Emergency Relief under the Swiss Rules (Art. 43)
An overview after 4 years of practice

Since the emergency relief proceedings were introduced in the revised Swiss Rules of International Arbitration (the "Swiss Rules") in 2012, a total of seven Applications for emergency relief proceedings have been filed before SCAI Secretariat.

Four cases were filed in 2014, two cases in 2015 and one in 2016. Out of the seven applications, six resulted in decisions by the Emergency Arbitrator, in one of those cases the Emergency Arbitrator found that it had no jurisdiction, and one application was terminated at the request of the parties, who proceeded under a normal Swiss Rules arbitration procedure. The subject matter of the disputes varied, ranging from Formula 1 driver contracts to contracts for loans, service, distribution & franchising, cooperation and the sale of goods.

What Type of Cases?
Six out of the seven cases were international arbitration cases with parties from Western Europe, Eastern Europe, North America, Africa and Asia, while one of the cases was a Swiss domestic arbitration. The seat of the arbitration was in Switzerland in all of the cases. The applicable substantive law was Swiss law in five cases and English law in two cases. The Arbitration Court appointed the Emergency Arbitrators from various legal backgrounds, depending, inter alia, on the applicable law and the nationality of the parties. The nationality of the Emergency Arbitrators was Swiss, British, Australian and Belgian.

What is the Scope?
The emergency relief provisions apply to all Swiss Rules proceedings, in which the Notice of Arbitration is submitted on or after 1 June 2012, unless the parties expressly opt out of the mechanism (Art. 1(3) and 43(1) Swiss Rules). Therefore, the applicability is determined by the date on which the Notice of Arbitration is submitted, and not the date of the arbitration agreement.

In one of the cases dealt with so far, the Respondent argued that the Emergency Arbitrator did not have jurisdiction to decide on the Application for emergency relief, as the arbitration agreement was concluded at a time when the 2004 version of the Swiss Rules applied, which did not provide for an emergency relief procedure. The Emergency Arbitrator confirmed having jurisdiction, as the arbitration agreement referred to the Swiss Rules "in force on the date when the notice of arbitration is submitted", and the parties had not opted out of the 2012 Rules or Article 43 specifically.

The SCAI Arbitration Court will appoint and transmit the file to a sole emergency arbitrator, unless there is manifestly no agreement to arbitrate according to the Swiss Rules, or it appears more appropriate to proceed with the constitution of the arbitral tribunal and refer the application to it. This may be the case, for example, when the Application for emergency relief is filed after the Notice of Arbitration. In this respect, it should be noted that the Arbitration Court has the power to shorten the deadlines for the constitution of the arbitral tribunal under such circumstances (Art. 43(2) and 2(3) Swiss Rules).

Emergency relief proceedings are designed to assist parties in the context of Swiss Rules arbitration proceedings. Accordingly, a Notice of Arbitration must be filed at the latest within 10 days of the Application for emergency relief, failing which the Arbitration Court will terminate the proceedings (Art. 43(3) Swiss Rules).
Why the Urgency?
In essence, a party applies for emergency relief proceedings under the Swiss Rules in situations where it needs urgent measures that cannot await the constitution of an arbitral tribunal under a normal procedure. The Secretariat and the Arbitration Court constantly keep this in mind when processing an Application for emergency relief. The Swiss Rules provide that the appointment of the Emergency Arbitrator must be made “as soon as possible.” In all seven cases dealt with so far, appointments were made within one working day from receipt of the Application and payment of the Registration Fees, except for one case where it took two working days.

What are the Criteria?
As for the standard applied by the Emergency Arbitrators when examining whether to grant the requested emergency relief, three criteria have consistently been applied in the cases already decided on, although their individual assessment has varied, depending on the applicable law, the seat of the arbitration and the background of the Emergency Arbitrator. These criteria are: (1) whether the applicant has a prima facie case on the merits; (2) whether urgency justifies the requested measures, and (3) whether there is a risk of irreparable or substantial harm if the request is not granted (i.e. harm not adequately reparable by an award of damages).

What can be requested?
While two requests were made for a specific performance, the majority of the requests were for negative injunctions, including injunctions to refrain from: disposing of assets or goods; selling goods; disclosing information; and taking action that would deprive an Applicant from a contractual right. It is of course possible that other relief will be granted in the future, if requested and justified. Requests for injunctions against third party non-signatories to the arbitration agreement were dismissed for lack of jurisdiction. The requested emergency relief were partially granted in four cases, denied in full in one case and declared inadmissible for lack of jurisdiction in one case. Ex parte measures were requested in three cases (Article 26(3) and 43(1) Swiss Rules). The request was denied in two cases and partially granted in one case. In the one case where ex parte measures were granted, the Emergency Arbitrator issued a Preliminary Order, which it subsequently confirmed in an Interim Award once it had heard the Respondent.

How are Emergency Proceedings conducted?
Article 43(6) of the Swiss Rules provides that “the emergency arbitrator may conduct the emergency relief proceedings in such a manner as the emergency arbitrator considers appropriate, taking into account the urgency inherent in such proceedings and ensuring that each party has a reasonable opportunity to be heard on the Application”. The emergency arbitrator thus has wide discretion as to the conduct of the proceedings, but that discretion is framed by the requirement that the emergency arbitrator renders a decision within 15 days from the date on which the file was transmitted to it (Art. 43(7) Swiss Rules) and ensures the parties’ right to be heard.

The emergency arbitrator’s decision has the same effect as a decision of an arbitral tribunal on interim measures (Art. 26 Swiss Rules), i.e. it may take the form of an award or may initially be granted by way of a preliminary order. The decision is binding upon the parties until the arbitral tribunal subsequently constituted modifies it or renders its final award.

To give an example of an emergency relief proceeding, the first application for Emergency Relief was submitted to the Swiss Chambers’ Arbitration Institution on 4 February 2014. The request was submitted by a Swiss company requesting injunctions
against a Canadian company in relation to a dispute arising out of a cooperation agreement governed by Swiss law. By noon the following day, two of the five candidates approached had signalled their availability and independence. A Belgian national was subsequently appointed as emergency arbitrator and received the file on 6 February 2014, 2 days after receipt of the application. The emergency arbitrator issued draft procedural rules and a draft provisional timetable and held a conference call with the parties the next day. The answer to the request for emergency relief was filed on 11 February 2014, the reply on 13 February 2014 and the rejoinder on 15 February 2014. A hearing took place at the seat of the emergency relief proceedings on 18 February 2014, and the parties filed their statements of costs one day later.

The emergency arbitrator issued a decision on the application for emergency relief on 20 February 2014. The emergency arbitrator partially granted the applicant’s request that the respondent be enjoined from disclosing the contents of the cooperation agreement and from using certain documents, tools, research and analytical techniques said to be the property of the applicant. The applicant’s request that the respondent be enjoined from making further contact with the applicant’s suppliers and that it be permitted to withhold payments received was denied. Finally, as to the request for a penalty, the emergency arbitrator found that it did not have jurisdiction to impose a penalty for non-compliance with the nondisclosure order.

Concluding Remarks

The 7 cases filed since the adoption of Article 43 of the Swiss Rules prove that the emergency relief proceedings are working well and that a decision on the application can be obtained within the fifteen-day time limit set out in Article 43(7) of the Swiss Rules.

It is worth noting that out of the seven applications decided upon: one case was terminated prior to the constitution of the arbitral tribunal on the merits, one case was terminated during the subsequent arbitral proceedings; one case was settled; final awards were issued in three cases; and one case is still pending. While the provisions on emergency relief proceedings are still in their early part of life, it is safe to conclude that they are working successfully and meeting the needs of users with no time to lose.

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