SCC Arbitration Institute

SCC Practice Note Emergency Arbitrator Decisions 2019–2022

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1. Introduction

The SCC Arbitration Institute (the "SCC") was among the first arbitration institutes in the world to offer emergency arbitrator proceedings. In 2010, the new Appendix II was added to the SCC Arbitration Rules and the SCC Rules for Expedited Arbitrations (together the "SCC Rules"), enabling parties to seek interim measures before the referral of their case to an arbitral tribunal.

To date, the SCC has received a total of 69 applications for the appointment of an emergency arbitrator[2].

This article will summarise emergency arbitrator decisions rendered during the years 2019, 2020, 2021 and 2022[3]. It considers commercial arbitration cases only[4].

[2] For the period 1 January 2010 – 31 December 2022.
[3] In total 22 cases.
[4] To comply with the SCC's strict confidentiality obligations, certain emergency arbitrator decisions have been excluded altogether. However, where possible, decisions have been anonymised and certain facts have also been altered where necessary.

2. The Procedure

Both the SCC Arbitration Rules and the SCC Rules for Expedited Arbitrations contain Emergency Arbitrator provisions which enable a party to apply for the appointment of an emergency arbitrator before a dispute is referred to an arbitral tribunal.

The SCC will notify the counterparty as soon as an application is received, and the SCC Board will seek to appoint an emergency arbitrator within 24 hours of the application being received[5].

To facilitate this, the SCC has a dedicated email address for emergency arbitrator applications that is monitored during evenings and weekends, all year round.

When an appointment has been made, the SCC promptly refers the application to the emergency arbitrator.

In accordance with Article 8 (1) of Appendix II, a decision on interim measures must be made no later than 5 days after the application is referred to the emergency arbitrator. The SCC may extend this time limit if it receives a reasoned request from the emergency arbitrator or if otherwise deemed necessary.

The powers of an emergency arbitrator to grant interim relief are the same as those of the arbitral tribunal, as set out in Article 37 (1)-(3). This means that the emergency arbitrator may "grant any interim measures it deems appropriate".

The emergency arbitrator is also granted a broad authority to conduct the emergency proceedings in such manner they consider appropriate.

Over the years, however, the following standards have been established for deciding on applications for interim relief:

- A reasonable possibility of success on the merits – the claimant must have at least a *prima facie case*.

- Irreparable harm – the claimant must show that they will incur irreparable harm without an interim decision.

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[5] Article 4 (1) Appendix II of the SCC Rules.

- Urgency – the claimant must demonstrate that the matter at hand is so urgent that it cannot wait for an arbitral tribunal's final award.

- Proportionality – the claimant's request for relief must be proportional to the consequences to be averted.

The majority of emergency arbitrators apply these standards, with some variations, alongside guidance from the UNCITRAL Model Law on International Commercial Arbitration.

3. Emergency Arbitrator Decisions 2019–2022

3.1. Requests for interim relief granted

3.1.1. SCC Emergency Arbitration – Case 1

Background
The claimant (seated on one of the Channel Islands) had engaged the services of the respondent (a legal services provider seated on the same Channel Island) several times. The respondent was also providing legal services to the claimant's parent company.

In 2018, the respondent, acting on behalf of two other clients, sent a letter of demand to the claimant's parent company.

In the emergency proceedings, the claimant alleged that because the respondent had represented both the claimant and its parent company, it had gained confidential information about the claimant throughout the years, and so the claimant alleged that there was a risk that the respondent might share and use such information with its other clients, such as in the court proceedings pending against the claimant's parent company.

Request for interim measures
The claimant initially asked the emergency arbitrator to order the respondent to cease acting for the other clients involved in the pending court proceedings against its parent company, and to not issue any claim against the parent company or any other member of its group of companies, on behalf of these other clients. However, the claimant later modified these claims to instead ask the emergency arbitrator for an order that the respondent pay the costs of the emergency proceedings.

Procedure
One day after the application was filed, the SCC appointed an emergency arbitrator. Shortly following the referral, the emergency arbitrator issued a procedural order.

During the correspondence between the parties and the emergency arbitrator, a letter was sent from the respondent to the claimant confirming that the respondent was no longer instructed the other clients in the pending court proceedings. So, the claimant accepted that the relief it was seeking in the emergency proceedings was no longer necessary. Instead, the claimant asked the emergency arbitrator for an order that the respondent pay the costs of the emergency proceedings.

After being granted a short extension, the emergency arbitrator rendered a decision within seven days of referral.

Analysis and decision
As the respondent had raised a jurisdictional objection, the emergency arbitrator first ascertained that all the jurisdictional requirements were met on a *prima facie* basis. The emergency arbitrator found that the SCC provisions for emergency measures were applicable, as the dispute resolution clause contained in the invoked engagement letter referred to the SCC Arbitration Rules.

When awarding the costs, the emergency arbitrator found guidance in Articles 49(6) and 50 of the SCC Arbitration Rules which set out the principles for apportioning the costs, and considered the respondent's claims that the claimant's application was (i) unmeritorious, and (ii) premature. As for the first allegation, the emergency arbitrator found that the claimant's application could not be considered unmeritorious, while the second allegation was found to be irrelevant to the assessment of the costs of the emergency proceedings.

The emergency arbitrator also considered the parties' contribution to the efficiency and expeditiousness of the proceedings, where both parties had contributed to their timeliness. The emergency arbitrator ultimately concluded that, even if the parties disagreed regarding the merits, the case's outcome favoured the claimant.

For this reason, the emergency arbitrator ordered the respondent to reimburse the claimant for the costs of the emergency proceeding.

3.1.2 SCC Emergency Arbitration – Case 2

Background
The parties had entered into a joint venture and formed an equity joint venture company (the "JV"). At the time of the emergency proceedings, the Canadian claimant owned 60% of the JV's shares while the Chinese respondent owned the remaining 40%.

Pursuant to the Equity Joint Venture Agreement (the "JVA"), each party had a right of first refusal to purchase the shares of the other party where the latter did not want to extend the term of the JVA.

As the respondent had expressed its intention not to carry on in the joint venture, the claimant argued that the JVA required that the purchase price of the respondent's share be assessed at net asset value. The respondent, however, demanded a higher price. The respondent further asserted that the transfer of the shares must go through an appraisal and public bidding process despite refusing to list the shares in the appraisal and bidding process or to take any other action to give effect to such a process.

Request for interim measures
The claimant requested an emergency decision ordering the respondent to comply with the JVA by commencing the process for appraisal and bidding for the JV shares and list its shares without delay.

Procedure
The SCC appointed an emergency arbitrator and referred the case the day after receiving the application.

After conferring with the parties, the emergency arbitrator requested a three-day extension of time to render the interim decision, which was granted.

The respondent submitted its reply three days after referral, to which the claimant then provided comment. The claimant also filed an amended application to the emergency arbitrator.

The decision on interim measures was rendered eight days after the submission of the application.

Analysis and decision
The emergency arbitrator first noted that, even though the parties did not use the precise name of the SCC in their arbitration agreement, the respondent did not dispute the jurisdiction of the SCC or the emergency arbitrator.

As regards the claimant's reasonable possibility of success on the merits, the emergency arbitrator found that it was likely that, if the appraisal and bidding process was not yet complete, an arbitral tribunal would be prepared to order a transfer of the respondent's shares to the claimant at net asset value. If, however, the appraisal and bidding process was complete, then the arbitral tribunal would order relief in the form of damages to compensate the claimant for anything required to be paid by the claimant in excess of net asset value, in addition to an order for the transfer of the shares. So the emergency arbitrator concluded that the claimant had established at least a reasonably arguable *prima facie* case.

The emergency arbitrator also found urgency to be present. The emergency arbitrator stated that if the appraisal and bidding process (which was estimated to need three to five months to be completed) was not commenced as soon as possible there was a real risk that the share transfer process would extend beyond the expiry date of the JV's business license, at which time the JV would need to be dissolved and liquidated.

The emergency arbitrator further considered that the liquidation and dissolution of the JV would result in significant loss being caused to the

claimant, including the value of its shares in the JV, the loss of opportunity to purchase the respondent's shares and, in particular, the loss of the opportunity to continue to profit from the JV as an active group of companies.

Turning to the final element of the test, the emergency arbitrator concluded that any harm caused by respondent (i.e., certain costs associated with the appraisal and bidding process), which in any case would be covered by the claimant's undertaking as to damages, was substantially outweighed by the risks of immediate and irreparable harm to the claimant in case the emergency relief was not granted.

The emergency arbitrator granted the interim relief sought by the claimant.

3.1.3 SCC Emergency Arbitration – Case 3

Background
The claimant, an Italian company, and the respondent, a South Korean company, had entered into a contract of sale (the "Contract"). The respondent terminated the Contract based on a contention that the claimant had breached the Contract by not making a necessary payment into an escrow account as required by the Contract. The claimant objected to the termination contending that a condition precedent for such payment had not been fulfilled. Following the termination of the Contract, the respondent entered into an agreement with a third party for the sale and purchase of the same product.

Request for interim measures
The claimant requested an order to prevent the respondent from delivering the product to the third-party buyer.

Procedure
One day after receiving the application, the SCC appointed an emergency arbitrator and referred the case. On the day of referral, the emergency arbitrator sent a draft procedural order to the parties. Two days later, the emergency arbitrator convened a telephone conference with the parties and an amended procedural timetable was agreed upon.

The emergency decision was rendered five days after the referral.

Analysis and decision
With reference to the doctrine of separability, the emergency arbitrator determined that the *prima facie* jurisdictional objection – alleging that because the claimant's payment obligation had not become effective, due to lack of approval of the contract by the relevant authority – did not mean that the arbitration agreement had not come into force between the parties.

The emergency arbitrator further found that the threshold for irreparable harm was met, firstly noting that, as a remedy, specific performance was explicitly allowed in the CISG, (the law governing the Contract). The emergency arbitrator further assumed that the product comprised by the Contract could not simply be replaced by another one. Thirdly, if the respondent sold and delivered the product to the third-party buyer, it was doubtful whether the claimant would be able to exercise any ownership rights to the product against the third-party buyer. Lastly, the emergency arbitrator considered the fact that the respondent was subject to certain insolvency proceedings – noting that it was unclear whether the claimant's claim for damages would have any preferential value, in the event that an arbitral tribunal were to find that the respondent's termination of the Contract was wrongful.

Based on a *prima facie* assessment of the case, the emergency arbitrator also concluded that the claimant had a reasonably arguable case and, having regard to the upcoming date of the delivery in question, the emergency arbitrator established that the urgency requirement was fulfilled since there was a risk that the delivery would take place before an arbitral tribunal could make a decision.

Lastly, the emergency arbitrator opined that the claimant's interest in securing the possibility of specific performance of the Contract outweighed the respondent's interest in being able to deliver the product to the third-party buyer.

The emergency arbitrator granted the interim measures requested.

3.1.4 SCC Emergency Arbitration – Case 4

Background
The Norwegian respondent was employed as CEO in one of the claimant's subsidiaries (seated on one of the Channel Islands) and the parties had entered into a shareholders' agreement through which the respondent acquired a number of shares in a third company.

About six months after the respondent had ended their employment, the claimant was informed that the respondent had been appointed as CEO for one of the claimant's competitors.

Request for interim measures
The claimant asked the emergency arbitrator to make an interim order prohibiting the respondent from participating in, or promoting, competing business operations and requiring the respondent to immediately resign from their position as CEO in the competing company as well as refrain from resuming such business until the end of the time stated in the non-compete clause contained in the parties' agreement.

Procedure
Payment of the emergency arbitration costs wasn't received until four days after the SCC received the claimant's application. The same day as that payment was received, four days the application's submission, the SCC appointed an arbitrator and referred the case.

Upon agreement with the parties, the emergency arbitrator requested and was granted an extension of time to render an interim decision.

The decision was rendered 6 days after the emergency arbitrator's appointment.

Analysis and decision
In its answer, the respondent raised a jurisdictional objection, so the emergency arbitrator commenced the proceedings by determining that the claimant's claims were expressly based on the parties' agreement and that the arbitrator had jurisdiction over the dispute.

It was concluded that the respondent had indeed founded a company whose future business was covered by the non-compete clause in the parties' agreement and that the claimant had shown that there was an imminent risk of irreparable or almost irreparable harm.

The claimant's request for interim measures was granted.

3.1.5 SCC Emergency Arbitration — Case 5

Background
The dispute arose out of a Shareholders' Agreement (the "Agreement") entered into by the parties. The claimant was a company registered in Luxembourg and a top-level holding company of a group of companies. The respondent was a Swedish citizen and a former senior member of the management team for the claimant's Swedish operations.

Two years into the Agreement, the respondent resigned and informed the claimant that they would immediately take up a new position as General Manager with one of the claimant's key competitors. The claimant contended that the respondent's intended employment would be a breach of the Agreement, which subjected the respondent to a 15-month non-compete obligation.

Request for interim measures
The claimant asked the emergency arbitrator to restrain the respondent from commencing their employment with the claimant's competitor or otherwise provide services to the competitor until an order was made by an arbitral tribunal or the date upon which the 15-month non-compete period expired, whichever was earlier.

Procedure
One day after receiving the application, the SCC appointed an emergency arbitrator. That same day, the case was referred to the emergency arbitrator who convened a telephone conference with the parties and issued a procedural order. Three days later, the respondent submitted its response. Following this, the claimant submitted its reply to the respondent's submissions.

The emergency decision was rendered five days after the referral.

Analysis and decision
Before considering whether the claimant's application for interim measures met the necessary prerequisites for granting such relief, the emergency arbitrator addressed the issue of jurisdiction. Based on the arbitration clause, the emergency arbitrator was satisfied as to their jurisdiction to decide the request for interim measures. In any event, neither party raised any objection to the emergency arbitrator's jurisdiction.

Having regard to the truncated nature of the emergency arbitrator proceedings and the limited scope of the emergency arbitrator's mandate, the emergency arbitrator considered that the enquiry into the merits was to be conducted on a *prima facie* basis only.

The emergency arbitrator agreed with the claimant that an arbitral tribunal, when assessing the enforceability of the non-compete obligation clause, was likely to examine whether the following two conditions were met: (i) the claimant could identify a legitimate business interest that was capable of protection, and (ii) the clause, properly construed, was not broader than necessary to protect confidential information.

The emergency arbitrator found that the claimant had at least a reasonable chance of successfully persuading an arbitral tribunal that it had a legitimate interest in the confidential information it sought to prevent the respondent from using. The second condition was considered to be met on a *prima facie* level.

Further, given the respondent's seniority in the claimant's team, their years of experience and exposure to the company's inner workings and strategic priorities, the emergency arbitrator found that there was a real risk that the respondent might use or pass on, either wittingly or unwittingly, the claimant's confidential information to its competitor. The emergency arbitrator was satisfied that the harm would not be easily reparable by an award of damages since any damage caused to the claimant's business could be permanent.

As for the criterion of urgency, the emergency arbitrator found that the requested relief could not wait the time needed for an arbitral tribunal to

order relief of the kind sought by the claimant.

The emergency arbitrator granted the relief requested by the claimant.

3.1.6 SCC Emergency Arbitration — Case 6

Background
The claimant (a Spanish individual) and the respondent (a Swedish company) were parties to a distribution contract (the "Contract") under which the claimant had an exclusive right to market and sell the respondent's products in a specified territory (the "Territory").

The parties' dispute concerned the respondent's alleged violation of the Contract. The claimant alleged that they were evicted from the respondent's online platforms, that the respondent had violated the claimant's territorial exclusivity and that the respondent poached the claimant's business associate.

Request for interim measures
The claimant sought specific orders for the respondent to (i) restore the claimant's access to the online platform; (ii) continue to perform its contractual obligations relating to sales orders placed by the claimant, and (iii) refrain from directly selling the products in the Territory.

Procedure
One day after the application was filed, the emergency arbitrator was appointed, and the case was referred. Following a telephone conference with the parties, the emergency arbitrator established a timeline for the proceedings. The emergency order was issued 5 days after the case was referred to the emergency arbitrator.

Analysis and decision
As for a *prima facie* case, the emergency arbitrator was satisfied that there was a reasonable case that the respondent had violated various terms of the Contract to the claimant's detriment. In this regard, the emergency arbitrator placed weight on documentary and testimonial evidence adduced in the proceedings.

Regarding urgency and irreparable harm, the emergency arbitrator was satisfied that this requirement was met. In doing so, the arbitrator noted the "very special" nature of the parties' business, which catered to people in need of special equipment in a very small market. In the emergency arbitrator's view, the respondent's non-compliance with the terms of the Contract would irreparably hurt the claimant's reputation with intermediaries and the final customer, and that urgency flowed from this.

As for proportionality, the emergency arbitrator held that this requirement was met as the measures requested by the claimant were aimed at preserving the *status quo* of the contract, and that there "can be no disproportion in asking a Party to abide by the terms of a contract that it recognizes still as binding".

In summary, the request for interim relief was granted.

3.2 Requests for interim relief granted in part

3.2.1 SCC Emergency Arbitration — Case 7

Background
The claimant (a Danish company) and the respondent (a Russian company) had entered into an international sub-license agreement and several auxiliary agreements concerning a business (the "Business"), under which the claimant granted the respondent a non-exclusive license to operate the business as a franchise brand for a fixed term.

These agreements were concluded as part of a broader suite of transactions in which the claimant entered into materially identical agreements with other companies within the same industry (the "Portfolio companies"). To the best of the respondent's understanding, each of the Portfolio companies were owned by the same company.

Following a change in the ultimate ownership of the Portfolio companies, disputes arose between the respondent and the new owner. After a series of unsuccessful discussions, the respondent sent the claimant a termination notice purporting to terminate the agreements in respect of the Business. Notwithstanding the claimant's rejection of the respondent's right to terminate, the respondent implemented a series of unilateral measures to rebrand the Business.

Request for interim measures
The claimant asked the emergency arbitrator to order the respondent to take all necessary steps to restore the *status quo* ante prior to the respondent's termination notice, including but not limited to: (i) restoration of the brand signage at the Business' premises, (ii) refraining from installing its own electronic distribution channels; (iii) refraining from advertising and/or marketing the Business under the new brand and; (iv) refraining from taking any steps that would cause or result in an aggravation of the dispute.

Procedure
The emergency arbitrator was appointed one day after SCC's receipt of the application. Shortly thereafter, the case was referred to the emergency

arbitrator who promptly established a procedural timetable following a virtual conference with the parties. After the exchange of various written submissions, the emergency award was rendered 5 days after the referral.

Analysis and decision
First, the emergency arbitrator assumed jurisdiction to decide the application based on the sub-license agreement which contained an SCC arbitration clause. Secondly, the emergency arbitrator found that there was a strong possibility that the claims for wrongful termination and specific performance would succeed on the merits. The sub-license agreement was for a fixed term, but the respondent had not shown that it would have the right to terminate the agreement prematurely.

Thirdly, the emergency arbitrator found that the claimant would incur severe and irreparable harm if the application was denied. In the emergency arbitrator's view, potential issues included: (i) whether the respondent was liable for harm suffered by the entire Portfolio; and (ii) whether the claimant's reputation would be affected by the sudden removal of the Business from the Portfolio. The emergency arbitrator found that "establishing, assessing and proving all damage may be very difficult, if not practically impossible". Therefore, damages may not be a sufficient remedy for the claimant.

Fourthly, the emergency arbitrator considered that the balance of interests favoured the claimant. On this point, the emergency arbitrator noted that the respondent would be able to open a rebranded business if it was able to demonstrate, before an arbitral tribunal, that it was entitled to terminate the agreement.

In view of the above, the emergency arbitrator granted the first three requests for relief made by the claimant but dismissed the introductory part of the request (a request for "an award that the respondent take, or cause to be taken, all necessary steps to restore the *status quo* between the parties") as well as the last request (a request for the emergency arbitrator to prohibit the respondent from "taking any steps that would cause or result in aggravation of the dispute") for being too vague and unspecific to be enforced.

3.3 Requests for interim relief denied

3.3.1 SCC Emergency Arbitration — Case 8

Background
The claimant (a Polish company) had entered into a construction contract with the Lithuanian respondent company. Pursuant to this contract, the claimant procured two performance guarantees.

The claimant alleged that the project had been fraught with delays and problems which were not attributable to the claimant. For its part, the respondent had presented claims for damages for delays pertaining to the claimant's failure to meet the milestones set in the contract.

Request for interim measures
The claimant filed an application to obtain emergency relief ordering the respondent not to draw down on two performance guarantees and ordering the respondent not to set-off the claimant's payment claims against the alleged claims for delay damages.

Procedure
The emergency arbitrator was appointed the day after receipt of the claimant's application. The following day, a case management conference was convened, and a procedural timetable was agreed. The respondent did not participate in the conference.

Two days later, the respondent replied to the previous communications and requested a two-day extension of time to submit a reply to the application since it was unaware of the emergency arbitrator proceedings. Following receipt of this email, the emergency arbitrator convened an additional case management conference and the parties agreed on an amended timetable.

Due to the amended timetable, the emergency arbitrator filed a request for extension of time for rendering the interim decision, which was granted by the SCC.

The emergency decision was rendered 7 days from the referral.

Analysis and decision
The jurisdiction requirement was not in dispute, and the emergency arbitrator was satisfied that they had jurisdiction to decide the application.

The emergency arbitrator stated that the likelihood of whether the claimant would prevail on the merits in respect of delay would turn on whether the delays encountered were attributable to the claimant. The

emergency arbitrator found that since the minutes of one of the parties' meetings could suggest that the claimant's claims for extension of time may, to some extent, be merited and so considered that criterion satisfied.

However, the emergency arbitrator found urgency lacking. There was no evidence adduced that could suggest that an attempt by the respondent to demand payment under the guarantees was imminent. Likewise, in respect of a set-off and interim payments, no evidence showed that interim payments were likely to be withheld or suspended when due.

Further, the emergency arbitrator was not persuaded that the harm would not be reparable by way of damages and found that the threshold for irreparable harm was not met. In any event, the arguments by the claimant that it may encounter a severe shortfall in its liquidity position or even face insolvency should the respondent demand payment under the guarantees, were held to be unsubstantiated.

In light of the above, the emergency arbitrator considered it irrelevant to consider the question of proportionality.

The claimant's request for interim relief was denied by the emergency arbitrator.

3.3.2 SCC Emergency Arbitration — Case 9

Background
The two Finnish parties had entered into a subcontract under which the claimant performed some of the respondent's obligations towards a third, non-disputing, party. The main service agreement, entered into by the respondent and the third party, expired in 2020 and was replaced with a modified agreement, where another sub-contractor was appointed.

Request for interim measures
The claimant sought an order restraining or prohibiting the respondent from (i) taking any further action pursuant to the notice of termination vis-à-vis the main Service Agreement or the sub-contracting agreement; (ii) taking any further step which has the de facto effect of terminating or letting expire the sub-contracting agreement and the main Service Agreement; or (iii) appointing, assigning or contracting any other sub-contractor for the performance of services pertaining to both agreements.

The claimant further requested an injunction ordering the respondent to restore the *status quo* pending final resolution of the dispute and ordering the respondent to assume prolongation, renewal or renegotiation discussions with the claimant and the third party.

Procedure
The same day as the application was received by the SCC, an emergency arbitrator was appointed, and the case was referred to them.

Later that same day, the emergency arbitrator established a procedural order. Both parties filed three submissions each, including the application for interim relief.

The interim decision was rendered five days after the referral.

Analysis and decision
First, the emergency arbitrator concluded that it was undisputed that the application was covered by the arbitration agreement.

Upon review of the written evidence provided by the parties, the emergency arbitrator found it established that the expiration of the parties' contractual relationship must have been known to the claimant at least two months before the filing of the application for interim relief. This meant, in the emergency arbitrator's opinion, that the criteria of urgency was not fulfilled.

Further, the emergency arbitrator noted that interim relief, such as that requested by the claimant, may well be granted when exceptional circumstances apply but that such circumstances were not present in this case.

The emergency arbitrator denied the claimant's request for interim relief.

3.3.3 SCC Emergency Arbitration — Case 10

Background
The claimants (Estonian, Polish and French companies) and the respondent (an Estonian company) had entered into a contract for the engineering, procurement and construction of a facility in Estonia (the "Contract").

Under the Contract, the claimants warranted that the availability of the facility would meet or exceed 92% for a two-year guarantee period (the "Guarantee period"). The availability guarantee was supported by a liquidated damages mechanism, which was linked to any shortfall in availability (the "Availability LD's").

The respondent issued a demand for Availability LD's on the basis that availability during the Guarantee period was 63,55%. The claimants, on the other hand, asserted that the availability amounted to 95,44%. On the basis of the non-payment of the Availability LD's by the claimants, the respondent called on the on-demand bond that the claimants were required to procure under the Contract.

Request for interim measures
The claimants asked the emergency arbitrator to order the respondent to withdraw the demand made on the warranty security and to prohibit any further demands pending an arbitral tribunal's final award in arbitration proceedings.

Procedure
The SCC referred the case to the emergency arbitrator the day after receiving the application and the emergency decision on interim measures was rendered five days after the referral.

Analysis and decision
The emergency arbitrator had regard to an SCC Practice Note on Emergency Arbitrator Decisions[6] invoked by the claimants and considered it to "represent international best practice that any emergency arbitrator in proceedings conducted under the SCC Rules should pay close attention to when called upon to decide a request for interim relief".

The emergency arbitrator found that their jurisdiction and a *prima facie* case on the merits had been established.

As for the urgency and risk of irreparable harm, the emergency arbitrator found that they had not been established since the arguments put forward by the claimants were speculative. The emergency arbitrator was not persuaded that denying the application would subject the claimants to the kind of reputational damage that could not be adequately compensated with an award of damages. The claimants, according to the emergency arbitrator, had failed to provide any concrete evidence of specific business opportunities that risked being lost in the event that the interim relief sought was not granted.

Further, the emergency arbitrator found that proportionality had not been established as the claimants had failed to provide sufficient evidence to persuade the emergency arbitrator that the respondent's demand on the bond was abusive and/or made in bad faith.

The emergency arbitrator denied the claimants' application.

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[6] SCC Practice Note: Emergency Arbitrator Decisions Rendered 2015-2016 by Anja Håvedal Ipp, 2017, pp. 17-18.

3.3.4 SCC Emergency Arbitration — Case 11

Background
The proceedings concerned two virtually identical contracts (the "Contracts") involving the claimants (two Polish contractors) as contractors and the respondent (an Estonian company) as the owner of the facilities. These contracts provided for, amongst other things, the engineering and design of two industrial facilities.

The contracts stated that the respondent was entitled to reject payments under the contracts until the claimants fulfilled certain obligations. In the emergency proceedings, the claimants disputed that the respondent was entitled to rely on this right.

Request for interim measures
In summary, the claimants sought an order declaring that the respondent was not entitled to rely on its contractual "right to reject payments" based on the claimants' non-provision of the specified securities, and that the respondent was permitted to retain a percentage of the contract price in lieu of these securities.

Procedure
The emergency arbitrator was appointed one day after the claimants filed their application. Shortly thereafter, the case was referred to the emergency arbitrator who established the procedural timetable. A virtual hearing was held on a Sunday and the emergency decision was rendered one day after the hearing (5 days after the case was referred to the emergency arbitrator).

Analysis and decision
As their jurisdiction went uncontested, the emergency arbitrator turned to the second criterion: the claimants' reasonable prospect of success on the merits. The emergency arbitrator was not satisfied that the claimants had a reasonable possibility of succeeding in their argument that the respondent was not entitled to exercise its contractual "right to reject payments" under the contracts. Based on the parties' arguments, the emergency arbitrator was not persuaded that: (i) the respondent necessarily acted in bad faith; or (ii) Estonian law necessarily prevented the respondent from insisting upon its contractual rights (as alleged by the claimants).

Regarding urgency, the emergency arbitrator held that it could be expected that an arbitral tribunal be constituted within a few weeks and that the claimants' argument that the issue may become moot before the constitution of an arbitral tribunal was not a reason for urgency. Instead, this suggested that any harm suffered by the claimants was temporary.

The emergency arbitrator was neither satisfied that irreparable harm / balance of harm had been made out as the claimants had failed to provide evidence of harm.

For these reasons, the emergency arbitrator dismissed the claimants' request for emergency relief.

3.3.5 SCC Emergency Arbitration – Case 12

Background
The dispute arose out of an international license agreement between the Swedish claimant (as licensee) and the Belgian respondent (as licensor), under which the claimant's business was operated under the respondent's brand.

The claimant alleged that despite its rightful termination of the license agreement, the respondent continued to act as licensor and engaged in behaviour which disrupted the claimant's business.

Request for interim measures
The claimant requested that the emergency arbitrator order the respondent to: (i) discontinue all activities under the license agreement (including marketing the claimant as part of the respondent's brand and the sale of the claimant's services); (ii) disconnect from the claimant's management system and cease meddling with the system; (iii) "deflag" the claimant as part of the respondent's brand and notify relevant websites of this change; and (iv) disconnect the claimant from the respondent's management.

Procedure
On the same day as the application was filed, the emergency arbitrator was appointed, and the case was referred. By the next day, the emergency arbitrator had liaised with the parties and had fixed a timetable for the proceedings. Following three rounds of substantive submissions, the emergency arbitrator issued the emergency order 5 days after the case was referred.

Analysis and decision
The emergency arbitrator's jurisdiction was not disputed. As for the reasonable prospects of success on the merits, the emergency arbitrator held that it was satisfied. In this regard, the respondent's counsel appeared to acknowledge that the claimant had terminated the international license agreement.

Regarding urgency, the emergency arbitrator held that this was established. The emergency arbitrator assessed whether the requested relief could

reasonably await the constitution of an arbitral tribunal. Based on the available evidence, the emergency arbitrator found that some financial harm could likely materialize imminently due to the claimant's business being involuntarily linked to the respondent's brand and infrastructure, and that such harm would likely persist until an arbitral tribunal was constituted.

However, the emergency arbitrator found that the requirement of irreparable harm was not met because the alleged harm could probably be repaired by an award for damages. In this regard, the claimant had not adduced any evidence of imminent harm to the claimant's financial status if the interim relief was not granted.

In addition, the claimant had not asserted that the alleged harm would be particularly difficult to quantify as monetary damages or that the respondent would be unable to honour an obligation to pay damages if so ordered by an arbitral tribunal.

In light of their findings on the fourth point, the emergency arbitrator did not consider it necessary to consider the fifth point of proportionality.

The emergency arbitrator dismissed the claimant's request for interim measures in its entirety.

3.3.6 SCC Emergency Arbitration — Case 13

Background
The claimant (a Chinese company) and the respondent (a Bolivian individual) were parties to a consultancy agreement. According to the claimant, the respondent had terminated the agreement around 8 years prior to the commencement of the emergency proceedings. Since then, the respondent had commenced various court proceedings against the claimant.

Request for interim measures
The claimant requested an order for the respondent to withdraw all the lawsuits related to the consultancy agreement, and to not file any more lawsuits related to the consultancy agreement.

Procedure
On the day that the claimant's application was filed, the emergency arbitrator was appointed, and the matter was referred to the emergency arbitrator. Later that same day, the emergency arbitrator wrote to the parties to establish the procedural timeline. However, the emergency arbitrator was unable to reach the respondent via the email addresses provided by the claimant. The emergency arbitrator obtained a 5-day extension to render the award and informed the claimant that the matter would only move

forward upon notification of the claimant's request to the respondent.

The emergency arbitrator resumed the proceedings after the claimant submitted a notarised certificate which stated that the request for interim measures had been delivered to the respondent.

The respondent did not take part in the proceedings. The emergency decision was issued 10 days after the case was referred to the emergency arbitrator.

Analysis and decision
As a preliminary point, the emergency arbitrator addressed the non-participation of the respondent. The emergency arbitrator held that it followed from the notary certificate that the claimant's request was successfully delivered to the respondent. Since then, the respondent was in a position to get acquainted with the case material and present its position. On this basis, the emergency arbitrator was satisfied that they could proceed and consider the claimant's application.

The emergency arbitrator first found that they had jurisdiction to hear the claimant's request. In this regard, the emergency arbitrator noted that the dispute was brought forward on the basis of an arbitration agreement contained in a contract signed by both parties.

Turning to the merits of the claimant's request, the emergency arbitrator applied the following criteria: (i) urgency, (ii) *prima facie* case; (iii) irreparable or serious harm; and (iv) balancing of hardships.

Regarding urgency, the emergency arbitrator found that the claimant had not proved that the emergency measures sought could not await the constitution of an arbitral tribunal. In this regard, the claimant's complaints were based on a series of court decisions, the latest of which was issued approximately 6 months prior to the commencement of the emergency proceedings. Further, the claimant had failed to present any documentation in support of the allegation that the emergency measures were urgent.

As regards a *prima facie* case, the emergency arbitrator found that this was not satisfied as they had not been presented with any material regarding the merits of the parties' dispute, which rendered it impossible for the emergency arbitrator to speculate about the claimant's chances of success on the merits.

As for irreparable or serious harm, the emergency arbitrator found that this was also not satisfied. Based on the available evidence, the emergency arbitrator found that there was a low probability that any further court decisions would be rendered before the constitution of an arbitral

tribunal, and even if so, no quantifiable or actionable damage would be suffered by the claimant.

As to the balance of hardships, the emergency arbitrator favoured the respondent. In this regard, the emergency arbitrator balanced the interests of the claimant (in having to defend its interests in multiple fora) and the respondent (in having to be involved in international arbitration proceedings when the claimant's jurisdictional objections had been rejected by a court).

For the reasons above, the emergency arbitrator dismissed the claimant's request for interim measures.

3.3.7 SCC Emergency Arbitration — Case 14

Background
The claimant (a company based on Cyprus) and the respondents (two Swedish companies) were parties to a shareholders' agreement which provided that shares "may only be transferred if they have previously been offered for sale to other shareholders [...] unless such shares are transferred to the selling party's affiliate" (i.e., a right of pre-emption).

The dispute arose under a shareholders' agreement, originally entered into by the respondents and three non-disputing companies. Two of the non-disputing companies later sold their respective shares to the claimant, who entered into the shareholders' agreement.

Following the respondents' sale of its shares to a third party, the claimant was invited to pre-empt the third party's purchase.

The claimant was of the opinion that the respondents had not complied with their pre-emption obligations under the shareholders' agreement and its agreed regime for pre-emption of shares.

Request for interim measures
In summary, the claimant requested an order for the respondents to refrain from taking steps to transfer their shares to any third party until the contractual one-month pre-emption period had expired and the respondents had complied with their corresponding notice obligations.

Procedure
The emergency arbitrator was appointed one day after the claimant's application was filed. That same day, the case was referred to the emergency arbitrator who promptly conducted a virtual procedural conference to establish a timetable. The emergency arbitrator's decision

was rendered 5 days after the referral.

Analysis and decision
The emergency arbitrator's jurisdiction was not contested by the respondents. As such, the emergency arbitrator assumed jurisdiction as the claimant's request for relief was based on the shareholder's agreement which contained an SCC arbitration clause.

However, the emergency arbitrator held that the claimant had not discharged its burden of proving (on a *prima facie* basis) a reasonable possibility that its claims would succeed on the merits. In coming to this decision, the emergency arbitrator examined the wording of the shareholders' agreement and the evidence the parties adduced on how the shareholders' agreement had been previously applied in similar situations. Ultimately, the emergency arbitrator was not persuaded by the claimant's reading of the pre-emption mechanisms provided under the shareholders' agreement. Instead, the emergency arbitrator held the view that the claimant had been given a right to exercise its pre-emption right, had taken measures to do so, and had no right to "a second bite at the apple".

Although the emergency arbitrator's findings in respect of the factor of reasonable possibility of success on the merits were sufficient to dispose of the claimant's application, the emergency arbitrator set out brief reasons why the remaining criteria for interim relief were also not satisfied. On the issue of urgency, the emergency arbitrator considered that the claimant had created a situation in which urgency could be invoked itself, and that such procedural behaviour should not result in advantages for an applicant. As for irreparable harm and proportionality, the claimant had not demonstrated that damages would not be a sufficient remedy or that the respondents would not be in a position to pay any damages awarded.

For the foregoing reasons, the emergency arbitrator rejected the claimant's request for interim relief in its entirety.

4. Conclusions

In 2019, the SCC received eight applications for the appointment of an emergency arbitrator, in 2020 five applications were submitted, seven applications were submitted in 2021 and in 2022, the SCC received only two applications.

Out of the 22 applications, eight applications were granted, three were granted in part, 10 were denied and one application was dismissed due to lack of jurisdiction.

From the above numbers, it can be concluded that it remains difficult for claimants succeed with such applications – proof of urgency and irreparable harm remaining the most difficult criteria to establish.

However, more applications than usual were granted during this period. Out of the 14 applications received between the years 2015–2016, four requests were granted in full, six were dismissed and three granted in part.

In the years 2017-2018, seven applications were received and only one was granted, one was partially granted and the remaining five were either denied or dismissed.[7]

The short timeframe of emergency arbitrator proceedings can be challenging for the parties as well as for the arbitrator. During the years 2019-2022, a slight increase in requests for extensions of time to render the interim decision can be seen. Despite this, 54% of the interim decisions were rendered within the five-day time limit.

On average, the extension requested was for two days.

Between 2019–2022, parties from 28 different countries participated in SCC's emergency arbitrator cases, and arbitrators from 10 different countries were appointed.

Of the 22 cases administered, all were international. That is, at least one of the parties to the proceedings was from a country other than Sweden.

According to Article 9(4)(iii), an interim decision ceases to be binding on the parties if arbitration proceedings are not commenced within 30 days of the date of the interim decision.

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[7] Two applications were dismissed due to withdrawal.

11 emergency applications submitted between the years 2019–2022 were followed by a request for arbitration. All, except for one, was submitted within the 30 days.

The above numbers relate rather well to the allocation of applications granted and applications denied. Generally, claimants that are successful in emergency arbitrator proceedings will, naturally, submit the dispute to an arbitral tribunal. On the other hand, many claimants that are unsuccessful with their interim application choose not to pursue the claims in arbitration proceedings.

In other cases, the parties seem to settle the dispute after the emergency decision is rendered.

Even though decisions on interim measures remain unenforceable in many jurisdictions[8], the apparent high degree of voluntary compliance with emergency decisions makes emergency arbitrator proceedings a useful procedural tool.

[8] ” Emergency Arbitration: A lasting trend?” by Kaj Hobér, July 2016, Funding in Focus, Vannin Capital.