# Emergency Arbitration - An examination of the SCC solution.

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**Summary**

This paper is an examination of the new SCC emergency arbitration rules and a look at the consequences of the recent focus on emergency protection rules within the arbitration community. It contains an analysis of the proposed new SCC rules and of the mechanisms and framework governing them, as well as an examination of the the similar rules of the ICDR institute, in effect since 2006, and of the impact that these and older emergency rules have had so far.

Also included are references to, and a brief comparison with, the ICC rules of 1990 that would seem to be the progenitor of the modern emergency rules of recent years, with a view to what kind of impact the ICC rules have had on contemporary arbitration as well as what kind of legacy the rules have passed on to the community of today. What then follows is an analysis of alternatives to emergency arbitration, and of the consequences that the shift into this new type of arbitration might have.

## Abbreviations

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| AAA | American Arbitration Association |
| Congo Case | *Societe Nationale des Petroles du Congo and Republic of Congo v TEP Congo.* Paris court of appeal, 2003 |
| IFCLA | International Federation of Computer Law Associations |
| ICDR | International Centre for Dispute Resolution |
| NYC | Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Also known as the New York Convention |
| SCC | Stockholm Chamber of Commerce |
| IFCAI | International Federation of Commercial Arbitration Institutions |
| WIPO | World Intellectual Property Organization |
| NAI | Netherlands Arbitration Institute |
| CPR | International Institute for Conflict Prevention and Resolution |

**Relevant Rules and Texts**

*Rules for Non-Administered Arbitration*, International Institute for Conflict Prevention and Resolution

*SCC Rules on an Emergency Arbitrator on Interim Measures, Draft rules with notes,* march 2009

*ICC Rules of Arbitration*, in force as from Jan 1998

*United Nations Convention on the recognition and enforcement of foreign arbitral awards,* as of 1958

*Enforcing Arbitration Awards under the New York Convention, Experience and Prospects,* document and presentation at the 1999 UN New York Convention Day

*Interim Measures in International Arbitration*, IFCLA 2008, Richard Allan Horning

Rules for a Pre-Arbitral Referee Procedure, in force Jan 1 1990, ICC

*The ICC's pre-arbitral referee procedure – How valuable is it?,* Ian Meredith and Marcus Birch, 2008

*The ICDR's Emergency Arbitration Procedure in Action*, parts one and two, Guillaume Lemenez and Paul Quigley, 2008

*First Court Decision on Pre-Arbitral Referee*, Emmanuel Gaillard, New York Law Journal, june 5, 2003

*Recent Development in International Dispute Resolution Around the World,* International Dispute Resolution, White & Case, september 2003

*The Need for Speed,* article by Dr. Francis Gurry, Director of WIPO Arbitration And Mediation Center, at the 1997 Biennial IFCAI Conference.

*SCC strengthens its Arbitration Rules*, article published 15 april 2009 on the SCC webpage

*Law and practice of International Commercial Arbitration*, Redfern and Hunter, 4th edition

*ICDR Emergency Measures of Protection*, art 37 of the ICDR rules

*Rules for Non-Administered Arbitration*, International Institute for Conflict Prevention and Resolution

# 1. Introduction

On the 15th of April 2009 the Stockholm Chamber of Commerce (SCC) published an article on its homepage titled *SCC strengthens its Arbitration Rules.*[1] It described the way that the SCC intended to proceed with the development of emergency arbitration rules. The article indicated that some very fundamental premises of arbitration, namely the way interim measures are handled, are undergoing changes, and it would seem that the way practitioners and clients perceive these premises, is changing at an even brisker pace. In essence it is about the realization that some instances of less desirable actions by an uncooperative party simply cannot be compensated by an award, but must be stopped before they take place.

In summary this text is about the consequences of these new rules, a posited lack of compatibility of the new emergency rules with the already existing framework of treaties - a framework that might be ill equipped to handle the increasing demands put on it from the new type of measures introduced by emergency arbitration.

The SCC is not the first institution to adopt new rules to face the current demands on arbitration, and I will therefore compare the SCC solution to other institutional solutions, and discuss their consequences. Now since the institutions are based, due to facts of geography and convenience, in different jurisdictions and therefore subject to different lex arbitri the consequences of the deployment of these new rules will vary, although some underlying principles should remain the same.

## 1.2 Method and Aim

Since these rules governing emergency arbitration are relatively new, they are not yet treated extensively (or hardly at all) in literature. Currently any doctrine on the subject is to be found in article form. Therefore, I will be relying foremost on articles published by different organizations and institutes, primarily dealing with the effects of the ICDR emergency arbitrations rules (active since 2006), as well as a few other recent and not so recent attempts at establishing this new type of procedure. The ICDR solution is the most interesting for this purpose since it is modern, as well as similar in many aspects to the SCC solution. Also of particular interest is the *Congo Case* of 2003, a case before the Paris Court of Appeal, of which the result and reasoning shed some light on some of the more problematic aspects of emergency measures.

My aim is to describe and analyse the possible effects of the SCC rules changes in the positive as well as negative. I will also discuss what kind of effects the general shift in attitude within the arbitration community as regards the importance of emergency measures will have. Note that at this stage I am postulating that there is, in fact, a change in attitude. Further, it is my intention to point to some weaknesses in this new system of emergency measures.

1 http://www.sccinstitute.com/?id=23696&newsid=25681

# 2. Background - New Demands

## 2.1 Emergency relief

Emergency relief is a protective system of interim measures that have come to supplement the existing system of interim measures previously available. It is protective in that it serves to conserve the status quo between parties seeking arbitral relief.
The rules of the system have in common across the different arbitral institutions that they are used before the arbitral tribunal has begun its proper work, even before the tribunal is constituted, thereby giving them the emergency nomination.
They are employed by a sole emergency arbitrator, who is appointed in an expeditious manner.[2] The purpose being to protect assets and information that might otherwise be altered or lost or otherwise rendered useless or of less value by one party to the detriment of the other, so as not to make the main arbitration proceedings meaningless.

Emergency relief is seeing increasing importance in the world of arbitration, and the different institutions are working on new rules to meet the demands on arbitral solutions today and tomorrow.

## 2.2 Arbitration in general

*"The practice of arbitration therefore, comes, so to speak, naturally to primitive bodies of law; and after courts have been established by the state and a recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle it with less formality and expense than is involved in recourse to the courts"*[3]

The above passage describes the origins and history of arbitration fairly accurately. It is a method of solving disputes that pre-dates the formal court justice system, and it survives because of the qualities that it embodies that sets it apart from its younger sibling - qualities like speed, confidentiality, flexibility. Qualities that are getting more and more appreciated in recent history, to the point where it is again the preferred system for certain types of disputes and between certain combinations of parties.

Just as the laws governing dispute resolution by court are constantly evolving, so is arbitration, and in recent years we are seeing new demands, particularly on speed and protective measures. The international world of business is operating at a rapid pace and issues that are not resolved quickly can often have great economic and political repercussions. And even though arbitration usually offers a speed advantage compared to national courts, this is often not enough for certain types of disputes, in which a late decision might be more or less useless. In the time it takes to constitute an arbitral tribunal that can issue interim orders, a lot of damage can be done by an uncooperative or careless party.

2 As far as I am aware no institute is currently contemplating rules whereby more than one emergency arbitrator is appointed per case.
3 Holdsworth, History of English Law, 1964, p 187

## 2.3 Interim measures

Interim orders have traditionally been the recourse when a party is in need of protective measures, so as not to lose monetary or intellectual resources etc. Hunter and Redfern explain the intent of interim measures as follows:

*"During the course of an arbitraion, it may become necessary for the arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names."*[4]

As touched upon in 2.1 the interim order solution requires a tribunal to be in existence and up to speed on the case so that it can issue orders. In the time window before the constitution of the tribunal the only way to receive the needed protection has traditionally been to make an application to a national court, which in many cases can provide an emergency injunction within 24 hours. However there are countries and situations in which this is not an option and where interim relief is far from an emergency procedure, often taking months to obtain.
In addition, national injunctive measures is a blunt instrument on the international arena of business of today - it might not be enforceable in every jurisdiction where it needs to be, thus making it effectively useless in such areas as intellectual property protection etc, where assets travel easily across borders (and injunctions do not). Also, let us not forget that arbitration is often sought for the confidentiality and non-disclosure that it offers, an aspect that may indeed be lost if recourse to a national court is taken for emergency measures. This is where we come back to arbitration, which has been developed as an international tool for dispute resolution, and may offer a better framework for these types of issues. The powers of arbitral tribunals to order interim measures is widely recognized on an international scale and thus internationally enforceable, thanks to strong multilateral treaties and customs, so the issue of enforceability is less of a hurdle. Though there are other problems.

Not surprisingly it is far from an uncommon situation that the parties to an arbitral dispute have a vested interest in preserving certain assets and circumstances as they were at the outset of the conflict, and not find themselves in a situation where ones position is worsened before an award has been issued and the situation finally resolved.
This is where interim measures come into play, as a means to "maintain the status quo".[5] Indeed, in the text of several institutional rules the practice of interim orders is explained using words such as protection, and conservation. The tribunals ability to act is however, as previously mentioned, restricted to the period after which the tribunal has been constituted - a serious drawback of the system, as evidenced by the recent interest in (and development of) emergency rules, where a more expeditious solution is sought.

A national court may be the only alternative when important evidence and assets are at risk of disappearing in the weeks and months between the request for arbitration and the constitution of the actual tribunal. To make matters worse, in many cases the arbitral tribunal is handicapped by antiquated national legislation (this is, for example, the case with Greek[6] and Italian[7] law) making interim measures of protection close to an impossibility, or at least seriously restricted in their usefulness. This last matter is not a problem in Sweden, where the courts stand ready to assist in most cases of interim relief, but there still needs to be a tribunal in existence to decide on the matter.

4 Hunter & Redfern p. 393
5 Hunter & Redfern p. 393
6 Greek Code of Civil Procedure, art. 889
7 Italian Code of Civil Procedure, art. 818

There are other complications in the area of interim measures, but what we will be concentrating on in this document are those associated with the timing of the relief, i.e. the problem that the current system of interim relief has with delivering the relief needed when it is needed, and what kind of problems the proposed system of emergency relief might give rise to when trying to remedy this weakness of the arbitral system.

## 2.4 Emergency arbitration

A problem in arbitration is that the need for injunctive relief is greatest at the very first sign of a conflict (in which arbitration is sought). This is something that the arbitral process has been ill equipped to handle, seeing as how the tribunal must actually exist before it can issue any orders, interim or otherwise.

*"Historically, the only option available to a party in this situation was to apply for interim relief in court. But that option has many drawbacks. For example, the relief sought may not be available; court proceedings may be public, lengthy, costly, and veer in unexpected directions; and a foreign party may fear that a national court will be biased in favor of its nationals."*[8]

So, interim relief from a national court has its drawbacks, but nevertheless must be used until a tribunal can issue interim orders. Because even with the quoted drawbacks the need for protective measures may sometimes be of such importance that the negative aspects fade in comparison.

*"An enforceable interim measure can maintain the status quo until the award is made and it can also secure assets out of which an award may be satisfied where a recalcitrant debtor is deliberately dissipating assets to render itself eventually judgment-proof."*[9]

As stated in the above quote it is often of utmost importance (to one party) that certain assets and circumstances do not change from the outset of the conflict, when relief is sought, to the conclusion where a judgement is rendered by a tribunal. However, interim measures are often not fast-acting enough to preserve this status quo, and one party might indeed render itself effectively "judgement-proof" by wilful obstruction in which contested assets are reduced in value, or even wholly depleted. Some form of assets are effectively irreplaceable (typically intellectual property, classified information etc.) and their destruction or manipulation are difficult to translate into monetary loss.

A solution was needed, and one was presented in 1990 by the ICC in the form of the ICC Pre-arbitral Referee Procedure, offering the first real form of emergency relief in arbitration.
The ICC solution, as well as later solutions such as the one recently chosen by the SCC, all have in common that a system is put in place whereby interim protective measures can be put into play even before the start of the main arbitral proceedings, even before the constitution of the tribunal.

However, in a system as organic and interdependent as international arbitration, no solution is ever easy - considering, for example, that even ordinary interim measures (or orders) often encounter enforcement difficulties due to the fact that they may not satisfy the demands on finality set out by the New York Convention, how will emergency orders fare? This will be discussed in chapter 5, where we will examine the controversies and difficulties surrounding emergency arbitration.

8 *The ICDR's Emergency Arbitrator Procedure in Action*, the Dispute Resolution Journal, August/October 2008 issue. Article by Guillaume Lemenez and Paul Quigley, page 2.

9 *Enforcing Arbitration Awards under the New York Convention - Experience and Prospects,* V. V. Veeder

## 2.5 Current trends

In the business climate of today we are seeing an ever increasing importance of those kind of assets (primarily intellectual property) that can easily lose their value to one party if misused by another during a conflict. This has led to an increasing demand for protective measures that can ensure that the arbitral proceedings do not become effectively meaningless.

*"There is a great demand for interim measures prior to the constitution of the Arbitral Tribunal. The SCC User Survey for 2008 indicates that 82 percent of counsel active in SCC arbitration believe that interim measures should be available from the initiation of the arbitration."*[10]

The quoted user survey illustrates the problem of interim measures not being available at the very outset of a conflict, when they are most needed, and the reason why they are now being made available.

### 2.5.1 Inadequacy

Current institutional rules, as well as (and even more importantly) current international treaties, do not seem to satisfy the needs of parties as they have evolved over the time that the world has entered a stage where business is conducted at the speed of light.
The reigning school of thought seems to be that the institutions need to make interim measures available when they are actually needed, i.e. at the very outset of an arbitration, as recognized at the IFCAI conference of 1997:

*"[...] the problem in arbitration, however, is that the need for emergency relief is generally the first manifestation of the existence of a dispute and thus arises before an arbitration has been commenced and, in consequence, before the arbitral tribunal has been constituted. The claimant is therefore confronted with a situation in which it needs to obtain relief, but there is no arbitral tribunal in place to grant the relief."*[11]

As we can see the IFCAI recognized the problem in the late 1990's, even if it is not until around 10 years later that we are seeing the results of this realization.

### 2.5.2 Speed

In a world where intellectual property and digital information is of ever increasing value it is natural that the demands on dispute resolution in which these type of assets are involved change. But even with more traditional assets involved the speed and scope of today's contractual dealings defy the capacities of most rules of arbitration. Even though arbitration is often preferred because it can produce enforceable final decisions in a more timely manner than the national courts, it still lacks the capacity to protect a party from the loss of assets if the speed at which an injunctive measure can be employed is not enough.

### 2.5.3 Protection

As mentioned in the introduction, some instances of less desirable actions by an uncooperative

10 - *Linn Bergman, SCC strengthens its Arbitration Rules*, article published 15 april 2009 on the SCC webpage.
11 "The Need for Speed", article by Dr. Francis Gurry
Director, WIPO Arbitration And Mediation Center, at the 1997 Biennial IFCAI Conference.

party simply cannot be compensated by an award, but must be stopped before they take place. Again, this view is increasingly more common in a world where intellectual property is such a valuable commodity, and the abuse of such is often impossible to measure in terms of monetary worth, after the damage has been done.

# 3. Examination of the current solutions

Three institutional solutions appear as the most interesting for further examination. The SCC solution because of being the most current. The ICC solution by virtue of being the oldest and still functioning solution. And the ICDR solution by virtue of being deployed only a few years ago by a major institution, thus having a modern approach, but not so modern that we cannot already examine some of its effects.

Worth mentioning is that fairly soon emergency arbitration may come full circle when the ICC updates its rules - the prevailing thought is that this will happen within a few years. Unfortunately I do not have substantiated preliminary thoughts as to the direction of the changes contemplated, but it still bears speculation. What we do know is that the ICC rules have been criticized as lacking in a few critical areas, and we will examine these to see what (if any) parallels can be drawn to the more modern rules of, primarily, the SCC.

## 3.1 The SCC solution

The reader is asked to bear in mind that at the time the main work on this paper was done the SCC solution was still a work in progress[12]. I base my observations on the draft rules as presented April 15, 2009.

### 3.1.1 Main Features and their meaning

Eight features are presented by the SCC as being of distinguishing importance when crafting new emergency rules.[13] They are described and commented below.

***A. The rules are made part of the SCC Rules, thus applicable to all disputes where the parties have agreed to arbitrate under the SCC Rules.***

For the parties to take advantage of the Emergency Arbitration option there does not need to be a separate provision made for this eventuality. A modification of article 32 of the SCC Rules points us to a new appendix of the Rules (Appendix II) which deals with Emergency Arbitration. If parties are wary of the these emergency measures then they will have to specify in their arbitration agreement that there will be no Emergency Arbitration (a so called "opt-out solution"). This is a a similar solution to the ICDR solution of 2006 as well as the NAI (with their Summary Arbitration Proceedings[14]), but differs from the very early rules on emergency procedures set out by the ICC in 1990[15] in which a separate agreement is required. The reason is to increase the impact of the new rules by giving the parties the option when it is most needed. The ICC rules of 1990 were hardly

12 The rules were finalized in 2010 with minor changes.
13 *SCC strengthens its Arbitration Rules*, article published 15 april 2009 on the SCC webpage.
14 Arbitration Rules of the Netherlands Arbitration Institute, Art. 42
15 ICC Pre-arbitral Referee Procedure.

ever opted for[16], at least not for the first decade of their existence and it has been speculated that the provision of a separate agreement was the reason[17]. There may have been other factors as well, such that the world of arbitration might not have been ready for emergency measures until more recently.[18]

One could argue that the SCC solution is a self evident one if the prevailing theory in arbitration today is that emergency arbitration is needed, then obviously the option to use it should be part of the normal steps taken to initiate an arbitration. The ICC chose a different route back in 1990, but are currently in the process of revising its rules and it is expected that the institute will change to the *opt-out* solution. We will not know for certain for several more years, but in the field of arbitration this new emphasis on the importance of emergency interim measures seems to be rather unified, and so it is not anticipated that the ICC will keep the present opt-in solution. Surprisingly though, when the WIPO started to consider rules for emergency relief in 1997 it considered[19] a solution similar to the one used by the ICC - i.e. the opt-in solution in which the parties need to actively decide beforehand that emergency relief will be available if needed. And this was well after the fact had been established that the ICC model was not having the desired or expected impact.

***B. Initiation of arbitration is not necessary.***

Article 32 of the proposed SCC Rules contains a new provision:

*32.4 - Provisions with respect to interim measures requested before the case has been referred to the Arbitral Tribunal are set out in Appendix II.*[20]

With the addition of the new Appendix II and art 32.4 it is possible to provide interim measures before the constitution of the arbitral tribunal.

*Appendix II Art 1.1 - A party may apply for the appointment of an Emergency Arbitrator. Such application may be made at any time until the case has been referred to the Arbitral Tribunal pursuant to Article 18 of the SCC Rules.*

Being able to offer interim measures before the constitution of the tribunal would seem to be a mandatory provision of any rules dealing with emergency arbitration, since the purpose of the procedure is to produce orders concerning circumstances requiring immediate attention, circumstances which cannot wait for the constitution of the tribunal (a process that can often take weeks).
However, it is also a very fundamental step away from traditional arbitration and the New York Convention, seeing as how the NYC of 1958 was not drafted with emergency arbitration in mind.

Redfern and Hunter state, on the issue of inability to act prior to the formation of the tribunal that *"[...], the arbitral tribunal cannot issue interim measures until the tribunal has been established. The point may seem so obvious as to be hardly worth mentioning."*[21]

16 Unsubstantiated information indicates that the procedure may only have been used 9 times between 1990 and 2008.
17 Hunter and Redfern p.396
18 See also 3.1.1.B
19 "The Need for Speed", article by Dr. Francis Gurry
Director, WIPO Arbitration And Mediation Center, at the 1997 Biennial IFCAI Conference.
20 SCC Rules on an
Emergency Arbitrator on Interim Measures
DRAFT NEW RULES WITH NOTES
March 2009
21 Law and practice of International Commercial Arbitration, Redfern and Hunter, 4th edition p. 395

Clearly something has changed in the 5 years since this was written.

We will examine this issue separately but we can also establish for now that the NYC concerns itself with *"awards to which the convention applies".*[22] We will try to establish where emergency arbitral orders or awards might fit into this, considering that the SCC states that *"Initiation of arbitration is not necessary"* and that the NYC concerns itself with arbitral awards. Can there really be an award when there has been no arbitration in the traditional sense?

***C. The power of the Emergency Arbitrator is limited in scope to decisions on interim measures and in time to the referral of an initiated arbitration to an Arbitral Tribunal. The power of the Emergency Arbitrator thus ceases when the Arbitral Tribunal takes charge of the case.***

Examination of the new Appendix II (article 1.2) reveals the scope of the power of the Emergency Arbitrator. Referring us back to article 32 the appendix tells us that with regards to interim measures the emergency arbitrator has the same power that a normal tribunal would have, but the scope of her power is limited to interim measures only. In fact, her powers to act end as soon as the provisions of SCC Rules article 18 are fulfilled, i.e. when the arbitral tribunal has been appointed and the advance on costs has been paid.

*"The Emergency Arbitrator's mandate to decide on interim measures is proposed to be equivalent to the mandate of the later constituted Arbitral Tribunal. The Emergency Arbitrator shall thus decide on interim measures applying the provisions in Article 32 of the SCC Rules which means that he or she shall grant any interim measure that is deemed appropriate, that the requesting party may be ordered to provide appropriate security and that the decision may take the form of an order or an award"*[23]

The final words of this section is also of special interest in that it is proposed that the decision of the Emergency Arbitrator take the form of an order or an award. This is of course of importance when dealing with the execution of said decision, and in determining what an emergency measure actually is when trying to connect it to the New York Convention. More on this later.

An interesting question here is whether this new step in the arbitral proceedings leaves any new openings for stalling or other tactical options. A possible scenario could be that one party does everything in its power to delay the constitution of the arbitral tribunal so that the Emergency Arbitrator can render a decision that is somehow of long term benefit to that party.

***D. The other party shall be notified of the application (i.e. not ex parte)***.

A separate article of Appendix II (Article 3) deals with the issue of *ex parte* notification. The bar is set high in that the SCC secretariat shall notify the other party "as soon as an application for an Emergency Arbitrator has been received". It is of special importance to note that there need not have been a request for arbitration filed for a party to request emergency arbitration!

*"It has been discussed to allow applications for an Emergency Arbitrator only in cases where arbitration has been initiated but that option has been ruled out as it limits the usefulness of the provisions without providing any advantages*"[24]

22 Hunter & Redfern p.526

23 Rules on an Emergency Arbitrator on Interim Measures NOTES (article published on the SCC homepage April 15 2009. Page 2.

24 Rules on an Emergency Arbitrator on Interim Measures NOTES (article published on the SCC homepage April 15 2009. Page 2.

Without this provision any emergency measures taken could come as something of a surprise to the non-requesting party, considering the short timespan from request to action, and it is therefore of critical importance that they are informed in a timely fashion. That the SCC institute take on the task of informing the other affected parties would seem to be the norm, with other institutes handling this aspect in a similar manner. If this was not not the case we would likely see some underhanded behaviour in this matter, even with an obligation to inform there could still be a lot to be gained by waiting until the last moment to inform, or even not to inform and accept any consequences.

Worth noticing at this point is that the ICDR chose to lay the burden of notification on the initiating party, rather than on the institution. One of the clearest differences from the SCC rules. [25]

***E. An Emergency Arbitrator shall be appointed within 24 hours from the application was made***

For reasons of simplicity and in the interest of speed the SCC has chosen to have the board appoint the emergency arbitrator, and leave this potentially time consuming task out of the hands of any recalcitrant party.

*The jurisdiction of the SCC to administer an application for the appointment of an Emergency Arbitrator is proposed to be determined on the same basis as a Request for Arbitration."*[26]

The ICDR employed this same reasoning when drafting their provision giving a time frame of one business day (from request to appointment) in 2006, and for good reason, since the appointment of arbitrators is a well recognized area for the employment of stalling tactics in traditional arbitration, and allowing the parties to have a say could result in the loss of much of the benefit of an emergency procedure.

The SCC considered the one business day model but arrived at the less uncertain 24 hour frame. Perhaps it is not out of place to characterize the SCC solution as the more modern and truly international one, considering national holidays and the like. In any event, making the decision on appointment an administrative one is likely the only viable option when it comes to emergency arbitration. If the parties were allowed to have a part in the decision making, other than a purely advisory one, the speed of the process would likely become compromised to a point where the emergency aspect was lost.
This being said the ICDR has on occasion set up conference calls with the parties prior to appointing the emergency arbitrator, with a view to collecting their opinions and preferences. This is something which is not explicitly mentioned in the SCC draft rules of April 15, but one would assume the option of collecting the parties opinions is not excluded because of this, if the parties are amenable, and if there is time to accomplish it before party interests become damaged.

It is perhaps worth mentioning that any emergency arbitrator appointed by the SCC will be considered biased in the arbitration proper when it starts, and so the draft of April 15 contains a provision excluding her from appointment to the arbitral tribunal, unless the parties jointly agree they want her on it. This is because the emergency arbitrator will otherwise come to have formed strong opinions on different aspects of the case, and perhaps even have a prideful interest in maintaining whatever status or outcome he or she came to preserve through an emergency order.

25 ICDR Emergency Measures of Protection article 37b

26 as Rules on an Emergency Arbitrator on Interim Measures NOTES (article published on the SCC homepage april 15 2009. Page 2.

In the event of a successful challenge to the appointment of an emergency arbitrator, under both the SCC as well as the ICDR rules, the board will appoint a replacement.
However, the ICDR has chosen, at least in one case, to take a very proactive and perhaps surprising role in the interim time the replacement was being appointed. The ICDR used the time to invite the challenging party to submit its response so as not to slow down the proceedings.[27] In this case the party cooperated despite the unusual circumstances. The way the ICDR institute acted is, however, in line with the spirit of emergency rules - the ability to offer effective protective interim measures is more important than keeping to strict administrative procedures.

***F. An emergency decision shall be made within five days from the date the application was referred to the Emergency Arbitrator.***

ICDR procedure seems to take 14 days on average. So then, is the SCC aim of 5 days an ambitious time frame? One aspect that needs careful consideration is that stalling tactics have always been popular in arbitration, so much so that in law school coursework there are even lectures on the subject. Is it reasonable to expect that a decision will be made in the short timespan the SCC has set out if stalling tactics are developed and routinely used? The SCC does not elaborate much on these matters in the material published for consideration, nevertheless it is reasonable to expect that deliberation on the subject has in fact taken place, and that the probable conclusion of these deliberations by the SCC drafters is that time extensions will likely become norm. Extensions of the self imposed 5 day time limit is something that the institution is empowered to do, and it is routinely used throughout the course of normal arbitration.

However, a short timespan does go very well in hand with what is expected from a procedure for emergency interim measures. The ICDR practice of taking two weeks on average to deliver emergency relief defies the intention of emergency arbitration, which is all about maintaining the *status quo* - two weeks is a veritable eternity in which anything could happen. Then again, the emergency arbitrator is also empowered to order interim measures in the traditional sense, so truly pressing matters could be dealt with even before the emergency decision is delivered, in the form of less definitive interim orders not in the form of an emergency award (the character of emergency awards and their status, or not, of actual award will be discussed later). Having an interim order enforced against an uncooperative party in the even shorter time frame between initiation of emergency arbitration and delivery of an emergency award would pose other difficulties though. However, courts worldwide have more experience enforcing interim orders than they have enforcing emergency awards so in some cases it might actually be worthwhile. There are currently no examples of this unusual procedure, so even if possible it is highly theoretical,

***G. The decision is no longer valid if arbitration is not initiated or if the case is not referred to an Arbitral Tribunal within a certain time from the date the decision was made.***

This provision would seem to add a bit of uncertainty to the process, if it was not for the reasoning of the SCC drafters, which suggests that it will simply be up to the emergency arbitrator to renew his or her decision, on application by a party (or even on his own initiative). The provision reflects the fact that the emergency decision is not a true arbitral (final) decision, and is not intended to finally resolve anything. This is of course problematic for enforcement purposes, seeing as the NYC, the primary enforcement tool in international arbitration, deals only with awards that are final. More on this later.

27 The "Energy Case" of 2008

***H. The decision may be renewed or altered by the Emergency Arbitrator and later by the Arbitral Tribunal.***

This may be the most problematic provision of the suggested rules. It suggests to us that a decision by an emergency arbitrator might lacks the finality required for enforcement under international treaties, especially in conjunction with the G. provision above. The explicit allowance of alterations of the decision suggests something other than a final decision, and the fact that a second instance (the arbitral tribunal) can impose their own take on the decision at a later date likewise tells us that this type of award (if indeed that is what it is) might not be compatible with the requirements of finality in the NYC.

There is also the problematic aspect of the arbitral tribunal perhaps not having the same opinion on the merits of the case as the emergency arbitrator, thus creating a situation where, potentially, we could see a reduction in the predictability of the process. The consequences of this are hard to say anything about, but it is not far fetched to reason that a party would go and act in a certain way after receiving a beneficial emergency decision, only to then have the decision altered into something that makes the chosen course of action less than desirable, perhaps harming the party.

## 3.2 Other institutional solutions

Two institutions are of special interest in comparison to the SCC, namely the ICDR and the ICC. The ICDR has a US centric outlook on arbitration, being grounded geographically in the US and aspected towards the common law tradition. But that notwithstanding, the rules implemented by the institution in 2006 are at first glance very similar in many respects to what the SCC are implementing and because of that a deeper look is warranted.

The ICC has the distinction of being the progenitor of emergency arbitration, implementing rules in 1990 that, while not being titled emergency arbitration, tried to fill that same purpose and carried (and still carry) important distinctions that make an examination of what kind of effect they have had interesting. Perhaps they offer the only set of rules that has been available long enough to draw any conclusions from, at this point.

### 3.2.1 The ICDR Solution

The International Centre for Dispute Resolution implemented their solution on emergency arbitration in May 1 of 2006. It consists of a new article (Emergency Measures of Protection - Art 37) incorporated in the Centres existing rules (International Arbitration Rules) on arbitration, and deals explicitly with emergency arbitration. It is more or less contemporary with the SCC rules and was drafted with the same goals and with the same considerations in mind. The AAA (of which the ICDR is a part) did offer rules for emergency measures in 1999 already, but they suffered from the same main drawback as has been identified in the ICC rules of 1990, in that they had to be specifically agreed on for inclusion by the parties in their arbitration agreement, and thus were not frequently used.

We might look upon the ICDR rules as an upgraded version of the AAA rules of 1999 with some important improvements, and considering the normal pace of change in the field of arbitration the ICDR adjusted swiftly. As a comparison, the ICC is only now starting work on new rules, two decades after implementation of their current rule set (a set with several identifiable flaws).

Article 37 of the ICDR Emergency Measures of Protection is specifically designed to be an effective alternative to seeking emergency relief from the courts. By using the so called "opt-out solution" (i.e. the option is there unless specifically excluded) it is made sure that the option is always available when needed. This seems to be the prevalent and preferred method in modern emergency pre-arbitral theory today, and for good reason, considering the poor track record of usage of the precursor rules of the ICC and AAA.
And indeed, the article 37 rules were used at least four times, that we know of, in the first two years of existence, proving that there was a demand.

In fact, the ICDR goes one step further in that the emergency rules apply if the parties have agreed on arbitration before the ICDR regardless of whether the ICDR rules are to be used or not[28]. In fact, the ICDR emergency rules also apply when parties to a conflict with international connotations specify AAA *arbitration* but do not specify AAA *rules* - this is of course peculiar to the AAA/ICDR relationship but it does show the clear intent of the drafters that emergency arbitral rules should be made readily available. This latest provision was actually the reason emergency measures were used in two of the four known cases (as of May 2008).

In reality many seemingly domestic conflicts should be able to benefit from the emergency rules under AAA arbitration since the AAA apply article 1.3 of the UNCITRAL rules to determine if a conflict is international, and this provision allows for a broad definition of what is to be considered international.

Unlike the proposed SCC rules ICDR emergency procedures may not be filed for until a request for arbitration has been made. The SCC rules could be considered as more evolved in this regard - fulfilling the mission statement of making interim measures available when they are needed (i.e. at the very outset of a conflict). Just as with the proposed SCC rules the board of the ICDR institution selects the emergency arbitrator, and within a similar time frame of one business day, although as discussed earlier the SCC has chosen the less confusing and more internationally viable 24 hour model as opposed to the business day model of the ICDR. The business day model has proven to be problematic in that different cultures and parts of the world observe different holidays, this problem is eliminated with a concrete 24 hour allotment.

The ICDR has proven its commitment to emergency arbitration by quickly responding to challenges to the choice of arbitrator[29] and quickly offering a replacement. Quickly in this case being within another business day. The question becomes, can we expect the same from the SCC? It is reasobale to do so, since both institutions use a similar method of appointment (board appointment), and neither requires (but sometimes offer to take, situation permitting) input from the parties to appoint the emergency arbitrator.

Just as with the proposed SCC rules the tribunal, once established, has the power to modify the emergency decision, and the emergency arbitrator can not be appointed as a member of the tribunal unless the parties agree to include him or her. What is less clear is if the emergency arbitrator can still render a decision after the tribunal has been constituted if she has not done so yet and a protective measure is still needed (and the tribunal is not yet ready to act on the issue). The issue has not come up so far. However, the International Institute for Conflict Prevention and Resolution[30]

28 ICDR rules, art 1
29 the "Energy Case"
30 “The International Institute for Conflict Prevention and Resolution, known as the CPR Institute, is a New York City membership-based nonprofit organization that promotes excellence and innovation in public and private dispute resolution, serving as a primary multinational resource for avoidance, management, and resolution of business-related disputes.” - http://cpradr.org

has issued guidelines in their Rules for Non-Administered Arbitration that may be an indication of how the arbitration community would interpret the ICDR (and indeed the SCC) rules.

*"[...]if the tribunal is constituted before the special arbitrator has rendered an award or order, the special arbitrator shall retain jurisdiction to render such award or order unless and until the tribunal directs otherwise."*[31]

So, in special circumstances we might see an emergency arbitrator actually working in tandem with the tribunal, offering strong emergency support during the initial phase of the arbitration. This is interesting because the consequences when it comes to enforcement are hard to predict. The situation as such is hardly without precedent, since it has long been practice to seek emergency relief from a national court while waiting for the tribunal to work through the merits of the case, the difference being that the tribunal does not have such a close relationship to or indeed any power over a national court, which it does over an emergency arbitrator working under these conditions. It is an aspect worth examining in more detail after some time has passed.

### 3.2.2 The ICC Solution

It is less clear if the ICC process, *Rules for a Pre-Arbitral Referee Procedure*, is truly emergency arbitration. It was developed in a period in which the concept of emergency arbitration was not yet a recognized part of the arbitral process, and it lacks much of the features common to emergency rules of today. The rules were never intended to be of universal use, but rather an optional tool, whereas the modern institutional rules have a clear intent of changing the way in which arbitration is conducted (to always include emergency arbitration when needed). It is interesting to note that in its standard model clause for incorporation of its rules in a dispute resolution process the ICC clearly states that:

*"The extent to which the ICC Rules for a Pre-Arbitral Referee Procedure are recognized and accepted may vary from one country to another depending on the applicable law(s). Parties wishing to have recourse to these Rules should ensure that they conform with the law(s) applicable to each case".*

This tells us without doubt that the concepts introduced by the ICC in 1990 were indeed something new in the world of arbitration, and that there was an acute awareness that the process might not be supported by the international framework that is in place to facilitate arbitration. Or at least not fully. It is also interesting that the ICC leave the burden of ensuring that their emergency rules are of actual use in a given case to the parties. The emergency rules being implemented in recent years, by different institutions, have in common that the administrative responsibilities and decisions are shouldered by the institutions, to facilitate the proceedings and ensure speedy delivery of an emergency order. The arbitral framework of 20 years ago could simply not be relied upon to support the execution of emergency orders and the ICC knew this, and so refused to put itself in a position of responsibility (or liability).

Exactly how the ICC rules work is not of much interest for our purposes as they will shortly (within a few years) be reworked and updated to match what other institutions, like the SCC, are trying to accomplish. They are however the forerunner in the field, making it worthwhile to discuss them in context, updated or not (and even perhaps more so the non-updated version).

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31 14.13 –Rules for Non–Administered Arbitration, International Institute for Conflict Prevention and Resolution

# 4. Alternatives.

## 4.1 "Fast Track" Arbitration

In the same climate that prompted the creation of the ICC's Pre-Arbitral Referee Procedure, and also initiated by the ICC, there was significant work being done to try to speed up the proceedings of ordinary arbitration. The term fast-track arbitration was first coined in the 1990s, when the duration of arbitration proceedings in international economic transactions was increasingly criticised.

In the face of this criticism, the major arbitral institutions searched for solutions. At the beginning of the 1990s a few fast-track cases, with highly reduced deadlines, conducted before the International Court of Arbitration of the ICC made a name for themselves, being brought to a close within an extremely short time and thus gaining a certain prominence. At the end of 1991, four related arbitration proceedings with a value in dispute amounting to several $100 million were initiated with the ICC, two of which were introduced under general arbitration clauses, while the other two were to be settled under fast-track provisions. The subject of the dispute was a complex redetermination of purchaseprice for a commodity product. The parties were related but not identical. There were numerous petitions regarding the consolidation of the fast-track cases with the two other cases, as well as questions of jurisdiction and of the independence of one of the arbitrators nominated by the parties. These cases combined classic characteristics of difficult arbitral proceedings with the added pressure of an extremely tight deadline. However, one of the two fast-track proceedings was concluded within a period of only 60 days, the other within a period of 80 days.

Exactly one year later, again at the beginning of the year, in another ICC case, the parties carried out a dispute in the fast (track) lane in the truest sense of the word: Since a dispute developed between a racing team and the host of the F1 championship immediately before a Grand Prix race, regarding the proper varnishing of two race cars. A prompt decision was required, and the ICC Arbitration Court succeeded in making such a prompt decision—just 38 days passed between commencement of the arbitration proceedings and the rendering of the award and the participation of the racing team in the imminent Grand Prix was thereby ensured. In this case the speed and protective effect of the proceedings come close to that of emergency arbitration.

However, we need to bear in mind that the purpose of emergency arbitration is primarily a protective one, and not to render lasting awards in the traditional sense. Fast track arbitration, by virtue of its greater speed, do fulfil some of the same functions. It (for example) gives less time for an uncooperative party to negatively affect the interests of all parties, before a final judgement is rendered. But then the speed in which a final award can be delivered is not always the critical component in arbitration, but rather how quickly the status quo can be assured.

Ideally all arbitrations should be conducted at a quick pace. The shorter overall deadlines of fast-track arbitration might still mean that it would be useful in a protective capacity. However, it is not always possible to entice the parties into following the fast-track model, due to lack of cooperation between them. Indeed, to function at all fast track arbitration needs cooperative parties, as it is based on the presumption that both sides actually want a speedy resolution (favourable or not), with little of the incitements available to an emergency arbitrator to make this happen. This feature may not make it a true alternative to emergency arbitration, since the true emergency procedures are highly adversarial in character, while fast track arbitration is mostly employed between parties that

are generally on good terms and want to keep it that way.

In any case, neither the ICC nor the LCIA (the other great proponent of "fast track" during the 1990's) actually included any specific rules system supporting this form of arbitration in their latest revisions, although the ICC tried the process in the *Formula One case* described above.[32]

## 4.2 Streamlining

Redfern and Hunter discuss different strategies that institutions might want to codify in their procedural rules in order to speed up arbitral proceedings.[33] These strategies could eventually stand as a separate system that parties could choose to employ instead of the ordinary rules.
Like with the early ICC fast-track solution this would require that the parties agreed beforehand which system to use, alternatively that the institutional rules were drafted in such a way that it was at the arbitrators discretion which system to use. Either way it would create a higher level of flexibility, but at the cost of foreseeability (or vice versa).

The suggestions that Redfern and Hunter make that are most interesting from an emergency protection standpoint are that the arbitrator should try to

- Identify the burning points at issue first and foremost.
- that exact and unyielding time limits should be strictly imposed, and
- that the arbitrator should not give extensive reasoning for his decision.

Also, only a single arbitrator would be used, so as to speed up decision making. These conditions would perhaps fill some of the same functions as the new generation of emergency arbitration rules do, but would come with its own set of problems since some measure of legal security invariably must be sacrificed in order to achieve these goals. For example, trust in the arbitral process might be damaged if extensive reasoning is not evident, or if unyielding time limits hinder a party from properly presenting its case, etc.

## 4.3 Ad Hoc

Ad hoc arbitration could fill the same role as emergency arbitration as regards protective measures, since the proceedings will take shape according to the needs of the parties. Because of the adaptive nature of hoc rules, there could be rules constructed to handle the same kind of problems that emergency arbitration was set up to handle. And this would seem ideal, if it was not for the fact that ad hoc arbitration requires a close cooperation between the parties to be of any effectiveness at all, something that is of going to be problematic in most of the situations where protective measures are needed. Also, since ad hoc procedures are usually set up to solve a dispute after it has arisen, and are thus not in place at the critical initial time period when emergency arbitration is of most use, it is doubtful if the purposes of the two systems are of enough similarity for one to ever act in place of the other.

32 ICC case no. 10211/AER
33 Hunter and Redfern, p.342

# 5. Complications.

With any new system of rules there will be attached effects that aren't immediately evident. In the sections below we will discuss a few of the areas in which emergency rules of arbitration might become problematic.

## 5.1 National legislation and national courts

Most nations party to the New York Convention have incorporated a few similar rules in their national arbitration acts that are of interest for our purposes. These concern the speed and scope of emergency decisions and in the case of the Swedish Arbitration Act they are found in section 54 under the Recognition and Enforcement of Foreign Awards heading. Art. 54.2 states that a foreign award shall not be enforced in Sweden if;

*"the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case".*

It is in the nature of emergency arbitration that it is fast. This is a clear aim of the establishment of the new emergency arbitral institutional rules around the world. In the case of the proposed SCC rules, initiation of the arbitration proper is not even needed, and the emergency arbitrator is to be appointed within only 24 hours of the request, and is then expected to render a decision no later than five days after the referral of the application for emergency arbitration.

Obviously this is a short timespan to render decisions on potentially complicated matters - the ICDR rules, similar to the SCC rules in many other ways, allows for a comparatively longer timespan in which to render a decision. Approximately two weeks have been used in the cases that are known, and even then voices have been raised in concern about the speed. Only having five days, in the SCC case, to present the information pertinent to ones case before a decision is rendered may not satisfy these common national rules about giving the parties enough time for presentation, with the result that unenforceable awards are rendered.

But then again, there is nothing in the SCC rules actively denying a party the opportunity for presentation, and it is strongly implied in the draft proposal work that there is to be no *ex parte* relief granted (and explicitly, no *ex parte* notification) - this may very well mean that, in practice, the SCC emergency arbitrator will not be able to render a decision within the five days allotted. There is however a provision for extension if the circumstances require it. In the proposal it is stated that;

"*the Emergency Arbitrator shall conduct the proceedings in such manner as he or she considers appropriate but always in an impartial, practical and expeditious manner giving each party an equal and reasonable opportunity to present its case."*

In this statement lies a strong implication that the fairness of the proceeding will not be compromised in the pursuit of speed.

### 5.1.1 Mandate

The scope of the emergency arbitrators power is fortunately not an issue with the SCC rules, as it is proposed to be the same as that of the normal arbitral tribunal which is later appointed. This is not the case with the ICDR rules where the emergency arbitrator is given a more specific mandate;

*"to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property"*

A challenge could conceivably be made as to whether an emergency arbitrator, under the ICDR rules, has acted in a conservatory or even necessary capacity. This would be harder under the SCC rules since the SCC arbitrator has a broader mandate.

However, courts of the USA that have handled challenges to arbitrator powers concerning interim relief under ICDR emergency rules seem to have taken a pro emergency measure stance, and have chosen not to undermine the authority of arbitrators when it comes to interim relief. For example it was stated in the *Banco de Seguros del Estado v. Mutual Marine Office* case that:

"It is not the role of the courts to undermine the comprehensive grant of authority to arbitrators by prohibiting an arbitral security award that ensures a meaningful final award."

Even though this is the standpoint of US courts there is little reason to suspect that the reasoning would vary in any significant way elsewhere. The willingness to make the international arbitral system work is a global consensus.

### 5.1.2 Enforcement

An award is only enforceable by a national court, drawing jurisdiction from its national laws and international conventions (in practice, the New York Convention).
Even without considering the special case of emergency awards there are issues with enforceability of interim measures, with some voices within the arbitration community considering mere orders and interim awards as lacking the dignity of proper awards, and thus being largely unenforceable under the NYC. Without effective enforcement any theoretic reasoning here or elsewhere is meaningless, so will courts (worldwide) truly enforce emergency awards?
It all comes down to how the courts reason on the criteria leading up to enforcement, such as compatibility with treaties, national legislation, the dignity of emergency awards etc. The ICDR solution, as previously discussed, is of interest here as it has all of the distinguishing features of modern emergency protection. In particular it bears a strong resemblance to the SCC solution.

US courts have had plenty of occasion to weigh in on the ICDR solution since 2006 when it was implemented, and so far the enforcement rate looks very good indeed for emergency arbitration. The protective measures rendered in the form of emergency awards seem to have been mostly upheld by the courts.
Other than the track record of the ICDR rules it is worth considering how courts treat interim measures, since these are the progenitor of the emergency award measure, and have forced the courts to consider many of the same points at issue as with emergency awards. And we know that interim measures are indeed largely enforced.

## 5.2 Compatibility with existing treaties and conventions

This is really about to what extent emergency measures and emergency arbitration is compatible with the framework that supports and makes international arbitration possible currently. Consider for example that the intent of the all important New York Convention is the enforcement of *final* awards across international boundaries and that, as has been discussed, emergency measures have very little in the way of finality. Is the framework really up to the task that the arbitration community is about to set it? Is the global and national will and intent there to reshape or reinterpret the framework?

In the case of the forerunner in the field, i.e. the ICC pre arbitral referee procedure, we actually have information to suggest that pre-arbitral measures may in fact lack the dignity to qualify for enforcement under international agreements. Now this may in fact be due mostly to a lack of intent when drafting the rules, and some unfortunate wording. Nevertheless the issue bears closer examination.

That examination consists mostly of observation of the circumstances under which decision was rendered, and subsequent action was taken, in the *Societe Nationale des Petroles du Congo and Republic of Congo v TEP Congo* case at the Paris Court of Appeal in 2003.
This was the first time the nature of a pre-arbitral order was tried in a national court and fortunately the outcome and reasoning is public, although this in itself does point to another shortcoming of a process sought, among another things, for the sake of confidentiality (this is however another discussion). The outcome tells us several things (as follows in 5.2.1).

### 5.2.1 Congo Case

In the Congo case the Paris Court of Appeal was tasked with an annulment proceeding by the Republic of Congo, regarding an order by a pre-arbitral referee rendered with the ICC pre-arbitral referee procedure.
The Republic of Congo held that the order constituted an award and thus was capable of being set aside by the French courts due to French law.[34] The opposing party, TEP Congo, held that the order was not to be considered an award.

The court did render a decision - that the proceedings were inadmissible, and it did not actually go so far as to decide on the nature of the order.
Instead the court started by examining the status of the referee, stating that if it went ahead and tried the status of the order without first determining the status of the source of the order it would then assume that the referee was actually empowered to render an award, and this the court was not willing to do.

What the court wanted to decide was whether the referee had the same power as that of an arbitral tribunal. The court examined the foreword of the ICC rules and found that nowhere was the procedure characterized as arbitration. It further found that the nature of the proceeding was one derived from the contract between the parties and any resulting order did not have the *res judicata* status of an award - it was not a final decision. Since the court thus found the referee incapable of rendering final decisions, and there therefore could be no award to annul, the parties were referred

34 –Article 1504 of the French New Code of Civil Procedure, which provides for an action for annulment of arbitral awards (*sentences arbitrales*) made in France in international matters on grounds of, among other things, lack of jurisdiction or failure to respect due process.

back to the arbitral tribunal that had to finally decide on the dispute.

Now, some important considerations must be made. The court did not decide on the status of pre-arbitral decisions as such, only on the status of ICC pre arbitral referees, but it did raise some excellent points that are of interest to us.
What is truly the status of a pre-arbitral "arbitrator" and how is it decided? The national courts obviously are unclear on the matter, so will it fall to the institutions to create a new tradition for the courts to follow?
What of the matter of the finality of a decision? A pre-arbitral decision does not per definition resolve any dispute, yet the courts are asked to treat it with the same dignity as, at the very least, an interim award. What of the binding effects of a pre-arbitral decision?

The SCC and other later adopters of pre-arbitral proceedings do have a different starting point in that the referee is actually identified as an arbitrator, and in the case of the SCC rules is said to be explicitly capable of rendering awards (due to a reference in the new emergency arbitral rules to art 32.3 of the SCC rules).

But, lets not forget that the Paris court of appeal was actually more interested in the nature of the referee/arbitrator position than in any title that an institute chooses to confer on it. No institute stands on its own, and there needs to be a consensus within the community as regards the framework within which arbitration operates. The court also attached significance to the contract between the parties. Thus it would seem that in similar cases under the new generation of institutional rules (of which the SCC rules are part), if the parties can be shown to have had the intent to be bound by the decisions of an arbitrator in a pre-arbitral process, with the clear understanding that the institute and the parties explicitly confers the power of an arbitrator on the "referee", then perhaps this makes the position of pre-arbitrator into arbitrator. The following quote from the *International Dispute Resolution* publication illustrates the point;

*"The Court considered that the question of appealability rested not on whether the referee's decision was held to be an award or an order, but rather on the referee's mandate."*[35]

If we turn again to the ICC draft rules, Appendix II, art 9 set out the effects of an emergency decision. How then does it correspond to the ICC effects?
Well, it is worth noticing that the SCC does not call the decision of the emergency arbitrator anything but a decision. It is not labelled an order or an award, and considering the rules clearly state it only has a temporary binding effect it would perhaps be hard to pass it off as anything else. The main difference then is that this decision (the SCC decision) is rendered by an arbitrator clearly appointed and pointed out as such. The implications of the temporary nature of the decision are discussed further in 5.2.2.1 on finality.

### 5.2.2 New York Convention

Emergency awards have a lot in common with interim measures. There have long been problems with the enforcement of interim measures by the worlds national courts, since the measures do not hold up well to the wording in the New York Convention of what is considered an enforceable award. Essentially they are temporary in nature, just like emergency awards are and this is not a desirable characteristic when it comes to enforceability.

Since the ICDR rules have been in existence and in effect for a couple of years now we have an

35 *International Dispute Resolution* Vol. 16, No. 3, September 2003

opportunity to examine some of the consequences of a modern pre-arbitral procedure. And the critical consequence concerns have mostly been about the enforceability of emergency decisions. Specifically, what use is it to have the procedure in place if there is no international legal framework in place to support it after all?

So what sort of framework does the ICDR solution (and by virtue of its similarities the SCC solution) rest upon? Well, just as with the more historically common practice of interim relief we come back to the New York Convention. The Convention states that an award must be confirmed and sanctioned unless it is found that one of the exceptions in Article 5 of the convention applies. These exceptions are, as follows:

(1) Incapacity of a party, or the legal invalidity of the agreement to arbitrate.

(2) There was a lack of proper notice of the arbitrator's appointment or of the arbitration, or denial of the right to present one's case.

(3) That the award goes beyond the terms of the arbitration agreement.

(4) That the arbitral procedure was not in accordance with the arbitration agreement or the law of the country where the arbitration took place.

(5) the award has not yet become binding, or was set aside by a competent authority.

**5.2.2.1 Finality**

Art 5.5 of the NYC is where the *crux* of the matter is. Interim measures of protection, and indeed emergency arbitral decisions, are highly temporary in nature. They are created to preserve the *status quo* in a conflict, and they do not have any finality. They live only up until the tribunal decides on the matter, and they resolve nothing on a lasting basis. With this in mind it is hard to see how the NYC could be used to enforce these decisions. However, in the case of interim relief the NYC is used for enforcement purposes.

On interim relief US courts have reasoned that *"arbitrators have authority to award interim relief in order to protect their final award from being meaningless"*.[36] It is labelled a *"process preserving decision",* because to reason otherwise would mean the practice of interim relief would become, for all intents and purposes, meaningless.[37] Similarly it was stated that *"It is not the role of the courts to undermine the comprehensive grant of authority to arbitrators by prohibiting an arbitral security award that ensures a meaningful final award."*[38]

There is little reason to suspect other than that the the above same reasoning that the US courts have applied to interim measures of protection would also apply to emergency measures of protection, considering the way the courts have rationalized their decisions - basing them foremost on the needs of the arbitral system to function as intended.

36 *Yonir Technologies v. Duration Systems*, 2nd Circuit

37 *Arrowhead Global Solutions v. Datapath Inc*, 4th Circuit

38 *Banco de Seguros del Estado v. Mutual Marine Office, 2nd Circuit*

#### 5.2.2.2 Award or Order

Furthermore, the US courts have chosen to disregard any distinction between an "order" and an "award" for the purposes of enforcing interim measures, treating them both as enforceable under the NYC. This is of importance for the SCC solution since under the proposed rules the emergency award is labelled a *decision*:

*"Consistent use of the word 'award' when discussing final arbitral decisions does not bestow transcendental significance on the term ... [and] content of a decision—not its nomenclature—determines finality."*[39]

This leaves us with the procedure itself. If the award (or decision) itself is compatible with the New York Convention, is there anything else that could be challenged?

There is the issue of speed as we have previously touched upon. Both the SCC and the ICDR rules provide an intentionally speedy resolution, as well as a quick entry into the resolution process, since both sets of rules call for the appointment of an emergency arbitrator within one day or 24 hours, with a decision coming, ideally, soon after this. The NYC states (art. 5) that an award does not need to be enforced if a *"party against whom the award is invoked [...] was otherwise unable to present his case."* Concerns have been raised in this regard over the ICDR rules, and since the SCC rules call for an even faster resolution (of only 5 days) there is reason to believe challenges could be made based on the inability to present ones case properly in the short time allotted. The ICDR time frame has been accepted by the arbitration community mainly due to the fact that there is no ex-parte element to the process, seemingly excusing the short time allotted to present ones case. But in practice this may be due to the fact that on average the ICDR emergency relief cases tried to this day have produced decisions 14 days after initiation - somewhat longer than then 5 days envisioned by the SCC.

It remains to be seen if the SCC can live up to this undertaking. Ironically, it may be in the institutes best interest to extend, in practice, this time (note that this is possible according to the draft rules) in order to ensure that challenges are not made due to an inability to present ones case.

## 5.3 Ex Parte issues

Although ex-parte applications or proceedings are not part of any institutional arbitral emergency rules, there nevertheless exists a certain ex-parte element in that one side might end up with very little advance notification before having to present ones case before an arbitrator that holds extensive power to order measures affecting its assets.

Stalling tactics have long been employed in arbitration proceedings, but even starting an emergency arbitral process might be very tactical indeed, if the goal is to affect assets of the other party in the short term, assets that might play an important role in the relationship between the parties in matters not covered by the contract leading to arbitration. In this way the short notice and short timespan involved in emergency arbitration could have the same effect as if a party was not properly notified.

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*39 Publicis Communication v. True North Communications, 7th Circuit*

## 5.4 Scope of the emergency arbitrators powers

The SCC emergency arbitration rules give the arbitrator extensive powers, bestowing on him or her the same jurisdiction that a normal arbitrator serving under the SCC rules would have when it comes to interim measures. The extent of the measures available is constrained only by what the arbitrator "deems appropriate"[40].

It is conceivable that a challenge, in court, could be made as to whether an emergency measure really was appropriate, i.e. if the measure or relief granted really was within the scope of the emergency arbitrators powers, just as a the scope and jurisdiction of an ordinary arbitrators powers is sometimes challenged. However, what the courts will look at when deciding on the matter is, primarily, the SCC rules themselves, and the rules do grant arbitrators working under them extensive power. A party to a conflict in which it was agreed the solution would spring from SCC arbitration would be expected to be aware of this, and thus it is highly unlikely that the broad scope of the emergency arbitrators powers in itself would constitute valid grounds for a challenge. Again, in the case of the ICDR rules, where such challenges have been made, it was the opinion of a US court that *"[courts] are required to give deference to the arbitrators' interpretation of the Rule and the Agreement unless they have clearly exceeded their authority."*

Additionally, let us consider why the rules on (emergency) interim measures are implemented the way they are by most institutions - They are crafted this way so that arbitrators can, at the end of the arbitration procedure, render an award that still carries any meaning. Without broad powers to order preservative measures (i.e. interim or emergency measures of protection) there is a high probability that many rewards would indeed become de facto worthless. Courts are likely to recognize and respect this.

## 5.5 Updated NYC

As has been discussed throughout this paper there may need to come into existence an update or clarification to the New York Convention, on interim measures and their status in general and on emergency arbitral processes and awards in particular. No such update is currently near, but due to the strong reliance on custom and perception in international law practice in itself may avert the need for one, once we start seeing some emergency awards actually enforced.

40 SCC rules art. 32, referenced by Appendix II art 1.2 of the same rules.

# 6. Closing Comments

Having completed this work I am left with a feeling that emergency arbitration is indeed the way forward, and an understanding of why the different institutes are mostly all hard at work implementing new rules on the processes. But my findings seem to indicate that there may need to come into existence a new international consensus and framework, particularly on enforcement of these new rules. As it stands this area is something of a grey field, with different ideas on how exactly to make it all work, even if the will is there.

I have pointed to some weaknesses in this new system of emergency measures. A system that changes the world of arbitration. As I have discussed, the all important New York Convention does not really cover this new type of interim measure, and the foreseeability in employing the measures is currently not very good. This is because no one can say for sure how the different national courts will handle the issue of enforcement with no firm consensus on the status of emergency awards as yet in existence.

The institutional administrative issues of the new system that I have touched upon can probably be handled, as the SCC and other institutes have gone to considerable trouble drafting workable and flexible rules, revising them and not actually implementing them until satisfied they will hold up to the task. The foreseeable problems lie mainly outside of institutional control, in the hands of national courts, and in the case of convention updates in the hands of national policy makers.

The SCC draft rules do seem to stand up well to what other institutes are implementing, and they have a modern and utilitarian approach. They may even be leading in the field. I can see other institutes keeping a close eye on what the SCC make of it all once the rules have been put to use. There is little doubt that we are in a time of important changes in how arbitration is conducted, and we are seeing (and will likely see) some interesting effects.

Göteborg, January 2010 (final version December 2010)
Karl Falk