Kluwer Arbitration Blog

“I love my job”: An Ode to SCC Emergency Arbitration

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Readers of this blog need little convincing of the advantages of arbitration over litigation. Historically, one of the hold-out trump cards of litigation was the possibility of court-ordered (and thus, enforceable) interim relief. Having identified this problem, the SCC Arbitration Institute in 2010 was among the first arbitral institutions to introduce rules allowing the parties to receive an emergency arbitrator decision before the constitution of the tribunal (Appendix II to the SCC Rules).

***Emergencies have always been necessary to progress.* — Victor Hugo**

In the first ten years, the SCC saw almost 50 emergency arbitrator applications. All indicators suggest that its popularity will continue to increase. Indeed, the SCC has identified a trend of arbitration users turning to emergency arbitration to obtain a “streamlined proceeding with a predictable price tag”. This post explores how emergency arbitration under the 2023 SCC Rules operates, including to draw from the authors’ experience acting as counsel in such arbitration proceedings.

***There is nothing so strong or safe in an emergency of life as the simple truth.* — Charles Dickens**

SCC Rules give the emergency arbitrator broad discretion to “grant any interim measures it deems appropriate” (Article 1 of Appendix II to the SCC Rules). Based on the jurisprudence developed by SCC emergency arbitrators to date and the authors’ experience, the emergency arbitrator will only grant interim measures when the following questions are answered in the affirmative:

1. Does the emergency arbitrator have jurisdiction?
2. Does the claimant have, *prima facie*, a reasonable chance of success on the merits in the arbitration against the respondent?
3. Is the requested relief urgent?
4. Is the requested relief necessary to avoid irreparable harm, i.e., where such harm is not adequately reparable by a future award of damages?
5. Is the requested relief proportional to the potential harm that may be caused to the respondent?

Once any of the above questions is determined by the emergency arbitrator in the negative, they will not assess the remaining questions. The SCC statistics of 2017-2018 show that less than a third of applications were successful (in whole or in part). The statistics thus raise questions regarding the kinds of applications that are made and why claimants are pursuing such applications when the threshold to obtain relief could be perceived as high.

***Unless it's an emergency, don't bother me after 6:00 p.m. and on weekends.* — Merv Griffin**

Legal counsel is not a role well-known for its work-life balance and SCC emergency arbitration could politely be described as "a bit of a whirlwind", for all involved. After a claimant submits its application, the SCC springs into action. The secretariat sends the application to the respondent(s) and the SCC Board attempts to appoint the emergency arbitrator within 24 hours of receipt of the application (Article 4 of Appendix II to the SCC Rules). Any challenges to the emergency arbitrator must be made within 24 hours from the time the circumstances giving rise to the challenge became known to the challenging party.

Any decision on interim measures must be made within *five* days from the date the SCC Board referred the application to the emergency arbitrator (Article 8 of Appendix II to the SCC Rules). In a nutshell, upon making an application (or upon receiving the application) it may be wise to clear your diaries, including for the weekend. Now is the time to channel The Devil Wears Prada's iconic Emily Charlton ("*I love my job, I love my job, I love my job*"). Of course, the timeline makes sense given the inherent urgency of emergency arbitration.

***The prizes go to those who meet emergencies successfully. And the way to meet emergencies is to do each daily task the best we can.* — William Feather**

Once the emergency arbitrator is appointed, they have a broad discretion to conduct the emergency arbitration in the manner they consider appropriate, subject to the SCC Rules and any agreement between the parties, and "in an impartial, efficient and expeditious manner, giving each party an equal and reasonable opportunity to present its case" (Article 7 of Appendix II to the SCC Rules). In the authors' experience, emergency arbitration largely mirrors the conduct of an SCC arbitration, but with the fast-forward button on. The emergency arbitrator will generally in a matter of hours provide the parties with draft procedural directions and timetable for comment and propose a case management conference. Such drafts may contemplate:

1. Two to three rounds of written submissions;
2. The possibility of submitting witness statements;
3. A hearing, if needed;
4. A round of skeleton arguments summarizing the parties' positions; and
5. Costs submissions.

Given that time is of the essence, not all the above may be necessary. For example, it may be appropriate for the emergency arbitrator to conduct the proceedings entirely on the papers. As ever, it depends on the nature and complexity of the case. However, as counsel in an SCC emergency arbitration, you should be prepared for multiple deadlines calculable in hours rather than days.

***I always feel the danger because you might always be subject to an unexpected or emergency event.* — Felix Baumgartner**

Long before the emergency arbitrator has confirmed the procedural directions and timetable, the parties will likely be working on submissions. Respondent's counsel will hopefully already be familiar with the client, the context of the case and the claimant's application. However, in many cases, the respondent's counsel may not be so fortunate and will need to rapidly acquaint themselves with what is inevitably a complex matter. By contrast, the claimant has a distinct advantage, and may have calculated the best time to make its application. Either way, respondent's counsel should expect late nights, a lot of reading, calls with the client and any witnesses. A request to the client and potential witnesses to stay available during inconvenient hours, weekend or public holidays, will also likely be required.

Yet, as the statistics demonstrate, the respondent typically emerges as the successful party. As of December 2020, each SCC emergency arbitrator has determined that the claimant has had a reasonable possibility to succeed in subsequent arbitration. However, claimants have struggled to demonstrate the urgency and prove that they will suffer irreparable harm if their application is not granted. In the absence of convincing evidence, an emergency arbitrator will likely find that any harm is adequately reparable by e.g. an award of damages from an arbitral tribunal. Parties contemplating applying for an emergency arbitration may, depending on their strategies, do well to ensure the emergency arbitrator is able to answer in the affirmative the above questions before proceeding.

***True character stands the test of emergencies*. — Napoleon Bonaparte**

Once the emergency arbitrator closes the proceedings, the parties may have a small window to catch their breath before they receive the decision. Upon a reasoned request of a party, the emergency arbitrator has wide discretion to amend, by correction or supplementation, or even revoke the decision, if necessary based on the reasons invoked (Article 9(2) of Appendix II to the SCC Rules). According to the commentators in A Guide to the SCC Arbitration Rules, the rule should be applied restrictively.

By agreeing to arbitration under the SCC Rules, the parties also "undertake to comply with any emergency decision without delay" (Article 9(3) of Appendix II to the SCC Rules). This contractual obligation accounts for the fact that the enforceability of an emergency decision under the New York Convention depends on the relevant jurisdiction. Moreover, the obligation ceases to apply if, for example, an arbitration is not commenced within 30 days of the decision, or if the case is not referred to an arbitral tribunal within 90 days (Article 9(4) of Appendix II to the SCC Rules).

The SCC reports informal evidence of a high rate of voluntary compliance with emergency decisions for reasons attributed to economic prudence and preservation of credibility. But what of the blindsided respondent who, having fended off an emergency arbitration, faces the prospect of potentially having to incur further expense to pursue arbitration to recover costs? According to the SCC's Practice Note, all emergency arbitrations in 2017-2018 were followed by a request for arbitration. This suggests that, given the proportion of successful respondents, requesting arbitration remains the primary means of recovery in the absence of compliance by the

unsuccessful party.

***In an emergency, what treatment is given by ear? Words of Comfort.* — Abraham Verghese**

In the authors' experience, counsel in an emergency arbitration would do well to ensure their coffee and snack supplies are stocked, their team members, client and any witnesses are available and to commence drafting as soon as possible, addressing the five questions listed above. Counsel for claimant should bear in mind that the SCC secretariat might also appreciate a heads-up before submitting a request for emergency arbitration. Both parties should also try to bear in mind the strain of the proceeding on the emergency arbitrator. Each party should consider doing its utmost to make the emergency arbitrator's life easier by drafting clearly and concisely, meeting all deadlines (and making timely requests for extensions) and acting in courteous and collegiate manner while considering the best interests of the client. And remember to repeat the mantra, "I love my job".

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