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Why the Emergency Arbitrator's decision cannot be enforced and how the new rules may be made useful nonetheless

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1. The Emergency Rules

As of 1 January 2010, the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") has introduced new emergency rules enabling parties to SCC arbitrations to appoint an Emergency Arbitrator – prior to the commencement of proceedings – when urgent relief is required. The emergency rules, which establish a regime for emergency proceedings, are incorporated into the SCC Rules by a new article 32(4), which refers to Appendix II where the emergency rules are to be found. The Emergency Arbitrator may order any interim measures he deems appropriate.

Interim measures is a remedy or relief aimed at safeguarding the rights of parties to a dispute pending its final resolution. The underlying principle is that no party's rights should be prejudiced or affected due to the duration of adjudication.[1]

The SCC Rules have previously authorized the arbitral tribunal to grant any interim measures it deems appropriate.[2] The Rules have also provided that a request for interim measures made by a party to a judicial authority is not incompatible with the arbitration agreement or with the SCC Rules.[3] The rules on an

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1 Yesilirmak, Ali, Provisional Measures in international commercial arbitration, Kluwer Law International, 2005, p. 5. Yesilirmak uses the term "provisional measures" when defining the concept. He states that the terms "provisional" and "interim" are used interchangeably in international arbitration and that they allude to the same concept, op. cit., p. 8–9.

2 SCC Rules Article 32 (1).

3 This is prescribed by section 4, paragraph three of the Swedish Arbitration Act (Lagen (1999:116) om skiljeförfarande ("LSF")). The agreement to arbitrate according to the SCC Rules,

Emergency Arbitrator add the opportunity to request interim measures, outside the scope of court proceedings, before the case has been referred to the arbitral tribunal.[4] Such interim measures may be of great importance as the transfer of assets may be performed more quickly than the forming of a tribunal.

The new SCC Rules on emergency proceedings are construed as an opt-out regime, making them applicable to all SCC arbitrations where there is no agreement *not* to be bound by the emergency rules. The parties undertake to carry out an emergency decision by agreeing to arbitration under the SCC rules.[5] The emergency decision is binding on the parties until the emergency arbitrator has decided otherwise or a final award has been rendered. If a request for arbitration is not filed within thirty days from the day the emergency decision was made, or if the case is not referred to an arbitral tribunal within sixty days from that day, the emergency decision is no longer valid.[6] The arbitral tribunal is not bound by the decision or the findings of the emergency arbitrator.[7]

The SCC uses the terminology of arbitration in its new rules for emergency proceedings. The rules make reference to an emergency *arbitrator*,[8] who can choose to make his decisions in the form of an *award*.[9] It thus seems that the SCC is attempting to model an actual arbitration procedure dealing exclusively with interim measures which is separated from the arbitration proceedings dealing with the substantive issues in dispute. However, the power conferred on the Emergency Arbitrator is to issue procedural and temporary decisions only, pending the formation of the arbitral tribunal. The Swedish Arbitration Act does not make any provision for the concept of an Emergency Arbitrator, nor does the New York Convention. Is the SCC's Emergency Arbitrator actually an arbitrator? Are the emergency proceedings arbitration proceedings, and is the Emergency Arbitrator's decision really an award?[10] If not, what does that imply for the users of the new emergency rules? Can these decisions be enforced? And, if not, are there viable reasons to employ the new emergency rules and request

including its emergency rules, is thus not a procedural impediment to the interim measures procedure *per se* before courts of general jurisdiction. Westberg, Peter, Skiljeförfarande och avtal om civilprocessuella säkerhetsåtgärder, Festskrift till Lars Gorton, Juristförlaget, 2008, p. 619, referring to Heuman and Madsen. Conversely, to apply for interim measures before a court of general jurisdiction does not entail a breach of the SCC Rules or the new emergency rules.

4 SCC Rules Article 32 (4) and Article 9 (3) in the Appendix II.

5 Article 9 (3) in Appendix II.

6 Article 9 (4) in Appendix II.

7 Article 9 (5) in Appendix II.

8 See in particular Article 1 (1) in Appendix II. The term "arbitrator" is used throughout the emergency rules, including its title "Emergency Arbitrator".

9 Article 1(2) Appendix II and Article 32 (3) of the SCC Rules. The Emergency Arbitrator's decision "may take the form of an order or an award".

10 For an elaboration on the defintion of an arbitration agreement according to Swedish law, see Heuman, Lars, Skiljemannarätt, Norstedts juridik, 1999, p. 50 and Lindskog, Stefan, Skiljeförfarande – en kommentar, Norstedts Juridik, 2005, p. 96–97.

emergency proceedings? This article explores whether enforcement is possible in Sweden, through the Swedish Arbitration Act[11] and the Swedish Execution Code,[12] or internationally, through the New York Convention. It concludes that the Emergency Arbitrator is not actually an arbitrator, and that his decisions are not enforceable. It then proceeds to explore if there are – in the absence of any means of enforcement – viable ways to strategically employ the new SCC Rules on an Emergency Arbitrator.

2. Contractually Binding Decisions

By accepting SCC arbitration, the parties have accepted not only arbitration according to the SCC Rules, but also to be bound by any decision of an Emergency Arbitrator.[13] Article 32(4) of the SCC Rules incorporates the new rules on emergency proceedings, and by referring to the SCC Rules, the parties have therefore also adopted the emergency rules. The Emergency Arbitrator's decision is binding as expressly stated in article 9(1) of the emergency rules. The parties are, therefore, contractually bound by the Emergency Arbitrator's decision, as long as it stands. The tribunal has the power to declare the Emergency Arbitrator's decision null, as it is preliminary only. As Emergency Arbitrator, according to the SCC rules, has preliminary powers only, his award is contractually binding only as long as the Arbitration Tribunal has not decided otherwise.[14]

As arbitration clauses generally refer to the SCC Rules as in force at the time of dispute, not only arbitration clauses entered into after 1 January 2010, but also earlier concluded SCC arbitration clauses potentially have this effect.[15] But what is the appropriate forum in case of an adversary's non-compliance? Conversely, are there compelling reasons to comply with the Emergency Arbitrator's order? A binding decision may be of little use if there is no means to enforce the binding nature thereof.

[11] Lagen (1999:116) om skiljeförfarande.
[12] Utsökningsbalken (1981:774).
[13] Article 32 (4) in the SCC Rules and Article 9 (3) in Appendix II.
[14] Heuman Lars, Skiljemannarätt, Norstedt Juridik AB, Edition 1:1, 1999, p. 50–51.
[15] For arbitration clauses concluded before 1 January 2010 – when the rules entered into force – it must, however, be considered uncertain whether there is even a contractual obligation to abide by the emergency arbitrator's decision.

3. Enforcement of Emergency Interim Measures

Enforcement is a perennial issue in arbitration. The popularity of arbitration in the last few decades, especially in an international context, is largely due to the influence of the New York Convention which renders enforcement of international arbitral awards fast and predictable. International arbitral awards are enforced swiftly, as opposed to international court rulings the enforcement of which, if at all feasible, can be quite onerous.[16] When it comes to interim measures, however, arbitration does not provide any routes to enforcement. This is true for interim measures ordered by the arbitral tribunal, within the framework of the arbitration proceedings; and even more so for emergency interim measures, as they are ordered outside of the substantive arbitration proceedings, before the tribunal has been formed.

The major arbitration institutions including the ICC and AAA have for more than a decade provided for pre-tribunal handling of interim measures. The ICC originally invented the mechanism, launching its Rules for a Pre-arbitral Referee Procedure as early as 1990. AAA adopted its Optional Rules for Emergency Measures of Protection in 1999. Notably, LCIA drafted rules for an emergency relief procedure in 1997, although they were subsequently discarded.[17] The ICC Pre-Arbitral Referee Rules state that the decision shall be in the form of a reasoned order; it does not allow for the Referee to render its decisions in the form of an award.[18] The AAA Rules, conversely, employ arbitral terminology; thus an "interim award" may be granted by the "emergency arbitrator".[19]

3.1 Enforcement under the Swedish Arbitration Act

Under the Swedish Arbitration Act and Execution Code, an arbitrator has the capacity to make enforceable awards or decisions based on the party's claim.[20] For

[16] Enforcing court judgments given by a court or tribunal of a Member State – to the European Union – is, however, a much more straightforward procedure as the Brussels Regulation (No 44/2001) regulates enforcement in between member states. On this procedure, see Pålsson, Lennart, Bryssel I-förordningen jämte Bryssel- och Luganokonventionerna, Norstedts Juridik, 2008.

[17] Yesilirmak, Ali, op. cit., p. 121.

[18] Article 6.1 of ICC Rules for a Pre-Arbitral Referee Procedure in force as from 1 January 1990 reads: "*The decisions taken by the Referee shall be sent by him to the Secretariat in the form of an Order giving reasons.*"

[19] Article 4 of AAA Rules for Emergency Measures reads: "*If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim award granting the relief and stating the reasons therefore.*"

[20] Section 27 of the Swedish Arbitration Act and chapter 3 section 1, point 4 and section 18.

an award to be enforceable, the conditions set out in sections 27 and 29 of the Arbitration Act must be satisfied. The award must thus finally resolve the dispute or part of the dispute or finally terminate the proceedings. Only such awards are enforceable under the Swedish Execution Code.[21] A decision on interim measures does not finally resolve the dispute or part of the dispute or finally terminate the proceedings.[22] The Emergency Arbitrator's decision on interim measures is thus not an enforceable award under the Swedish Arbitration Act or – by extension – under the Swedish Execution Code.

Nor can the parties contractually enable an arbitrator to make enforceable interim decisions. The execution orders are exhaustively specified in the Execution Code. Without statutory sanction, new forms of execution orders cannot be created by agreement, nor can such orders be created through institutional arbitration rules which prescribe that the interim measure is issued through a separate award[23] – as the SCC Rules now do.

3.2 Enforcement under the New York Convention

The Convention contains neither a provision specifically dealing with the recognition and enforcement of foreign interim measures, nor a definition of the notion of 'arbitral award' that would allow a precise definition of its scope.

There has been considerable debate on the possible application of the New York Convention on interim measures,[24] but the Convention is only considered applicable to final and binding awards dealing with the substantive issues in dispute.[25] Interim measures are both modifiable and revocable and thus not binding. Therefore, enforcement of interim measures – before or after the forming

[21] Chapter 3 section 1, point 4 and sections 15–18 UB. In the preparatory works to the Swedish Arbitration Act, making interim measures enforceable was considered. However, the notion was rejected on the basis of due process concerns; see SOU 1994:81, p. 101 and Government Bill. 1998/99:35, p. 73.

[22] Chapter 3, section. 4, 1st sentence UB and Westberg, Peter, op. cit., 2008, p. 630.

[23] Westberg, Peter, op. cit., 2008, p. 630.

[24] Webster Thomas H., Obtaining Documents from Adverse Parties in International Arbitrations, Arbitration International, Vol. 17. No 1, LCIA 2001, p. 43–55. In the Publicis case (Publicis Commun. v. North Communs. Inc, 7th Cir. III, 2000, 206 F.3d 725) the issue under appeal was whether a foreign order to produce documents was enforceable under the New York Convention. The order was not enforceable under the New York Convention, but partial awards, finally resolving an issue, was, according to the US Court of Appeal, enforceable. The case focused on the finality of the measure in question. The claimant received a decision to resolution of the other issues subject to arbitration. Therefore, an interim foreign procedural order would not be enforceable in the US but a partial award would be enforced provided that it finally resolves an issue in the case. The Resort International case (Condominiums International Inc. v. Bolwell and another (1993) 118 ALR 655 (Lexis)) also applied the test of finality and discussed the type of documentary measure that would not be enforced under the New York Convention.

[25] Yesilirmak, Ali, op. cit., p. 74–80.

of a tribunal – cannot be obtained through the New York Convention.[26] Accordingly, the SCC's use of arbitral terminology – of arbitrators and awards – is irrelevant for the purpose of determining whether the emergency decisions are capable of enforcement under the Convention. The nature of interim measures – modifiable and revocable – bars their enforcement under the New York Convention.

3.3 Unenforceable Emergency Decisions

The Emergency Arbitrator has preliminary powers only and his award is only binding until the Arbitration Tribunal has decided otherwise. Calling a decision for interim measures an award will not make it one for the purposes of the New York Convention[27] or the Swedish Arbitration Act.[28] It should be noted that the issue of whether to enforce emergency decisions is ultimately determined by the respective legal system where enforcement is sought. The New York Convention only sets minimum standards for contracting states. There is nothing prohibiting a state from rendering interim decisions of a neutral party-determined authority – such as the SCC's Emergency Arbitrator – enforceable.

Due to its interim nature, the Emergency Arbitrator's decision, even if in the form of an award,[29] is not final. The Emergency Proceedings are not arbitration proceedings – as these proceedings cannot, by definition, result in an enforceable award. An Emergency Arbitrator is not an arbitrator under Swedish law or the New York Convention but merely a neutral party-determined authority, complementing the substantive proceedings by providing (unenforceable) interim decisions regarding arbitrating parties' rights.

[26] New York Convention, Art. V.I.e; Yesilirmak, Ali, op. cit., p. 259–265; Madsen, Finn, Skiljeförfarande i Sverige; en kommentar till lagen (1999:116) om skiljeförfarande och till reglerna för Stockholms handelskammares skiljedomsinstitut, 2nd edition, Jure, 2009, p. 107.

[27] Karrer, Pierre., Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, p. 108, in Van der Berg, Albert Jan (ed.): ICCA Congress Series No. 10, International Arbitration and National Courts: The Never Ending Story and Carlevaris, Andrea, The Recognition and Enforcement of Interim Measures Ordered by International Arbitrators, p. 525, in Yearbook of Private International Law, Volume 9, 2007, p. 503–539.

[28] See below. However, Westberg seemingly takes the opposite view and consequently argues that arbitrators do not have any mandate or right to label their interim decisions "awards", Westberg, Peter, op. cit., 2008, p. 631–633. Westberg writes (p. 633) that "*This relates to a direct manipulation of legal etiquette where, solely through the choice of the term in question, one achieves a certain effect which one is otherwise not expressly entitled to achieve.*"

[29] The SCC Rules, section 32(3), provides that the Emergency Arbitrator may make his interim measures "in the form of an order or award". Appendix II (the emergency rules) refers to 32(3) in its article 1(2).

4. Making Use of the Emergency Rules

Neither the New York Convention nor the Swedish Arbitration Act or Execution Code provide any means of enforcement for emergency decisions, and the possibility of other states so doing seems remote. Is, then, the newly established institution of Emergency Arbitrator impotent? Can either party disobey with impunity? Is it at the end of the day, in emergency interim matters, only the court that can bring a party to book?

Strictly speaking; yes. When it comes to emergency interim matters, only the courts enjoy coercive powers. The SCC rules on emergency proceedings cannot alter this state of affairs since the parties cannot contractually agree on enforceability.

When immediate compliance with an order for interim measures is essential, national courts are therefore still the best bet. However, there are reasons why parties may not want to resort to the jurisdiction of the courts. The chief concern is confidentiality, which cannot be preserved when the matter is put before a national court. Another is efficiency; national courts do not take up a matter in 24 hours, or guarantee a decision in five days.[30] Further, there is concern that state judges, being generalists in law, do not posses the expertise required to understand and equitably resolve the complex issues that arise in the occasionally peripheral niches of commercial law.

When these concerns are overriding the emergency rules may prove useful to a party in need of a swift, preliminary decision. There are rationales for complying voluntarily with an emergency arbitrator's decision and there are ways of putting pressure behind the decision of the Emergency Arbitrator. This article looks into chances for voluntary compliance; the opportunities of having the arbitral tribunal drawing adverse inferences from an adversary's non-compliance; the possibility of using the Emergency Arbitrator's decision as evidence in court proceedings; and, finally, the chances of achieving enforceability by contractually giving the Emergency Arbitrator the mandate to attach an order for a fine to its decision and contractually giving the arbitral tribunal the right to subsequently include the fine in its award.

4.1 Voluntary Compliance

In evaluating parties' compliance with the decisions of ICC's pre-arbitral referee, Craig, Park and Paulson have concluded that parties almost always comply

[30] Article 4(1) in Appendix II provides for the Board to seek to appoint an Emergency Arbitrator in 24 hours. Article 8(1) in the Appendix II provides that "*any emergency decision on interim measures shall be made no later than five days from the date on which the application was referred to the Emergency Arbitrator pursuant to article 6 of this Appendix.*"

with the decisions of the referee.[31] They explain that this is due, in part, to the risk that non-compliance has a negative impact on the party's position *vis-à-vis* the arbitral tribunal as regards the substantive issue in dispute.[32] The ICC Rules are construed as an opt-in regime, making them applicable only when the parties have specifically contracted for them. The SCC Emergency Rules are, conversely, construed as an opt-out regime. This may mean that rates of compliance will be lower with the SCC's Emergency Rules. Further, voluntary compliance may be hindered by the short time span – five days – which the SCC's Emergency Arbitrator is granted to render a decision. By comparison, the ICC's Pre-arbitral Referee has 30 days to complete the same task.[33] The short time span granted may weaken the status of the Emergency Arbitrator's decision as the ordered party may refuse to comply on the pretext that the issue has not been properly investigated or analyzed.

However, a party's desire to demonstrate good faith in the proceedings will, presumably, be overriding in many instances. The degree of risk posed to an ordered party in complying with the order will of course vary. When the risk can be mitigated by the requesting party posting security, complying with the decision and thus showing good faith would presumably be a rational choice.

4.2 Adverse Inferences

The – at least perceived – threat of non-compliance having an impact on the substantive proceedings may be powerful. If non-compliance with the emergency arbitrator's decision results in the arbitrators' mistrust in a party, this may prove to be of relevance for the substantive proceedings. The concept of adverse inferences is modeled on the idea that a non-compliant party, in the words of Judge Learned Hand; "has something to conceal and is conscious of guilt".[34]

Adverse inferences are a formalized and generally accepted procedural tool when it comes to evaluation of evidence in international arbitral proceedings. Based on the parties' contractual obligation to abide by the emergency arbitrator's decision, the arbitral tribunal may, in the subsequent arbitral proceedings, draw adverse inferences from the party's non-compliance with an emergency

[31] Craig W. Laurence, Park, William W., and Paulsson, Jan, International Chamber of Commerce Arbitration, 3rd edition, Oceana Publications, 2000, p. 460.

[32] Craig, W. Laurence, Park, William W., and Paulsson, Jan, op. cit., p. 460, see also Derains, Yves and Schwartz, Eric, A Guide to the new ICC Rules of Arbitration, Kluwer Law International, 1998, p. 276.

[33] Rules on Pre-Arbitral Referee, ICC Rules of Arbitration, Article 6.2.

[34] "*When a party is once found to be fabricating, or suppressing, documents, the natural, indeed the inevitable, conclusion is that he has something to conceal, and is conscious of guilt.*"; Judge Learned Hand in Warner Barnes & Co. v. Kokosai Kisen Kabushiti Kaisha, 2nd Cir, 1939, 102 F. 450, 453.

order. The tool can, strictly speaking, be used only when the interim measure sought relates to the preservation of evidence.

Ultimately, an adverse inference may alter the standard of proof or dispenses with the burden of proof. In literature on the subject, the issue of drawing adverse inferences and changing the burden of proof are dealt with in conjunction, but as different concepts.[35] An adverse inference may change the burden of proof if disobedience of an Emergency Arbitrator's decision is considered to show that the disobedient party has something to conceal. Consequently, it might also lower the standard of proof, corroborate the adversary's evidence or dilute the non-producing party's evidence.[36]

Adverse inferences are often the starting point when a party is recalcitrant in producing or preserving evidence. It is a widely accepted method[37] and there appears to be little doubt that based on the ICC, UNCITRAL, LCIA and AAA International Arbitration Rules, an arbitral tribunal is entitled to draw adverse inferences.[38] It is commonly referred to in arbitration literature, and endorsed by the IBA in its rules on evidence.[39] There is, however, some disagreement as to whether such an evaluation of evidence should be accepted.[40]

Adverse inferences and, by extension, the Emergency Rules, may be useful when the preservation of evidence is sought with the Emergency Arbitrator. If one knows that the adversary will not comply with an emergency decision, then the device may actually be used to make the point to the arbitrator that the adversary, to reiterate the words of Judge Learned Hand, "*has something to conceal and is conscious of guilt*".

[35] Brocker and Rogers both make a distinction between drawing adverse inferences and shifting the burden of proof. Brocker, Stefan, Discovery in International Arbitration – the Swedish approach, Stockholm arbitration report 2001:2, p. 25 and Rogers, Andrew, Improving procedures for discovery and documentery evidence in Van der Berg, Albert Jan (ed.), Planning efficient arbitration proceedings, The law applicable in international arbitration, ICCA Congress Vienna, 1994, p. 139–140.

[36] In the preparatory works to the Swedish Arbitration Act, it seems that a broader view is taken. It is stated that a party's non-compliance with the tribunal's order for interim measures may impact the final award, for example when it comes to the amount of damages to be ordered; see Government Bill 1998/99:35, p. 74. As regards an Emergency Arbitrator's order, it is difficult to see how non-compliance with it could impact the amount of damages awarded as long as the outcome of the emergency proceedings is not incorporated into the actual substantive arbitration proceedings. On such incorporation, see under "Contractual Penalty Awarded by the Tribunal", below.

[37] The IBA Rules Working Group commented that "*… [a]rbitral tribunals routinely create such inferences in current practice*"; See IBA Working Party, Commentary on the New IBA Rules of Evidence in International Commercial Arbitration in (2000) 2 Business Law International 14 at, p. 34.

[38] Webster, Thomas H., op. cit., p. 51.

[39] Article 9.4 of the IBA Rules on the Taking of Evidence in International Arbitration provides the right to draw adverse inferences for failure to comply with an order for document production.

[40] Heuman, Lars, Arbitration Law of Sweden, Juris Publishing, 2003, p. 404–405.

Evidentialy Effect in Judicial Proceedings

As the decision of the Emergency Arbitrator is not enforceable, it does not render the decided issues *res judicata*, and *lis pendens* does not arise.[41] A party may therefore have its request for interim measures tried by both the Emergency Arbitrator and a national court. One way of using the Emergency Arbitrator's decision may therefore be to put it forward as evidence in judicial interim proceedings before a national court. The requesting party then obtains both the expertise of an experienced jurist chosen for the task by the SCC, and the enforceability of national courts' decisions.[42] Of course there is no guarantee that the emergency arbitrator's decision will persuade the national judicial authority, but it would most probably be carefully considered. To be persuasive, the Emergency Arbitrator's decisions have to be well-reasoned. The Emergency Arbitrator is obliged to give reasons, and such would presumably most often be carefully drafted, in order to increase the chances of compliance.[43]

There are of course drawbacks to employing this two-tiered approach, especially in an international context, as a party seeking interim measures – after Emergency Proceedings are completed – has to apply for interim measures with a foreign court through a foreign legal system. Going through double interim proceedings takes time and in such context time may be the one thing that the party can ill afford.[44] Further, in court proceedings, confidentiality cannot be preserved. Confidentiality may be of great importance to the requesting party; it may need to ensure that competitors remain unaware of its business relations, or it may need to avoid the risk of suffering a damaged reputation. The Swedish Code of Judicial Procedure provides no means for preserving confidentiality.[45] There are no provisions providing confidential interim procedures in court for cases where the substantive dispute is to be resolved by confidential arbitration. The parties' agreement on confidentiality is of no relevance for public access to court files. The one way of obtaining confidentiality in Swedish courts is by

[41] Heuman, Lars, op. cit., 1999, p. 350.

[42] Admittedly, Emergency Proceedings sets the applicant back EUR 15 000, excluding the parties' own costs. The costs of the Emergency Proceedings are, however, potentially redeemable as the Emergency Arbitrator may apportion costs, Article 10 (2) in the Appendix II.

[43] Article 8 (2) Appendix II:
Any emergency decision on interim measures shall:
(i) be made in writing;
(ii) state the date when it was made, the seat of the emergency proceedings and ***the reasons upon which the decision is based****; and*
(iii) be signed by the Emergency Arbitrator.

[44] Westberg, Peter, Det provisoriska rättsskyddet i tvistemål, bok 2, Juristförlaget i Lund, 2004, p. 221.

[45] Westberg, Peter, op. cit., 2008, p. 619, 623.

claiming that the information contained is a trade secret.[46] There are, however, no guarantees that the court will actually consider the documentation presented to constitute such a trade secret and the request for interim measures with the court cannot be conditioned upon the court's assessment that such is at hand.[47] If the case includes sensitive information, going to the courts might therefore not be a viable option at all.

4.3 Contractual Penalty Awarded by the Tribunal

To strengthen the Emergency Arbitrator's decisions, parties could in their arbitration clause agree on a right for the Emergency Arbitrator to attach to its decision a statement that failure to comply with its orders will result in the penalty of a fine.[48] This contractual penalty would then later be included in the tribunal's award. The Arbitral Tribunal could then conclude that the party did not follow the Emergency Arbitrator's decision and would therefore award the contractual penalty as part of its award on the substantive issues in dispute. This way, the Emergency Arbitrator's penalty or fine would be awarded by the Tribunal. Accordingly, the party not abiding by the Emergency Arbitrator's decision would be fined by the Tribunal, no matter what the Tribunal's position will be as regards the material question or questions. As Westberg points out, such a contractual penalty equals in principle the public non-compliance fine that may be granted under chapter 15, section 3 of the Swedish Code of Judicial Procedure. The main difference is that the penalty is not of a public law nature but, rather, contractual. As the penalty is contractual in nature, it is thus payable to the requesting party and not the state which must be considered an advantage. A public penalty fine may indeed drain the adversary's assets and thus diminish the requesting party's opportunities of having a subsequent award successfully enforced.[49]

[46] Chapter 5, sections 1 and 4 of the Swedish Code of Judicial Procedure and chapter 36, section 2 of the Swedish Public Disclosure and Secrecy Act (2009:400) which replaced the Swedish Secrecy Act.

[47] Westberg, Peter, op. cit., 2008, p. 623–624.

[48] Writing before the SCC's Emergency Arbitrator was conceived, Professor Westberg suggest this regime for a provisional private judge (*swe*: provisorisk privatdomare); Westberg, Peter, op. cit., 2008, p. 636. The SCC's Emergency Arbitrator is, as has been elaborated on above, just that. On an arbitrator's capacity to attach a fine to its decision, see also Heuman, Lars, op. cit., 1999, p. 409–410 and Gaillard ICCA Congress Series, No. 5, p. 204.

[49] Westberg, Peter, op. cit., 2008, p. 633.

5. Conclusion

The new SCC Rules on emergency proceedings establish a regime for providing interim relief quickly, before the tribunal has been formed. The SCC uses arbitration terminology and seems to be attempting to create a separate arbitral procedure dealing solely with interim issues. However, the Emergency Arbitrator is not an arbitrator but merely a provisional private judge. His decisions are binding on the parties, but not enforceable, as they are not arbitral awards. Nevertheless, there may in a given case be good reasons to employ the new regime.

Firstly, there are of course chances of voluntary compliance with an emergency arbitrator's decision. Experience from the ICC Rules on Pre-Arbitral referee shows a very high compliance rate. The ICC Rules are an opt-in regime, and the Referee has a full 30 days to render a decision; whilst the SCC Rules constitute an opt-out regime, which demands a decision in five days only. The ordered party who has not actively chosen to be bound by the Emergency Arbitrator's decision, and who sees his assets being subjected to a freezing order after a five day interim proceeding conducted only in writing, may not be prone to compliance. However, these factors do not necessarily spell great differences in compliance rates between the SCC and the ICC regimes. Arbitrating parties are sophisticated enough to consider what they agree to, even if it is done by reference. Arbitrators will exercise caution in granting emergency measures and they will probably not be granted without appropriate security having been provided by the requesting party. The SCC can function as a depositary in these instances, keeping assets in escrow, where it is separated from the parties and from the Institute.

Secondly, a decision disobeyed not only shows lack of good faith, but opens up the possibility for the requesting party to call for adverse inferences to be drawn. Non-compliance with an order for production or preservation of evidence leads to the "inevitable" conclusion that the ordered party "has something to conceal and is conscious of guilt". The concept of adverse inferences is formalized and reference may be made to the IBA Rules on the Taking of Evidence in International Arbitration.

Thirdly, the Emergency Arbitrator's order may be used as evidence in subsequent interim court proceedings. Provided the Emergency Arbitrator's reasons are sufficiently convincing to persuade the court in such proceedings, both the expertise of the arbitrator and the coercion of the court's order are obtained. The drawbacks are that double proceedings take time and that confidentiality cannot be preserved.

Fourthly, parties could in their arbitration clause agree on a right for the Emergency Arbitrator to attach to its decision a statement that failure to comply with its orders will result in the penalty of a fine. The parties may thereby enable the Emergency Arbitrator to issue a penalty fine, and the arbitration tribunal may be given the authority to include that fine in its final award. Provided such

an award is enforceable, a party can thereby indirectly force the party to comply with the order. However, even if the parties have agreed upon the above – mentioned penalty, the Emergency Arbitrator's order will not be enforceable.

The decision on whether to employ the SCC rules concerning an Emergency Arbitrator, and how to make use of the Emergency Arbitrator's decision, depends on the needs of each individual case and client. Where confidentiality is paramount, using the courts is not an option. Where immediate enforcement is a priority, emergency proceedings must give way to the courts. A two-tiered approach is possible only where time permits. However, the mere knowledge that the Emergency Arbitrator's decision will be used as evidence in court proceedings for interim measures may induce voluntary compliance. This would be especially true in cases where confidentiality is of importance to the adversary.

Finally, it would appear that the SCC has attempted to create status for the decisions of its Emergency Arbitrator by employing arbitration terminology. Such terminology is, however, smoke and mirrors, and the Emergency Arbitrator's decisions remains unenforceable – but, as argued above, still usable.

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