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Waving the Green Flag to Emergency Arbitration under the Swiss Rules: the Sauber Saga

CHRISTOPH MÜLLER, SABRINA PEARSON*

I. Introduction: the genesis and rise of the emergency arbitrator

The emergency arbitrator is the “new kid on the block” on the international arbitration scene. The emergency arbitrator is the proposed solution to the so-called “temporal problem”,¹ namely the “unfortunate gap”² between the introduction of the arbitral proceedings and the constitution of the arbitral tribunal (an often time-consuming endeavour) when the parties have no other choice than to resort to national courts in order to obtain urgent interim relief in relation to their dispute.

The possibility of obtaining interim relief is of paramount importance to parties at the outset of a dispute. Interim relief may be required at this stage in order, *inter alia*, to prevent a party from destroying vital evidence, dissipating assets, calling a bank guarantee, or disclosing confidential information.

The gap between the introduction of arbitral proceedings and the constitution of the arbitral tribunal when the parties are obliged to seek interim relief from national courts is labelled as “unfortunate” for many reasons. First, the parties may be contractually prohibited from seeking interim measures from the national courts.³ Second, even if the parties are not prohibited from going before the national courts, national courts may not be able to order the specific type of interim measures requested.⁴ Third, parties

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¹ JASON FRY, *The Emergency Arbitrator – Flawed Fashion or Sensible Solution?*, (2013) *Dis Res Int'l*, p.180.

² BERND EHLE, *Emergency Arbitration in Practice*, in Christoph Müller/Antonio Rigozzi (eds), *New Developments in International Commercial Arbitration* (Schulthess 2013) p.89.

³ CHRISTOPHER BOOG, *Swiss Rules of International Arbitration – Time to Introduce an Emergency Arbitrator Procedure*, (2010) 28 *ASA Bull.* p.463. Parties may also be prevented from going before the state courts for religious reasons.

⁴ EHLE, *op. cit.*, p.89; SARAH VASANI, *The Emergency Arbitrator – An Effective Option for Urgent Relief*, (2015) 4 *Young Arbitration Review*, p.5; BOOG, *op. cit.*, p.464; FRY, *op. cit.*, p.180; PHILIPP HABEGGER, Chapter 3, Part II: *Commentary on the Swiss Rules, Article 43 [Emergency Relief]* in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner’s Guide* (Kluwer Law International 2013) para.1.

who have chosen to arbitrate any dispute that arises between them may be understandably reluctant to resort to the national courts. Indeed, national court proceedings can often be time-consuming,⁵ cost-draining and unpredictable while arbitration provides a neutral forum where proceedings are confidential and headed by arbitrators with specialized expertise.⁶ Finally, the interim relief sought may concern multiple jurisdictions making a “one-stop-arbitration-shop” much more attractive.⁷

The rules of most arbitral institutions now contain emergency arbitrator provisions, effectively bridging the gap between the introduction of an arbitral proceeding and the constitution of the arbitral tribunal with a new form of arbitral relief.

The pioneer of this movement was the International Center for Dispute Resolution (“ICDR”) which introduced emergency arbitrator provisions in its Rules in 2006.⁸ One by one, the various arbitral institutions (with the exception of the Vienna International Arbitration Centre (“VIAC”)⁹) have jumped on the bandwagon¹⁰ including the Swiss Chambers’ Arbitration Institution in 2012.

⁵ National court proceedings may be more time-consuming due to the fact that interim measures issued by a national court are usually open to appeal. Conversely, interim measures issued by an arbitral tribunal are usually not subject to appeal, see BOOG, *op. cit.*, p.464.

⁶ EHLE, *op. cit.*, pp.88-89; VASANI, *op. cit.*, p.5; BOOG, *op. cit.*, p.464; HABEGGER, *op. cit.*, para.1.

⁷ VASANI, *op. cit.*, p.5; FRY, *op. cit.*, p.180.

⁸ Art 37 ICDR Rules 2006. Previous, largely unsuccessful, attempts were made to introduce emergency arbitrator provisions through optional rules. In 1990, the ICC introduced the ICC Pre-Arbitral Referee Procedures and in 1999, the American Arbitration Association (AAA) introduced the Optional Rules for Emergency Measures of Protection.

⁹ Although discussed by the working group in charge of the revision of the VIAC Arbitration Rules 2013, it was decided not to introduce an emergency arbitrator mechanism into the VIAC Arbitration Rules. This was reportedly for 4 reasons: (i) there is a lack of practical experience in general with emergency arbitrators; (ii) it was unclear whether the users of the VIAC Arbitration Rules would accept decisions of an emergency arbitrator; (iii) the enforceability of such decisions are questionable and (iv) there are standard expedited proceedings before the Austrian courts for certain claims who can render immediate decisions when required, see FRANZ T. SCHWARZ/CHRISTIAN W. KONRAD, *The Revised Vienna Rules – An Overview of Some Significant Changes (and a Preview of the New Austrian Arbitration Law 2014)*, (2013) 31 ASA Bull. 807.

¹⁰ The International Institute for Conflict Prevention and Resolution (CPR) in 2007 (Rule 14 CPR Administered Arbitration Rules 2007); the Mexico City National Chamber of Commerce (CANACO) in 2008 (Arts 36 & 50 CANACO Rules 2008); the Netherlands Arbitration Institute (NAI) (Arts 42a-42b NAI Rules 2010), the Stockholm Chamber of Commerce (SCC) (Art 32(4) & Appendix II SCC Rules 2010) and the Singapore International Arbitration Centre (SIAC) (Art 26(2) & Schedule I SIAC Rules 2010) in 2010; the Australian Centre for International Commercial Arbitration (ACICA) (Art 28.1(a) & Schedule 2 ACICA Rules 2011) and the French Association for Arbitration (AFA) (Art 13 AFA Arbitration Rules 2011)

The present article focuses on the emergency arbitrator provision under the Swiss Rules of International Arbitration 2012 (“Swiss Rules”) and the experience of the Swiss Chambers’ Arbitration Institution with respect to the emergency arbitrator mechanism.

II. Emergency Arbitration in theory: the emergency arbitrator provision under the Swiss Rules (Article 43)

In 2010, given the recent introduction of emergency arbitrator provisions into the rules of other arbitral institutions, there was a call for the Swiss Rules “to keep up with the times” and “introduce a system for pre-arbitral interim relief”.¹¹

This call was heeded, and in 2012, the revised Swiss Rules were issued containing a mechanism for pre-arbitral interim relief at Article 43.

As is the case with respect to all other emergency arbitrator provisions, Article 43 applies automatically.¹² If parties do not wish Article 43 to apply, they must expressly opt out of its application.

Concerning its temporal scope, Article 43 applies to all arbitrations commenced after 1 June 2012. This is contrary to the position taken by many other arbitral rules which provide that the emergency arbitrator mechanism only applies to arbitration agreements entered into after the introduction of the emergency arbitrator provision.¹³ This rule is justified by the general assumption that parties impliedly consent to the most recent version of the

in 2011; the International Chamber of Commerce (ICC) (Art 29(1) & Appendix II ICC Rules 2012), the Court of Arbitration at the Polish Confederation Lewiatan in 2012 (Sect 36(4) & Appendix II Rules of the Lewiatan Court of Arbitration); the Hong Kong International Arbitration Centre (HKIAC) (Art 23.1 & Schedule 4 HKIAC Administered Arbitration Rules 2013) and Kuala Lumpur Regional Centre for Arbitration (KLRCA) (Schedule 2 KLRCA Rules 2013) in 2013; the London Court of International Arbitration (LCIA) (Art 9B LCIA Rules 2014), JAMS (Rule 2(c) JAMS Comprehensive Arbitration Rules & Procedures 2014) and the Arbitration Centre of the Portuguese Chamber of Commerce and Industry in 2014 (Art 5 & Appendix I, Rules of Arbitration of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry); and finally, the Madrid Court of Arbitration (Art 37 & Annex 2 of the Rules of Arbitration of the Court of Madrid 2015) and the China International Economic and Trade Arbitration Commission (CIETAC) (Art 23 & Appendix 3) in 2015. Some industry-specific international arbitration institutions have also adopted emergency arbitrator provisions, for example PRIME Finance (Annex C).

¹¹ BOOG, *op. cit.*, pp.462-477.

¹² See for example Article 29(5) and (6) of the ICC Rules 2012.

¹³ Article 29(6)(a) of the ICC Rules 2012 provides for example that “[t]he Emergency Arbitrator Provisions shall not apply if the arbitration agreement under the Rules was concluded before the date on which the Rules came into force.”

Swiss Rules.¹⁴ Notwithstanding, it is still open to the parties to argue that Article 43 is a substantially new or surprising provision which they cannot be deemed to have agreed to.¹⁵

It should be underlined that the emergency arbitrator mechanism under the Swiss Rules does not prevent parties from seeking interim measures from the national courts.¹⁶ Indeed, parties may still prefer – or be forced – to apply to the national courts for interim measures, in particular in the case where an interim measure against a third party is required.¹⁷

The purpose of the present section is not to provide an exhaustive commentary of Article 43. Such commentaries can be found elsewhere.¹⁸ Rather, this section elucidates the main aims underlying Article 43 and how the latter provision sets out to achieve such aims. As will be shown below, the primary goal of the emergency arbitrator provision under the Swiss Rules is to ensure speedy interim relief. However, Article 43 avoids straitjacketing the emergency arbitrator proceedings in order to ensure speed and incorporates a great deal of flexibility thus allowing the emergency arbitrator proceedings to be shaped to the requirements of a particular case. The other main aims which are revealed by a close examination of Article 43 include the objectives of ensuring due process, guarding against the abuse or inappropriate use of the proceedings as well as the goal of increasing the effectiveness of the interim relief sought, in particular through the possibility of *ex parte* relief. The specificities of the emergency arbitrator provision under the Swiss Rules are highlighted through its comparison with the emergency arbitrator provisions found in other arbitral rules. The effectiveness of this mechanism in practice is illustrated in the second section dealing with the initial experience of the Swiss Chambers' Arbitration Institution and, in particular, by the high profile Sauber case.

1. Ensuring speed whilst maintaining flexibility

The need to ensure speed whilst maintaining a certain amount of flexibility is apparent at all stages of the emergency arbitrator proceedings

¹⁴ HABEGGER, *op. cit.*, para.69. See also ANDREA MEIER, Article 43 in Tobias Zuberbühler/Christoph Müller/Philipp Habegger (eds), *Swiss Rules of International Arbitration: Commentary* (2nd edn Schulthess 2013), para.3.

¹⁵ MEIER, *op. cit.*, para.3.

¹⁶ MEIER, *op. cit.*, para.8.

¹⁷ EHLE, *op. cit.*, p.99. Emergency arbitrators only have jurisdiction over the parties to the arbitration agreement and cannot therefore issue interim measures against third parties.

¹⁸ See MEIER, *op. cit.* and HABEGGER, *op. cit.*

under the Swiss Rules: from the introduction of the application through to the issuance of the emergency arbitrator decision.

1.1 Content and timing of the application for emergency relief

With a view to ensuring that the application for emergency relief can be dealt with as efficiently as possible, Article 43 sets out certain information that must be contained in the application. This includes, in particular, the interim measures sought and the reasons therefor as well as the reasons for the alleged urgency and why the granting of the measure cannot await the constitution of the arbitral tribunal (Art 43(1)(a)).

The Swiss Rules, like the Stockholm Chamber of Commerce (“SCC”) and the International Chamber of Commerce (“ICC”) Rules,¹⁹ are flexible in allowing a party to submit an application for emergency relief prior to filing a request for arbitration. Conversely, the ICDR, London Court of International Arbitration (“LCIA”), Hong Kong International Arbitration Center (“HKIAC”) and Singapore International Arbitration Center (“SIAC”) Rules provide that the request for arbitration must be submitted before, or at the same time that, an application is filed.²⁰

However, in the event that the application is submitted prior to the request for arbitration, the latter must be filed within 10 days from receipt of the application (Art 43(3)).²¹ Flexibility is nevertheless ensured by allowing the Arbitration Court of the Swiss Chambers’ Arbitration Institution (the “Court”) to extend this 10 day deadline in exceptional circumstances (Art 43(3)).

1.2 Appointment and challenge of the emergency arbitrator

Flexibility is maintained at the appointment stage by not setting a time frame for the appointment of the emergency arbitrator. This compares to other arbitral rules which mandate that the emergency arbitrator must be appointed within a specific time frame.²² Speed, however, is ensured under the Swiss Rules by obliging the Court to make the appointment “as soon as

¹⁹ See Article 29(1) ICC Rules and Appendix II, Article 9(4)(iii) SCC Rules.

²⁰ See Article 6(1) ICDR Rules, Article 9.5 LCIA Rules, Schedule 4(1) HKIAC Rules and Schedule 1, Article 1 SIAC Rules.

²¹ Article 43(3) Swiss Rules.

²² Article 9.6 LCIA Rules provides that the emergency arbitrator must be appointed within 3 days; Article 6(2) ICDR Rules and Schedule 1, Article 5 SIAC Rules provide that the emergency arbitrator must be appointed within 2 business days; Appendix II, Article 4 SCC Rules provides that the Board shall seek to appoint the Emergency Arbitrator within 24 hours.

possible after receipt of the Application”.²³ This will usually be no more than two business days.²⁴

Unsurprisingly, given the urgent nature of the proceedings, the deadline for parties to bring a challenge to the appointed arbitrator is shortened as compared to usual proceedings. Parties thus have three days after the circumstances giving rise to the challenge become known to the party to bring a challenge.²⁵ The parties, however, are accorded more leeway than certain other arbitral rules including the ICDR, SIAC and SCC Rules which provide for tighter deadlines of 24 hours or 1 business day.²⁶

1.3 The proceedings

With respect to the conduct of the proceedings, the emergency arbitrator benefits from a large measure of discretion under the Swiss Rules, being permitted to conduct the arbitration in a manner that he or she considers appropriate (Art 43(6)). This compares to the ICDR, SIAC and ICC Rules pursuant to which the emergency arbitrator is obliged to establish a schedule or timetable for the proceedings.²⁷ Speed is guaranteed under the Swiss Rules, however, by obliging the emergency arbitrator to take into account “the urgency inherent in such proceedings” when conducting the arbitration (Art 43(6)).

1.4 The emergency arbitrator decision

Similar to the ICC and HKIAC Rules,²⁸ and in order to ensure that the proceedings are concluded as quickly as possible, the Swiss Rules provide that the emergency arbitrator must render a decision within 15 days of his/her appointment (Art 43(7)). Flexibility is nonetheless ensured by the fact that this deadline can be extended by the parties or the Court in appropriate circumstances (Art 43(7)).

The reasons in the emergency arbitrator decision can be stated in summary form, thereby increasing the speed at which a decision can be

²³ Article 43(2) Swiss Rules

²⁴ MEIER, *op. cit.*, para.22; HABEGGER, *op. cit.*, para.18.

²⁵ Article 43(4) Swiss Rules.

²⁶ See Appendix II, Article 4(3) SCC Rules; Article 6(2) ICDR Rules and Schedule 1, Article 3 SIAC Rules.

²⁷ Article 6(3) ICDR Rules; Schedule 1, Article 5 SIAC Rules and Appendix V, Article 5(1) ICC Rules.

²⁸ See Appendix V, Article 6(4), ICC Rules and Schedule 4, Article 12 HKIAC Rules. Article 9.8 LCIA Rules provides for a deadline of 14 days.

rendered.²⁹ Moreover, as is the case under most arbitral rules,³⁰ the emergency arbitrator has the option of either rendering the decision in the form of an order or an award.³¹

2. Preventing abuse or inappropriate use of the proceedings

Four devices are employed in order to guard against abuse by the parties of the emergency arbitrator proceedings.

The first can be found in the rule that the application for emergency relief must be accompanied by the payment of fees. Indeed, in order to guard against frivolous applications,³² the application for emergency relief must be accompanied by a non-refundable registration fee of CHF 4500 and CHF 20,000 towards the emergency arbitrator's fees and expenses (Art 43(1)(c)). This deposit is fixed at the higher end of the scale in order to prevent the proceedings being disrupted by requests for additional advances on costs.³³

Second, as we have seen above, the Swiss Rules allow an application for emergency relief to be submitted before the request for arbitration has been filed provided that the latter is filed within 10 days from receipt of the application. In the event that the request for arbitration is not filed within this deadline, the emergency arbitral proceedings are terminated (Art 43(3)).³⁴ This safeguard prevents interim relief being obtained for an indefinite period of time and also prevents undue settlement pressure being exerted by one party.³⁵

Third, with a view to ensuring the appropriate and efficient use of the emergency arbitrator mechanism, the Court will not appoint an emergency arbitrator if there is manifestly no agreement to arbitrate (Art 43(2)(a)) or if it considers it more appropriate to proceed with the constitution of the arbitral tribunal and refer the application to the arbitral tribunal (Art 43(2)(b)).

Finally, Article 26(2) – which is applicable due to the reference to Article 26 in Article 43(1) – allows the emergency arbitrator to order the party

²⁹ MEIER, *op. cit.*, para.46.

³⁰ See for example Article 6(4) ICDR Rules.

³¹ Cf Article 29(2) of the ICC Rules 2012 which provides that “[t]he emergency arbitrator’s decision shall take the form of an order.” Note also that the emergency arbitrator is obliged to determine the costs incurred with respect to the emergency proceedings in the decision (Art 43(9)).

³² EHLE, *op. cit.*, p.93.

³³ HABEGGER, *op. cit.*, para.11.

³⁴ Article 43(3) Swiss Rules.

³⁵ MEIER, *op. cit.*, para.28.

requesting interim relief to provide appropriate security in connection with the emergency relief sought thus ensuring that the respondent's rights are protected.

3. Ensuring due process

The aim of ensuring due process is most apparent in the deadline of 15 days for the issuance of the emergency arbitrator decision and in the rule that the emergency arbitrator cannot serve as an arbitrator in the main proceedings.

Indeed, the specific time limit of 15 days for the rendering of the decision was deemed to be an appropriate compromise guaranteeing speedy proceedings while ensuring that the parties' right to be heard during the proceedings is respected.³⁶

In addition, as is the case under the rules of other arbitral institutions,³⁷ the rule that the emergency arbitrator cannot serve as an arbitrator in the main proceedings, unless the parties agree otherwise (Art 43(11)), reflects concerns that they may be prejudiced by their participation or the knowledge acquired during the emergency arbitrator proceedings.³⁸

4. Increasing the effectiveness of the interim relief ordered in particular through *ex parte* relief

The effectiveness of any interim relief ordered under the Swiss Rules is heightened – by comparison to the emergency arbitrator proceedings under other arbitral rules – by the unique possibility of obtaining emergency relief *ex parte*. Indeed, *ex parte* relief is a distinctive feature of the emergency arbitrator procedure under the Swiss Rules that cannot be found in most other institutional arbitration rules, including the ICC, SCC, SIAC, HKIAC and ICDR Rules.³⁹

The possibility of obtaining *ex parte* emergency relief can be vital in cases where a respondent may attempt to frustrate the effect of an interim order if it is informed of it beforehand.⁴⁰ It is therefore considered to be an essential tool.⁴¹

³⁶ MEIER, *op. cit.*, para.44; HABEGGER, *op. cit.*, para.39.

³⁷ See for example Article 6(5) ICDR Rules.

³⁸ HABEGGER, *op. cit.*, para.67.

³⁹ MEIER, *op. cit.*, para.51; CHRISTOPHER BOOG/BERTRAND STOFFEL, Preliminary Orders and the Emergency Arbitrator: Urgent Interim Relief by an Arbitral Decision Maker in Exceptional Circumstances in Ten Years of Swiss Rules of International Arbitration – ASA Special Series No 44 (JurisNet 2014), p.74.

⁴⁰ EHLE, *op. cit.*, p.98; HABEGGER, *op. cit.*, para.36.

⁴¹ HABEGGER, *op. cit.*, para.36.

The fact that *ex parte* orders may be obtained in emergency arbitrator cases can be implied by the reference in Article 43(1) to “interim measures pursuant to Article 26”.⁴² Article 26(3) provides that the arbitrator may “in exceptional circumstances” rule on an application before it has been communicated to the respondent.

Article 26(3) ensures the protection of the rights of the respondent by providing that the application should be communicated to the respondent at the latest together with the preliminary order and that the respondent should be immediately granted an opportunity to respond and present its case.

In addition to the possibility of obtaining *ex parte* orders, two other provisions aim at enhancing the effectiveness of the interim relief ordered.

The first one is Article 43(5) which allows the Court to determine (if not already determined) the seat of the arbitration exclusively for the emergency arbitrator proceedings (rather than for the entire arbitration proceedings). This allows the Court to take into consideration whether the law of a particular seat permits the issuance of emergency measures by an emergency arbitrator⁴³ and also whether the law of a particular seat provides for the recognition of emergency arbitrator orders. In this regard, it is worth noting that the national arbitration laws of Singapore⁴⁴ and Hong Kong⁴⁵ now expressly provide for the recognition of emergency arbitrator orders.

The second provision which aims at enhancing the effectiveness of the interim relief ordered is Article 43(8) which provides that the decision of the emergency arbitrator has the same effect as an interim award. This provision thus confirms the binding nature of the decision on the parties⁴⁶ and is a reflection of the underlying goal of the drafters to increase the chances of the enforceability of the interim measures ordered.⁴⁷

⁴² BOOG/STOFFEL, *op. cit.*, p.74.

⁴³ MEIER, *op. cit.*, para.37.

⁴⁴ The Singapore International Arbitration (Amendment) Act 2012 defined “arbitral tribunal” to include “an emergency arbitrator appointment pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organization” thereby ensuring that orders made by emergency arbitrators are enforceable under Singapore’s International Arbitration Act.

⁴⁵ Part 3A of the Hong Kong Arbitrator Ordinance permits the recognition and enforcement of “any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules”.

⁴⁶ MEIER, *op. cit.*, para.52. It should be noted, however, that the measures granted are of an interim nature only and automatically cease to be binding upon the termination of the emergency relief proceedings pursuant to Article 43(3) or the arbitral proceedings or upon the rendering of a final award (see Art 43 (10)).

⁴⁷ HABEGGER, *op. cit.*, para.41.

The above section sets out the emergency arbitrator mechanism under the Swiss Rules in theory and focuses, in particular, on the main aims revealed by a close analysis of Article 43. However, to quote an old English proverb, “the proof of the pudding is in the eating”. In other words, only experience will tell whether the emergency arbitrator mechanism under the Swiss Rules will achieve its main aims and ultimately meet with success. The first experiences of the Swiss Chambers’ Arbitration Institution with respect to the emergency arbitrator mechanism are discussed further below.

III. Emergency Arbitration in Action: the experience of the Swiss Chambers’ Arbitration Institution

While many have questioned whether the emergency arbitrator mechanism is a “passing trend”⁴⁸, “flawed fashion”⁴⁹ or “passing fancy”⁵⁰, practice has shown that this mechanism is working extremely well in practice.

The available statistical data shows that this mechanism is being increasingly used with a steady trickle of applications for emergency relief being submitted to all arbitral institutions offering such services. As of March 2015, the ICDR has received 49 applications, the International Institute for Conflict Prevention and Resolution (“CPR”) has received 5 requests for the appointment of a Special Arbitrator, and Judicial Arbitration and Mediation (“JAMS”) has received 6 applications.⁵¹ In addition, the SIAC has received 42 applications and the HKIAC has received 2 applications.⁵² Furthermore, up until the end of 2014, the SCC received a total of 13 applications⁵³ while the ICC received 14 applications.⁵⁴

⁴⁸ KATE WILFORD, Emergency arbitrators: a passing trend, Hogan Lovells ARBlog, 29 January 2014, available at <www.hlarbitrationlaw.com/2014/01/emergency-arbitrators-a-passing-trend/>, accessed 6 October 2015.

⁴⁹ FRY, *op. cit.*, p.179 referring in particular to the ambiguous legal effect and status of the emergency arbitrator’s decision and concerns of commercial parties regarding the enforceability of the decisions.

⁵⁰ LINDSEY CHAFFETZ ET AL., Emergency Measures of Protection: Creeping Consensus or a Passing Fancy? (27 June 2012), available at <www.chaffetzlindsey.com/wp-content/uploads/2011/04/00070460.PDF>, accessed 6 October 2015.

⁵¹ SUSSMAN/DOSMAN, *op. cit.*

⁵² N VIVEKANANDA, The SIAC Emergency Arbitrator Experience, available at <www.siag.org.sg>.

⁵³ LOTTA KNAPP, SCC Practice: Emergency Arbitrator Decisions Rendered 2014, SCC Arbitration Institute Publication, available at <www.sccinstitute.com/about-the-scc/news/2015/scc-practice-emergency-arbitrator-decisions-rendered-2014/>, accessed 6 October 2015.

⁵⁴ See <www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/>, accessed 6 October 2015.

The decisions of the emergency arbitrator have also been issued within very short timeframes. Under the ICDR Rules, decisions have been issued on average 21 days after the request.⁵⁵ Under the ICC Rules, all emergency orders as of 2014 were rendered within the 15 day deadline.⁵⁶ Under the SIAC Rules, decisions were issued on average 8.5 days after the hearing⁵⁷ and under the SCC Rules, decisions were usually issued between 5-6 days after receipt of the application.⁵⁸

Moreover, despite concerns over the enforceability of emergency arbitrator decisions,⁵⁹ most of these decisions are voluntarily complied with.⁶⁰ Indeed, with respect to the emergency arbitrator cases completed under the SIAC Rules, all of the awards or orders were complied with or the disputes were settled shortly thereafter.⁶¹

Not only has the emergency arbitrator mechanism turned out to be an effective option for parties wishing to obtain interim relief prior to the constitution of the arbitral tribunal, but it has also been pointed out that the mere threat of emergency arbitrator proceedings has incentivized parties to come to the settlement table.⁶²

As discussed below, the initial experience of the Swiss Chambers' Arbitration Institution with respect to the emergency arbitrator mechanism has proved to be positive.

⁵⁵ SUSSMAN/DOSMAN, *op. cit.*

⁵⁶ SUSSMAN/DOSMAN, *op. cit.*

⁵⁷ VASANI, *op. cit.*, p.5.

⁵⁸ KNAPP, *op. cit.*

⁵⁹ Indeed, it is generally agreed that the decision of the emergency arbitrator does not constitute an "award" within the meaning of Article 1(1) of the New York Convention 1958. Accordingly, whether or not the decision is enforceable or not will depend on the national arbitration statutes at the place of enforcement and how such statutes deal with interim measures (see EHLE, *op. cit.*, pp.99-100).

⁶⁰ VASANI, *op. cit.*, p.7. See also in this respect, AMIR GHAFARI/EMMYLOU WALTERS, *The Emergency Arbitrator: The Dawn of a New Age?*, (2014) 30 *Arb Int'l* 164-165 discussing the reasons why most parties voluntarily comply.

⁶¹ VIVEKANANDA, *op. cit.*

⁶² VASANI, *op. cit.*, pp.5-6: "[...] parties frequently contact arbitral institutions [...] with an expressed intent to file an arbitration and simultaneously invoke emergency arbitrator procedures, but then never file either. Although it is impossible to say with certainty, the institutions interacting with these parties believe that the parties ultimately do not file those requests for arbitration and interim measures applications because the mere ability to do so functions as an effective early settlement."

1. Overview of the experience of the Swiss Chambers' Arbitration Institution to date

Up until the end of 2014, the Swiss Chambers' Arbitration Institution received 4 applications for emergency relief since the mechanism was introduced into the Swiss Rules in 2012.⁶³ All of these applications were filed in 2014.⁶⁴

The first application was completed within 15 days and entailed two rounds of written submissions, a hearing and costs submissions. The second application was immediately suspended and subsequently settled. The third application was initially suspended but then resolved within the time limit of 15 days.⁶⁵

The fourth application arose in the context of a high profile dispute between a Dutch race car driver, Diego van der Garde, and the Swiss Formula One Team, Sauber Motorsport AG ("Sauber"), and has been referred to as the "Sauber saga". The dispute centered around Mr van der Garde's request to be reinstated as one of the Sauber team's Formula One drivers for the 2015 Formula One season. This dispute was the subject of highly publicized court proceedings in Australia involving the enforcement of an arbitral award rendered against Sauber in the run up to the 2015 Melbourne Grand Prix.

2. The high profile example: the "Sauber saga"

Formula One cars are known for being the fastest road course racing cars in the world with a maximum recorded speed of 371km/h.⁶⁶ Equally impressive was the speed with which the arbitrators operating under the Swiss Rules and the Australian courts handled Mr van der Garde's request to be reinstated as one of Sauber Formula One team's drivers in time for the beginning of the 2015 Formula One season.

In January 2014, Mr van der Garde had entered into contracts with Sauber which provided that Sauber could nominate Mr van der Garde, upon exercise of a contractual option, as one of its two nominated race drivers in

⁶³ Swiss Chambers' Arbitration Institution, Newsletter 1/2015, available at <<https://www.swissarbitration.org/sa/en/news.php>>, accessed 6 October 2015.

⁶⁴ Ibid.

⁶⁵ See the comments of PHILIPP HABEGGER in the conference report entitled 'Zurich: Emergency arbitration and state court interim measures', GAR, 25 November 2014.

⁶⁶ See <www.formula1-dictionary.net/fl_speed.html>, accessed 6 October 2015.

the 2015 season.⁶⁷ It was widely known that Mr van der Garde's sponsors⁶⁸ had brought EURO 8 million to the table.⁶⁹

On 28 June 2014, Sauber exercised this contractual option.⁷⁰ However, in early November 2014, Sauber informed Mr van der Garde that the two positions had been given to other drivers,⁷¹ namely the Swede, Marcus Ericsson and the Brazilian, Felipe Nasr who had brought lucrative sponsorship backing of a reported GBP 10-12 million each⁷² to the table.

2.1 Emergency Arbitrator Proceedings

The arbitration agreement in the contracts between Sauber and Mr van der Garde provided for arbitration in Geneva under the Swiss Rules with the applicable law being English law.⁷³

Accordingly, a few days after being ousted from the Sauber team, still in November 2014, Mr van der Garde filed an application for emergency relief proceedings under Article 43(1) of the Swiss Rules. He sought interim injunctive relief to restrain Sauber from taking any action which would deprive him of an opportunity to participate in the 2015 Formula One season.⁷⁴

⁶⁷ THE HON. JUSTICE CLYDE CROFT, Promoting Australia as Leader in International Arbitration, paper prepared for the Law Institute of Victoria PD Intensive: Commercial Law, Melbourne, 26 March 2015, p.4.

⁶⁸ See NATALIE HICKEY, 'UPDATED: Nature of injunction might explain why Giedo van der Garde dropped Sauber attack', The Social Litigator, 18 March 2015; "[...] it is apparently not unusual for drivers to pay for their "seats" courtesy of their own financial backers, as Mr van der Garde had done. Mr van der Garde's father in law, Marcel Boekhoorn is reportedly the source of his financial support", available at <<http://sociallitigator.com/2015/03/18/nature-of-injunction-might-explain-why-giedo-van-der-garde-dropped-sauber-attack/>>, accessed 6 October 2015.

⁶⁹ 'Van der Garde v Sauber – what happens next?' Adam Cooper's F1 blog, 13 March 2015, available at <<http://adamcooperf1.com/2015/03/13/van-der-garde-v-sauber-what-happens-next/>>, accessed 6 October 2015; 'Sauber à qui perd gagne', Le Temps, 18 March 2015. In the Formula One racing world, there are two types of teams: the rich and front-running teams who pay their drivers significant sums and the financially strapped teams who accept sponsorship money from drivers in return for seats, see GARY HUGHES, International Enforcement of Arbitral Awards: Giedo van der Garde v Sauber, 13 April 2015, available at <www.lawinsport.com/articles/item/international-enforcement-of-arbitral-awards-giedo-van-der-garde-v-sauber/>, accessed 6 October 2015.

⁷⁰ 'Giedo van der Garde takes legal action against F1 team Sauber', The Guardian, 6 March 2015.

⁷¹ THE HON. JUSTICE CLYDE CROFT, *op. cit.*, p.4

⁷² 'Sauber sign Felipe Nasr to join Marcus Ericsson in new-look line-up', Daily Mail, 6 November 2014; see also 'Sauber à qui perd gagne', Le Temps, 18 March 2015.

⁷³ *Ibid*, p.4.

⁷⁴ *Ibid*, pp.4-5.

Mr Simon Greenberg was appointed as the emergency arbitrator. Following an exchange of submissions, he granted the interim injunction⁷⁵ in early December 2014,⁷⁶ presumably respecting the 15 day deadline under the Swiss Rules for the rendering of the emergency arbitrator decision.

2.2 Accelerated Arbitration Proceedings

After the issuance of the interim injunction by the emergency arbitrator, the parties agreed to an accelerated timetable for the hearing of Mr van der Garde's claim for permanent injunctive relief.⁷⁷ Presumably, the parties wished to effectively sidestep any potential issues that could arise with respect to the enforcement of an order for temporary injunctive relief.

The Swiss Chambers' Arbitration Institution is no stranger to accelerated proceedings. Indeed Expedited Procedures provided for at Article 42 of the Swiss Rules are a distinctive and popular feature of the Swiss Rules with almost 40% of the cases submitted between 2004 and 2014 being conducted under the Expedited Procedure.⁷⁸ The main characteristics of these proceedings are that (i) the case will be heard by a sole arbitrator; (ii) there is only one exchange of briefs; (iii) only one hearing will take place, if at all; (iv) the sole arbitrator is expected to render the award within 6 months from the date on which the files are transmitted to him or her⁷⁹; and (v) the reasons of the award are stated in summary form.

Around two months after the emergency arbitrator decision was issued, a hearing was held in London on 10 and 11 February 2015⁸⁰ before a sole arbitrator, Mr Todd Wetmore. The sole arbitrator issued his 109 page First Partial Award ("Partial Award") on 2 March 2015, just under two weeks before the start of the 2015 Formula One season in Melbourne, Australia.

The temporary injunctive relief was turned into permanent injunctive relief with Sauber being ordered in the Partial Award to "[...] refrain from

⁷⁵ Ibid, p.5.

⁷⁶ TOM CLARKE, Arbitration Case Update: Australian F1 Grand Prix – Giedo van der Garde v Sauber Motorsport, available at <<http://www.listgbarristers.com.au/latest-news/publications/arbitration-case-update-giedo-van-der-garde-v-sauber-motorsport/>>, accessed 6 October 2015. Tom Clarke represented Mr van der Garde before the Australian courts.

⁷⁷ THE HON. JUSTICE CLYDE CROFT, *op. cit.*, p.5.

⁷⁸ Swiss Chambers' Arbitration Institution, Newsletter 1/2015, available at <<https://www.swissarbitration.org/sa/en/news.php>>, accessed 6 October 2015.

⁷⁹ Cases submitted under the Expedited Procedure take on average six months before the award is rendered, see *ibid*.

⁸⁰ LOUISE ENGLAND, KVM Case Note – Giedo van der Garde BV v Sauber Motorsport AG, available at <www.kwm.com/en/au/knowledge/insights/case-note-giedo-van-der-garde-bv-v-sauber-motorsport-ag-20150520>, accessed 6 October 2015.

taking any action the effect of which would be to deprive Mr van der Garde of his entitlement to participate in the 2015 Formula One Season as one of Sauber's two nominated race drivers."⁸¹

2.3 Enforcement proceedings in Australia

Subsequently, on 5 March 2015, only 3 days after the issuance of the Partial Award, Mr van der Garde filed an application before the Australian courts to enforce the Partial Award.

A hearing was held on 9 March 2015 and two days later, on 11 March 2015, the Supreme Court of Victoria ordered the enforcement of the Partial Award including the injunction set out therein.⁸² Sauber appealed on the same day. However, the Court of Appeal rejected the appeal the following day (12 March 2015) for the same reasons given at first instance.⁸³

On 12 March 2015, shortly before the appeal judgment was handed down, Mr van der Garde also commenced contempt proceedings against Sauber on the grounds that it had failed to comply with the Orders attached to the judgment of 11 March 2015. A hearing was held the same day but was postponed.⁸⁴

Thereafter, during the night of 13/14 March 2015 – just over 24 hours before the start of the Melbourne Grand Prix – Mr van der Garde agreed to a settlement with Sauber for a reported USD 16 million.⁸⁵

As shown above, both the arbitration proceedings and the Australian enforcement proceedings were carried out at unprecedented neck-breaking speed. In the arbitration proceedings, an emergency arbitrator decision was rendered within a matter of weeks and a partial award was issued only three months later. In Australia, a first instance decision and appeal decision were issued within one week of the proceedings being commenced. Unsurprisingly,

⁸¹ THE HON. JUSTICE CLYDE CROFT, *op. cit.*, p.5.

⁸² *Giedo van der Garde BV v Sauber Motorsport AG* [2015] VSC 80 (11 March 2015).

⁸³ *Sauber Motorsport AG v Giedo van der Garde BV & Ors* [2015] VSCA 37 (12 March 2015).

⁸⁴ THE HON. JUSTICE CLYDE CROFT, *op. cit.*, pp.12-13.

⁸⁵ 'Sauber Formula One team settles with van der Garde for \$16 million', Autoweek, 17 March 2015. Unofficial sources have said that the sponsors of the Other Drivers provided additional funds: 'Sauber à qui perd gagne', *Le Temps*, 18 March 2015. Following the settlement, the parties returned before the Australian courts seeking an order by consent that the orders made in the decision of 11 March 2015 be vacated, discharged or permanently stayed. Interestingly, the Supreme Court of Victoria refused to issue an order vacating, discharging or permanently staying the orders made in the decision of 11 March 2015 holding that only an order staying enforcement until further order of the enforcing court would be consistent with the New York Convention (see *Giedo van der Garde BV v Sauber Motorsport AG (No 2)* [2015] VSC 109).

the Australian courts have used this case as a promotional platform to highlight their capacity to handle high profile, urgent arbitration matters.⁸⁶

IV. Conclusion: the emergency arbitrator is here to stay

The emergency arbitrator mechanism serves a real need of those arbitration users seeking interim relief in the initial stages of their dispute before an arbitral tribunal has been constituted. The increasing use of this mechanism is both a reflection of this need and a reflection of how effectively this mechanism is working in practice. Indeed, the available statistical data shows that the arbitral institutions and the appointed emergency arbitrators are able to handle applications for emergency relief within very short time restraints and that most parties voluntarily comply with emergency arbitrator decisions or settle their dispute shortly thereafter.

Almost all arbitral institutions have now incorporated emergency arbitrator provisions into their rules. However, the heightened degree of flexibility as well as the unique possibility of obtaining *ex parte* relief sets the emergency arbitrator provision under the Swiss Rules apart from emergency arbitrator provisions found in other arbitral rules.

As illustrated by the Sauber saga, the emergency arbitrator mechanism under the Swiss Rules is also working effectively in practice. The primary goal of the emergency arbitrator mechanism under the Swiss Rules of ensuring speedy interim relief was achieved in this case with the application for emergency relief being made in November 2014 and the interim relief being granted in early December 2014. The accelerated procedure agreed to by the parties also ensured that an award could quickly be issued (in a little over three months later) addressing the request for permanent injunctive relief, thereby alleviating any potential issues with respect to the enforceability of the emergency arbitrator decision ordering an interim injunction.

Despite initial reservations from various commentators that the emergency arbitrator is a “passing trend”⁸⁷ or “flawed fashion”,⁸⁸ the emergency arbitrator mechanism, including under the Swiss Rules, has proved to be both popular and efficient in practice. To use the fashion analogy, it looks like the emergency arbitrator is a “fashion trend with staying power” and that accordingly the emergency arbitrator will become a permanent fixture on the international arbitration scene.

⁸⁶ THE HON. JUSTICE CLYDE CROFT, *op. cit.*, p.13.

⁸⁷ WILFORD, *op. cit.*

⁸⁸ FRY, *op. cit.*, p.179.

Christoph MÜLLER, Sabrina PEARSON, *Waving the Green Flag to Emergency Arbitration under the Swiss Rules: the Sauber Saga*

Summary

On 11 March 2015 – just four days before the start of the 2015 Grand Prix season in Melbourne – the Australian courts enforced a Partial Award effectively ordering the Sauber Formula One team to allow the race car driver, Mr van der Garde, to race in the 2015 Formula One season as one of its team drivers. An appeal was rejected the following day and the parties thereafter settled just over 24 hours before the start of the Melbourne Grand Prix with Mr van der Garde not proceeding to the starting grid. This dramatic turn of events was the culmination of a dispute arising from the ousting of Mr van der Garde from the Sauber team’s 2015 lineup which started with the initiation of emergency arbitrator proceedings before the Swiss Chambers’ Arbitration Institution in November 2014. The present article focuses on the emergency arbitrator mechanism under the Swiss Rules in both theory and practice. The first part of the article examines the theory behind this mechanism by elucidating the main aims underlying Article 43 of the Swiss Rules and how the latter provision sets out to achieve such aims. A comparison with emergency arbitrator provisions under other arbitral rules highlights the heightened degree of flexibility in the emergency arbitrator mechanism under the Swiss Rules as well as the unique possibility of obtaining *ex parte* relief available under these Rules. The second part of the article focuses on the experience of the Swiss Chambers’ Arbitration Institution with respect to the emergency arbitrator mechanism with particular emphasis on the “Sauber saga” as an illustrative example of how effectively this mechanism is working in practice.

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Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (**mscherer@lalive.ch**) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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