2006 ("UNCITRAL Model Law"), precedents on emergency relief, treatise by commentators, and/or arbitration practice. Many of them turned to Article 17A of the UNCITRAL Model Law, which requires a "reasonable possibility that the requesting party will succeed on the merits of the claim." However, it still appears unclear as to how to assess the "reasonable possibility that the requesting party will succeed on the merits of the claim." In some instances, an emergency arbitrator interpreted it to require that claimant must appear more likely than respondent to prevail on the merits of the claim, but in other instances, an emergency arbitrator simply required a showing of a plausible claim.

The confusion in the standard also exists across, as well as, within various jurisdictions. Traditionally, English courts require a "real (as opposed to a fanciful) prospect of success on the merits," whereas the U.S. courts require likelihood of success on the merits that ranges from a "substantial likelihood," a "possibility," or a "likelihood" to a "probability." Civil jurisdictions, such as Germany and Spain, require a more stringent standard of the "fumi boni juris (literally: smoke of a good fire)." [6)] These diverse standards of review show the hardship in formulating a precise standard.

Appropriate Degree of Merits Review in Emergency Arbitrator Procedure

In deciding the appropriate standard of merits review in an emergency arbitrator procedure, the following aspects of the procedure need to be taken into account.

First, the purpose and the nature of an emergency arbitrator procedure should be considered. An emergency arbitrator has a limited role to provide an expeditious relief for those who cannot wait for the constitution of a full tribunal. An emergency relief is inherently temporary so much as it can be revisited by the subsequently constituted tribunal. The very purpose to provide an expeditious measure and the temporary mandate of an emergency arbitrator militate against a substantive review of the merits of a case.

Second, the time constraint that an emergency arbitrator faces distinguishes the emergency arbitrator procedure from other provisional measures proceedings of international courts and tribunals. Unlike other international proceedings, arbitral institution rules prescribe a specific time limit for the issuance of an emergency

measure. Under the ICC Rules, an emergency arbitrator is required to render a decision within 15 days from the date on which the file is transmitted to him/her, and the SCC Rules set out a more stringent timeline of five days from the date upon which the application was referred to him/her. Under such strict timeframe, parties are limited in presenting their evidentiary and legal evidence, and naturally an emergency arbitrator is ill-equipped to decide on the merits of a case.

Third, the impact of an emergency arbitrator's misjudgment on the merits of a case could have unexpected ramifications on the main dispute. Although many arbitral institution rules include a provision that a decision by an emergency arbitrator would not have res judicata or a preclusive effect, it cannot be denied that an emergency arbitrator's decision on the merits of a case would have *de facto* influence on the decision of the subsequently constituted full tribunal, which is difficult to rectify at a later stage.

Conclusion

The inherent subjectivity of the standard might render the efforts to articulate a specific standard of review in terms of merits impossible.[7)] That said, at a minimum, the level of merits review should not be so high as to conflict with the purpose and nature of emergency arbitrator procedure.

Prima facie, according to Black's Law Dictionary, means "at first sight" or "on first appearance but subject to further evidence or information." *Prima facie* test should remain as a *prima facie* test, being a low threshold only to prevent a frivolous or vexatious claim that is "manifestly without merit."

The views expressed in this article are those of the author and do not represent those of Bae, Kim & Lee LLC.

References

↑1 Anja Avedal, SCC Practice Note: Emergency Arbitrator Decisions Rendered 2015–2016 (June 2017), at 7.

↑2 Id.,at 15.

↑3 Id., at 18.

↑4 Among various arbitral institution rules which introduced emergency arbitrator proceedings, only the Australian Centre for International Commercial Arbitration Rules set out specific elements to be satisfied for the issuance of an emergency measure (See Schedule 1 of the ACICA Rules, Article 3.5).

↑5 For instance, Article 37(1) and Article 1(2) of Appendix II to the SCC Rules 2017 provide an emergency arbitration with the power to "grant any interim measure it deems appropriate." However, nowhere do the SCC Rules stipulate requirements for emergency relief.

↑6 Cameron Miles, *Provisional Measures Before International Courts and Tribunals* (Cambridge University Press, 2017), at 193.

↑7 Jose Maria Abascal, "The Art of Interim Measures," in *International Arbitration 2006: Back to Basics?*, 13 ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), at 764.

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