

The New Emergency Arbitration Rules of the ICC

By Sonia Bjorkquist and Eric Morgan (Osler, Hoskin & Harcourt LLP)

Parties to international agreements are increasingly turning to arbitration as a preferred way to resolve their disputes. However, many proponents of arbitration have nonetheless lamented one of its practical limitations – namely, that arbitration can be ill-suited to deal with urgent preliminary issues because of the time it takes to constitute an arbitral tribunal.

The International Chamber of Commerce (“ICC”), which administers arbitrations through its independent International Court of Arbitration, has recently gone some way toward addressing this traditional criticism of arbitration. At the start of this year, the ICC released a new version of its Rules of Arbitration. Among the changes, the Rules now contain an emergency procedure for parties to quickly obtain an interim ruling or conservatory measure from an arbitrator, usually within 15 days.¹

New Emergency Arbitration Procedure

Traditionally, if you had a legal emergency, you woke up a judge. This was true even where the underlying dispute was governed by an arbitration agreement. Canadian international arbitration legislation explicitly preserves the court’s power with respect to interim protection measures.² Correspondingly, the ICC Rules preserve some recourse to the court (without thereby waiving the agreement to arbitrate).³

However, the same features that make arbitration an attractive option for the resolution of underlying disputes, such as confidentiality and access to decision-makers with special expertise, can apply equally (and sometimes even more so) to the resolution of urgent matters. Seeking to provide a complete set of arbitration rules, the ICC’s new emergency arbitration procedure improves quick access to justice in a private setting.

The emergency procedure is available on application, but only before the file is transmitted to the arbitral tribunal.⁴ The procedure operates along the following general lines:

1. The party seeking the relief submits an application to the ICC Secretariat.⁵

¹ ICC Rules, Appendix V, Article 6(4) and (5).

² Article 9 of the *UNCITRAL Model Law on International Commercial Arbitration*, as enacted by the *International Commercial Arbitration Act (Ontario)*, RSO 1990, c I.9; *International Commercial Arbitration Act (Alberta)*, RSA 2000, c I-5; *International Commercial Arbitration Act (Nova Scotia)*, RSNS 1989, c 234; *International Commercial Arbitration Act (Saskatchewan)*, SS 1988-89, c I-10.2; *International Commercial Arbitration Act (Yukon)*, RSY 2002, c 123; *International Commercial Arbitration Act (New Brunswick)*, RSNB 2011, c 176; *International Commercial Arbitration Act (Prince Edward Island)*, RSPEI 1988, c I-5; *International Commercial Arbitration Act (Newfoundland and Labrador)*, RSNL 1990, c I-15; *International Commercial Arbitration Act (Northwest Territories)*, RSNWT 1988, c I-6; *International Commercial Arbitration Act (Nunavut)*, RSNWT (Nu) 1988, c I-6; *International Commercial Arbitration Act (Manitoba)*, CCSM c C151. See also section 9 of the *International Commercial Arbitration Act (British Columbia)*, RSBC 1996, c 233.

³ ICC Rules, Article 29(7).

⁴ ICC Rules, Article 29(1) and Appendix V, Article 2(2).

2. The ICC President considers whether the emergency procedure applies and, if so, the ICC Secretariat sends the application to the responding party.⁶
3. The ICC President appoints an emergency arbitrator within as short a time as possible, normally within two days of receiving the application.⁷
4. The applicant must submit a request for arbitration of the underlying dispute within 10 days of the ICC Secretariat receiving the application for interim relief, failing which the emergency arbitration proceedings will be terminated.⁸
5. The emergency arbitrator will establish a timetable to resolve the issue, taking into account the nature and urgency of the application while allowing the parties to present their positions.⁹
6. The emergency arbitrator will make an order resolving the issue and send copies to the parties, usually within 15 days of the application being sent to the arbitrator.¹⁰
7. The order will generally remain in effect until a final award is made.¹¹

The emergency arbitrator cannot subsequently serve on the panel for the underlying dispute¹² and likewise cannot bind the arbitral tribunal, which may amend the emergency order.¹³

Unlike waking up a judge, the ICC's emergency arbitration procedure comes at a price. The ICC has set a basic fee for an emergency arbitration at US \$40,000, to be paid up front by the party requesting emergency relief.¹⁴ The emergency arbitrator shall fix and award costs of the emergency arbitration,¹⁵ but they are subject to reallocation by the arbitral tribunal that ultimately hears the case.¹⁶ Moreover, it is open to the ICC President to increase the fee if the

⁵ ICC Rules, Appendix V, Article 1(1).

⁶ ICC Rules, Appendix V, Article 1(5).

⁷ ICC Rules, Appendix V, Article 2(1).

⁸ ICC Rules, Appendix V, Article 1(6), unless the emergency arbitrator determines that a longer period of time is necessary.

⁹ ICC Rules, Appendix V, Article 5.

¹⁰ ICC Rules, Appendix V, Article 6(4) and (5).

¹¹ ICC Rules, Appendix V, Article 6(6)(c).

¹² ICC Rules, Appendix V, Article 2(6).

¹³ ICC Rules, Article 29(3).

¹⁴ ICC Rules, Appendix V, Article 7(1).

¹⁵ ICC Rules, Appendix V, Article 7(3), including the ICC administrative expenses, the emergency arbitrator's fees and expenses, and the reasonable legal and other costs incurred by the parties for the emergency arbitrator proceedings.

¹⁶ ICC Rules, Article 29(4).

case warrants,¹⁷ and part of the up-front deposit is non-refundable even in the event that the problem somehow resolves itself without the emergency arbitrator's involvement.¹⁸

Transition Issues

The emergency procedure will only be available where the arbitration agreement was made after January 1, 2012. Thereafter, the emergency procedure is available by default and parties must specifically opt-out of it or agree to another pre-arbitral procedure for interim relief if they do not want the emergency arbitration provisions to apply.¹⁹

Limitations of Emergency Arbitration

The ICC's emergency arbitration procedure still contains certain limitations:

- The procedure is only available if **the dispute has not yet been transmitted to the arbitral tribunal**;²⁰
- The interim order will only apply to parties to the arbitration agreement, not **third parties**;²¹
- Depending on how a jurisdiction's arbitration legislation treats interim arbitral orders (as opposed to awards), parties may have difficulty with **enforcement**, although failure to abide by an interim order will at least constitute breach of contract²² and will be considered by the panel in the final award;²³ and
- It appears that an emergency arbitrator cannot make an order on an *ex parte* basis,²⁴ and therefore the procedure will not be suitable where the remedy sought (such as a freezing injunction) only operates effectively as a surprise.

It should also be noted that the new ICC Rules include procedures to challenge the emergency arbitrator.²⁵ While such safeguards are critical, and tight time limits for launching a challenge are

¹⁷ ICC Rules, Appendix V, Article 7(2).

¹⁸ ICC Rules, Appendix V, Article 7(5).

¹⁹ ICC Rules, Article 29(6).

²⁰ ICC Rules, Article 29(1) and Appendix V, Article 2(2).

²¹ ICC Rules, Article 29(2) and (5).

²² ICC Rules, Article 29(2).

²³ ICC Rules, Article 29(4).

²⁴ ICC Rules, Appendix V, Articles 1(5) and 2(3).

²⁵ ICC Rules, Appendix V, Article 3.

in place,²⁶ the provisions are open to potential abuse by parties who wish to achieve some delay in the context of a request for emergency relief.

Moreover, as noted above, the ICC Rules do not prevent a party from going to court for interim relief.²⁷ Parties need to be aware of the potential for interim disputes to proceed to court in a public forum despite the best laid plans for arbitration.

Conclusion

While not suited to every situation, arbitration does present a potential route for resolving interim issues. When forming an arbitration agreement or dealing with a dispute that has arisen under one, it is valuable to consider whether arbitration may be a more appropriate way of determining interim issues than simply resorting to the court system as a matter of instinct. Parties almost always benefit from a greater array of options to resolve their disputes, and the ICC has taken a positive step forward by adapting the rules to meet the rapidly evolving pace of international business and the demand for quick dispute resolution.

²⁶ ICC Rules, Appendix V, Article 3(1).

²⁷ ICC Rules, Article 29(7).