# Emergency Arbitrator Relief: A Practical Guide

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## Overview

Under most major arbitral rules, including those of the KCAB, parties may apply for emergency interim relief even prior to the constitution of the main tribunal. The application is heard by an emergency arbitrator (**EA**), who is specially appointed for this purpose.

In our experience, the EA procedure is a powerful legal and strategic tool when employed correctly, and certainly an option which should be considered in appropriate cases. However, statistics and anecdotal evidence suggest that the procedure may be underused, possibly due to lack of familiarity with the procedure or other concerns.[1)]

This article therefore seeks to provide a practical guide to the EA procedure. It (i) surveys the availability of the procedure and the applicable standards for relief; (ii) compares the EA relief with court-granted interim relief and considers the relevant factors in choosing between the two; and (iii) considers some topical issues relating to the EA procedure in more detail, namely the enforceability of the EA relief and the "*interim-interim*" EA relief.

## Availability of the EA procedure

The ability to obtain urgent interim relief is often of great practical significance. Without orders to preserve evidence, prevent abusive action such as parallel proceedings, or restore or maintain status quo, the ultimate objective of the arbitral proceedings may be undermined.

Prior to the introduction of the EA procedure, there was a substantial gap between the onset of the dispute and constitution of the tribunal, during which a party in need of urgent interim relief had to resort to national courts. This was not always a desirable course, for various reasons including limited confidentiality and the unpredictability of the approaches of national courts. Further, certain types of remedies (for example, orders for specific performance) may not be available in the relevant courts.

The EA procedure now forms part of most major arbitral rules, including the KCAB, SIAC, HKIAC, LCIA, ICC, SCC, ICDR, ACICA and SCIA rules. Typical features of the EA procedure are as follows. The details of these features vary across different rules:

- Applications for emergency relief may be made concurrently with or following the submission of the Notice of Arbitration/Request for Arbitration, before the constitution of the main tribunal.[2)] The ICC Rules allow for the application for emergency relief to be filed before the filing of the Request for Arbitration, but the EA proceedings may be terminated by the

1) For example, the 2015 Queen Mary *International Arbitration Survey: Improvements and Innovations in International Arbitration* found that only a minority of respondents (around 34%) had experience with the EA procedure. Further, 46% of respondents responded that they would look to domestic courts for urgent relief before the constitution of the main tribunal, versus 29% who responded that they would opt for an EA. Nonetheless, the overwhelming majority of 93% were in favour of the inclusion of the EA procedure in institutional rules.

2) See, for example, Appendix 3, Article 1.1 of the 2016 KCAB International Arbitration Rules.

ICC President if a Request for Arbitration is not received by the Secretariat within 10 days of its receipt of the EA application, unless the EA determines that a longer period of time is necessary (Appendix V, Article 1.6 of the 2017 ICC Rules).

- Upon receiving the application, the institution appoints an EA within two or three days of receipt of the application.[3] SIAC, ACICA and SCC specify shorter timeframes of 1 day, 1 business day and 24 hours respectively (Schedule 1, paragraph 3 of the 2016 SIAC Rules/Schedule 1, Article 2 of the 2016 ACICA Rules /Appendix II, Article 4 of the 2017 SCC Rules).

- Typically, the EA must render a decision within around two weeks of his appointment, unless the institution grants an extension.[4] SCC and ACICA provide for shorter periods of five days and five business days respectively (Appendix II, Article 8 of the 2017 SCC Rules/Schedule 1, Article 3 of the 2016 ACICA Rules).

- The main tribunal, once constituted, may confirm, vary or revoke the EA's decision.[5] Most rules also provide that the EA's decision ceases to be binding if the main tribunal is not constituted within a prescribed period (typically around 3 months).[6]

3) See, for example, Appendix 3, Article 2.4 of the 2016 KCAB International Arbitration Rules, which provides that the Secretariat shall endeavour to appoint an EA within two business days from its receipt of the application for Emergency Measures.

4) See, for example, Appendix 3, Article 3.4 of the 2016 KCAB International Arbitration Rules, which provides that the EA shall make a decision on an application for Emergency Measures within 15 days from his or her appointment, subject to the Secretariat's power to extend the time limit if all parties agree or other exceptional circumstances exist, such as when the case is complex.

5) See, for example, Appendix 3, Article 4.2 of the 2016 KCAB International Arbitration Rules.

6) See, for example, Appendix 3, Article 3.6 of the 2016 KCAB International Arbitration Rules.

## Standards for granting EA relief

Most institutional rules are notably silent on the applicable standards for granting EA relief, and there is no universally applicable test. The rules typically grant a wide discretion to EAs, circumscribed only by the broad concept of appropriateness (KCAB), urgency (ICC, HKIAC) or necessity (SIAC).

However, in practice, EAs find the standards applicable to the main tribunal when granting interim measures instructive, and do not significantly depart from them.[7] For example, many tribunals refer to Article 17A of the 2006 UNCITRAL Model Law as persuasive authority.[8]

We consider below the three key factors EAs typically require, based on our experience with the EA procedure as counsel and publicly available information on EA decisions[9]: (i) urgency/irreparable harm; (ii) proportionality/balance of convenience; and (iii) likelihood of success on the merits.

*1. Urgency/irreparable harm*

The interconnected requirements of urgency and

7) The 2016 ACICA Rules, the only major arbitral rules to date which specifically set out the criteria for granting EA relief, adopt the same standards for EA relief and for interim measures of the main tribunal (namely, irreparable harm, balance of convenience and likelihood of success on the merits).

8) This accords with our experience as counsel, as well as several EA decisions referred to in the *SCC Practice Note on Emergency Arbitrator Decisions Rendered 2015-2016*, for example Case No. EA 2016/150. Article 17A(1) (*Conditions for granting interim measures*) of the 2006 UNCITRAL Model Law provides that the applicant of interim measures must satisfy the arbitral tribunal that: (a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determwination. These provisions are mirrored in section 18-2 of the Korean Arbitration Act 2016.

9) In preparing the article, we have referred to the summary of EA decisions published by the SCC (The Arbitration Institute of the Stockholm Chamber of Commerce) in the *SCC Practice Note on Emergency Arbitrator Decisions Rendered 2015-2016* and the *SCC Practice: Emergency Arbitrator Decision between 1 January 2010 and 31 December 2013.*

irreparable harm are often considered together by EAs. In essence, the applicant must demonstrate that urgent interim measures are necessary to avoid irreparable harm.

In the EA context, the requirement of urgency means that the applicant must demonstrate why it cannot await the constitution of the main tribunal, which may take a few months. In one case, we acted as counsel for a Korean company which supplied certain components for incorporation into the counterparty's products. A dispute arose between the parties regarding the counterparty's obligations under the supply contract and our client refused to continue supplying the components. The counterparty brought an EA application requesting an order that our client continue to supply the components. We successfully resisted the application by showing that the urgency requirement was not met because the counterparty had enough components from previous shipments such that, even in the worst case scenario, the supply would not run out before the main tribunal was constituted.

As to the requirement of irreparable harm, EAs typically consider whether the harm may be adequately compensated by way of damages. Whilst the possibility of monetary compensation does not necessarily eliminate the possibility of EA relief, EAs typically require an additional aggravating factor over and above financial harm. For example, irreparable harm was found to exist where the absence of relief would leave the applicant with insufficient cash flows to continue its operations (eg, *SCC Case No. EA 2015/002*) or where there was a reason to assume that the respondent was actively undertaking measures to dissipate or otherwise make its assets unavailable for enforcement (eg, *SCC EA 070/2011*). In contrast, EA relief was denied where the EA found that the applicant would suffer substantial (but not irreparable) harm and, given the size and reputation of the respondent's parent company, even a substantial award would most likely be honored by the respondent, and if not honored then successfully enforced against the respondent (*SCC Case No. EA 010/2012*).

We have successfully met the urgency and irreparable harm requirements in a number of EA applications for anti-suit injunctions where, in breach of the arbitration agreement, the counterparties took steps to bring proceedings in local courts or a different dispute resolution forum. In one case, the counterparty had unsuccessfully attempted to secure anti-arbitration injunctions from the local courts. The EAs in these cases found that referring the dispute to another forum in breach of the arbitration agreement would cause irreparable damage to the arbitration process itself.

*2. Proportionality/balance of convenience*

In deciding whether to grant relief, EAs typically balance the potential harm the applicant is likely to suffer if the interim relief is not granted against the harm to the respondent that would result if the interim relief were granted and the respondent eventually prevailed, and consider whether the former substantially outweighs the latter. As one SCC EA summarised, "*if the negative impact of the requested relief is disproportionate to its benefit, then either the request must be declined or the relief redesigned to reduce the burden on the subject party" (see SCC Case No. EA 2016/046)*.

In one of our matters as counsel, we acted for a joint venture which engaged a construction company (the respondent) for the supply of certain infrastructure. Our client terminated the construction agreement for a number of reasons, including that the respondent had entered into a creditors' voluntary arrangement, and called on the on-demand refund guarantees advanced by a Korean bank. The respondent commenced proceedings before the Korean courts to injunct the bank from paying the on-demand guarantee and we

started the EA proceedings to stop the respondent from continuing with the Korean proceedings. The EA ruled in our client's favour, finding that the harm which would be suffered by our client in being denied the right to call on the on-demand guarantees and consequently having to enforce damages "in a queue" behind the respondent's prioritised creditors in insolvency would far outweigh the prospect of hardship on the part of the respondent in the reverse scenario (ie, if the respondent were to eventually prevail and be faced with enforcing damages against our client).

In practice, this balancing exercise means that EAs may be hesitant to grant relief if the respondent offers some undertaking or security which may be inferior to the relief requested but which still addresses the applicant's concerns to an extent.[10] This would obviously depend on the facts of the case and the nature of the undertaking or security offered.

EAs may also grant the request in part so as to limit the harm to the respondent. It should also be noted that institutional rules typically grant EAs the power to order security for costs to protect against damage caused by wrongly granted EA relief (see, for example, Article 32.2 of the 2016 KCAB International Arbitration Rules, which applies to EAs by virtue of Article 3 of Appendix 3).

*3. Likelihood of success on the merits*

EAs typically require the applicant to demonstrate a degree of likelihood of success on the merits. If there is little or no chance that the applicant would ultimately succeed on the merits, it would serve little purpose and be inequitable for the EA relief to be granted. However, neither the EA's decision nor its reasoning concerning the merits of the case would be binding on the main tribunal.

10) Such undertaking or security may also be relevant to the EA's assessment of the urgency/irreparable harm requirement considered above.

In practice, this requirement has been couched in different ways by different EAs: some EAs have referred to a "*prima facie*" standard, whereas others have adopted what appears to be a somewhat stricter standard of "*reasonable prospect of success*". There is, however, a general consensus that the standard of review to be undertaken by an EA must be of a preliminary nature and should fall short of the standard of review required of the main tribunal.

Given the limited submissions and evidence that would be available at the time of an EA application, it may be difficult to satisfy this requirement if, at a high level, both parties' cases appear finely balanced. In practice, both the applicant and the EA would have to be wary of unmeritorious challenges which may be raised by the respondent to thwart the application.

## Choosing between the EA relief and the court relief

*Relationship between the EA relief and the court relief*

The national courts generally enjoy concurrent jurisdiction with the EAs in granting interim relief pending constitution of the main tribunal. Similarly, institutional rules do not bar parties from seeking interim relief from national courts. However, some national laws require that the courts consider whether an effective remedy could be provided in the arbitral proceedings, and the availability of the EA procedure may limit the parties' recourse to the courts.

For example, section 44(5) of the English Arbitration Act provides that the court shall act "*only if or to the extent that the arbitral tribunal, any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively*". In *Gerald Metals SA v Timis* [2016] EWHC 2327, the English High Court confirmed that the effect of section 44(5) is that the courts will only have the power to grant urgent relief in support

of arbitral proceedings where effective relief cannot be granted in a timely manner in the arbitration (for example, because there is insufficient time and the application needs to be made *ex parte*). In assessing whether this is the case, the courts will take into account both the EA procedure (Article 9B of the 2014 LCIA Rules) and the procedure for expedited formation of the arbitral tribunal in cases of "*exceptional urgency*" (Article 9A of the 2014 LCIA Rules). Similarly, section 12A(6) of the Singapore International Arbitration Act provides that the court may order interim measures "*only if and to the extent that*" the arbitral tribunal (which is defined in section 2(1) of the Act to include an EA) has no power or is unable for the time being to act effectively. The equivalent provisions do not exist in the Korean Arbitration Act or the Hong Kong Arbitration Ordinance.

Whilst the above provision will likely cause some concerns about availability of court-granted interim relief in England and Singapore related matters, it appears likely that the national courts would step in and exercise their powers in cases where the difference between the EA relief and the court relief is sufficiently material and where the EA is unable to provide an effective remedy (for example, as recognised in the *Gerald Metals* case, where an *ex parte* application is required). The parties should carefully consider the position under the relevant jurisdiction(s) from the outset so as to obtain a comprehensive and realistic picture of their available options.

*Practical considerations in choosing between the EA relief and the court relief*

When both EA relief and court relief are viable options, the parties should choose between the two options by carefully considering various factors, including the following. The relative importance of each factor will vary depending on facts of the case (including, in particular, the characteristics of the relevant national courts) and individual party's needs.

- Confidentiality: Whilst confidentiality is considered to be one of the main advantages of arbitration, proceedings before the courts are normally public.

- Timing: As discussed above, the EA procedure typically takes about two weeks under most institutional rules. This timeframe may not be quick enough in certain cases. In contrast, national courts in a number of jurisdictions offer relief within a matter of days, or even on the same day as the application. One potential way in which this gap between the EA relief and the court relief may be narrowed is through "*interim-interim*" relief, which is considered in more detail below.

- Need to bind third parties: Given the consensual nature of arbitration, EA relief may only bind the parties to the arbitration, and any measure directed to a third party may only be sought before the national courts (for example, in the case of a freezing injunction against a third party bank).

- Ex parte: An *ex parte* application, or an application for relief without notice to the counterparty, is not available under most institutional rules. One exception is the 2012 SCIA Rules, Article 26(3) of which permits *ex parte* relief to be granted by way of a preliminary order in exceptional circumstances, provided that the notice is given no later than the preliminary order and that the respondent is granted an opportunity to be heard immediately thereafter. The parties will therefore have to resort to national courts if notice to the counterparty will defeat the remedy. Many national courts offer *ex parte* applications for interim relief if certain requirements are met (for example, if it is urgent and necessary for preserving evidence and/or assets).

- Costs: The costs of bringing the relevant application should also be considered and compared, including the administrative fees for the different fora and the legal fees required. However, it should be noted that resorting to national courts for interim relief may not entirely obviate the need to incur costs for arbitration, as the validity of the court relief is often made conditional upon commencement of arbitral proceedings within a certain timeframe.

- Enforceability/consequences of non-compliance: Whilst court-ordered interim measures are directly enforceable, the enforceability of EA decisions is uncertain in many jurisdictions. Further, whilst a breach of court-ordered interim measures would have serious repercussions (potentially amounting to contempt of court), the consequences for non-compliance with EA decisions are less concrete. Local law advice should be sought at an early stage to clarify the prospects of enforcement in the relevant jurisdictions.

## Topical issues relating to limitations of the EA procedure

The EA procedure, whilst providing an important alternative to national courts, is not without its limitations. We consider here some topical issues relating to the two main drawbacks of the EA procedure: enforceability and timing.

*Enforceability of EA relief*

As mentioned, enforceability of EA decisions is uncertain in most jurisdictions. The two exceptions to this general position are Singapore and Hong Kong. In 2012 and 2013 respectively, Singapore and Hong Kong made legislative amendments to expressly provide for the enforceability of EA decisions. The Hong Kong approach is wider of the two, and recognises the enforceability of *both* Hong Kong and foreign EA decisions pursuant to section 22B(1) of the Hong Kong Arbitration Ordinance, which provides that "[a]ny *emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court*". In comparison, Singapore amended the definition of "*arbitral tribunal*" in section 2(1) of the Singapore International Arbitration Act to include an EA, thereby broadening the scope of the "*orders and directions*" enforceable pursuant to section 12(6) of the Act to include EA decisions. Unlike the Hong Kong provision, however, section 12(6) of the Singapore International Arbitration Act does not specifically provide for the enforceability of foreign (ie, not Singapore-seated) EA decisions.

According to the 2015 Queen Mary *International Arbitration Survey: Improvements and Innovations in International Arbitration*, 79% of respondents pointed to concerns about the enforceability of EA decisions as one of the most significant factors impacting their choice between national courts and the EA procedure. Further, a substantial majority of respondents (78%) were in favour of decisions rendered by EAs being enforceable in the same way as arbitral awards. It remains to be seen whether other jurisdictions would follow the approach adopted by Singapore and Hong Kong.

In practice, the best deterrent of non-compliance appears to be the parties' perception that non-compliance may adversely affect the main tribunal's opinion of the party. Parties would not wish for their non-compliance with the EA decision to impact the main tribunal's decision as to costs and/or even, indirectly, the merits of the dispute. Further, normally, arbitral rules expressly require parties to comply with EA decisions. Non-compliance therefore amounts to a breach of the applicable arbitration rules. For example, Article 3.5 of Appendix 3 of the 2016 KCAB International Arbitration Rules provides that the parties are bound by, and shall carry out, the emergency

measures ordered by the EA.

Anecdotal evidence suggests that the degree of voluntary compliance is relatively high, but clearly far from absolute. In our experience, some but not all counterparties voluntarily complied with the EA decisions, and, in some cases, we were forced to bring enforcement proceedings before the counterparties eventually complied. However, even in cases of non-compliance, the EA decisions in our favour were instrumental in enabling us to reach a favourable settlement or obtain costs awards from the main tribunals who took a poor view of the counterparties' non-compliance. The EA relief may therefore provide a strategic advantage even where there are concerns about enforceability.

*Interim-interim relief*

As discussed above, sometimes the parties have no choice but to resort to national courts for interim relief because the relief is required with extreme urgency (ie, within a matter of days).

A potential way in which this "timing gap" between the EA relief and the court relief may be addressed is through the "*interim-interim*" relief, or interim relief granted pending the final decision of the EA. Only two major arbitration rules expressly address the possibility of such preliminary order, namely the 2016 SIAC Rules and the 2012 SCIA Rules.

Schedule 1, paragraph 8 of the 2016 SIAC Rules provides that "[t]*he Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary,* ***including preliminary orders that may be made pending any hearing, telephone or video conference or written submissions by the parties"*** [emphasis added]. As long as the counterparty is notified of the EA application (as required under Schedule 1, paragraph 1), the EA has a discretion to order preliminary relief without giving the counterparty the opportunity to make submissions.

As discussed above, the 2012 SCIA Rules go further and provide that a preliminary order may be made *ex parte*, or without notice to the parties (Article 26.3), but such power is subject to a number of conditions: (i) there must be exceptional circumstances; (ii) notice to the counterparty must be given at the latest together with the preliminary order; and (iii) the respondent must be granted an opportunity to be heard immediately thereafter.

However, even with respect to other institutional rules which are silent on the issue, it is arguable that the EAs should have the power to order such "*interim-interim*" relief, and some commentators have suggested that such measures are "*conceivable*" under institutional rules which are silent on the issue.[11] The arguments in support include the following: (i) there is no express prohibition of such preliminary relief in the rules and the EAs enjoy a wide procedural discretion; (ii) in some cases, the eventual EA relief may have no or little practical value without such preliminary relief; and (iii) different safeguards are available to control the potential adverse effects to the counterparty, including the EA's power to order security and modify or invalidate its previous decision. The main hurdle to the availability of the "*interim-interim*" relief is its potential conflict with the requirement under most institutional rules that the EAs give both parties a reasonable opportunity to present their case. Where time permits, the applicant of such preliminary relief may wish to

11) For example, analysing the ICC rules, Boog argues that "*nothing in the* [ICC] *Emergency Arbitrator Rules prohibits the emergency arbitrator from making such a preliminary order*." (See Christopher Boog, 'Chapter 4, Part II: Commentary on the ICC Rules, Appendix V [Emergency arbitrator rules], in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International 2013), pp. 836 – 837.) Similarly, Fry, Greenberg and Mazza remark that "*an initial order* ***before the responding party has filed its response***" is "*conceivable*" under the ICC rules [emphasis added]. (See J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration*, ICC, 2012, No. 3-1058.)

suggest a mechanism which provides the responding party at least some opportunity to present its case.

It remains to be seen whether the parties, the EAs, and the arbitral institutions will embrace the wider availability of the "*interim-interim*" relief, and further reduce the discrepancy between the EA relief and the court relief.

## Conclusion

The EA procedure can be an invaluable tool to parties in need of urgent interim relief, and sometimes the only avenue of redress available. Further, a favourable EA decision may provide a strategic advantage in the settlement discussions and/or the main arbitral proceedings.

This article has given an overview of the EA procedure under the different institutional rules, the applicable standard of relief, the factors to be considered in choosing between the EA relief and the court relief, and some ways in which the limitations of the procedure have been addressed.

Whilst the limitations of the EA procedure may mean recourse to national courts is sometimes the preferable option, it is hoped that improvements in the enforceability of EA decisions and the wider availability of "interim-interim" relief will enhance the usefulness of the procedure and narrow the gap between EA relief and court relief.

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