

The suitability of the emergency arbitrator
for investment disputes

A adequação do árbitro de emergência
para litígios de investimento

MARIANA FRANÇA GOUVEIA
JOÃO GIL ANTUNES

VOL. 6 Nº 2 SETEMBRO 2019

WWW.E-PUBLICA.PT



COM O APOIO DE:

FCT Fundação
para a Ciência
e a Tecnologia

ISSN 2183-184x

THE SUITABILITY OF THE EMERGENCY ARBITRATOR FOR INVESTMENT DISPUTES

A ADEQUAÇÃO DO ÁRBITRO DE EMERGÊNCIA PARA LITÍGIOS DE INVESTIMENTO

MARIANA FRANÇA GOUVEIA¹

Faculdade de Direito da Universidade Nova de Lisboa
Campus de Campolide, 18,
1099-032 Lisboa - Portugal
mariana.françagouveia@plmj.pt

JOÃO GIL ANTUNES²

Faculdade de Direito da Universidade Nova de Lisboa
Campus de Campolide, 18,
1099-032 Lisboa - Portugal
joao.pereira.antunes@gmail.com

Abstract: In the past, interim relief prior to the constitution of the arbitral tribunal had taken the form of multiple legal mechanisms. For one reason or another, all of them would eventually fail. In 2006, however, the paradigm would change definitively with the creation of the Emergency Arbitrator. Currently, all the main international arbitration institutions, with rare exceptions, offer their users the possibility of obtaining such interim relief. The normative architecture of this new mechanism – idealised and structured for disputes between private entities – ended up being applied to disputes involving states, state entities, and state enterprises. Given the characteristics of both these actors and the disputes in which they participate, the question arises as to whether this system, as it exists, can be applied to them without any need for adaptation. Therefore, we propose a careful analysis of the international arbitral case law on the matter, which, although scarce, is finally beginning to provide relevant insights.

Keywords: international arbitration; emergency arbitrator; states, state entities, and state enterprises.

A. INTRODUCTION	2
B. THE EMERGENCY ARBITRATOR IN INTERNATIONAL RULES: MAIN FEATURES AND LEGAL REQUIREMENTS	6
I. ICC Rules	6

1. Dean and Full Professor of NOVA University of Lisbon School of Law. Partner in the Arbitration Department of PLMJ law firm.

2. Legal Officer at the Legal Affairs Department of the Portuguese Ministry of Foreign Affairs. Prior to joining the MFA, Assistant Legal Counsel at the Permanent Court of Arbitration and Associate Lawyer at PLMJ law firm.

II. SCC Rules	10
III. LCIA Rules	11
C. THE EMERGENCY ARBITRATOR: A TAILORED-MADE MECHANISM FOR COMMERCIAL ARBITRATION?	12
D. CHALLENGES IN RELYING ON THE EMERGENCY ARBITRATOR IN INVESTMENT DISPUTES	14
I. The relationship between the temporal application of a treaty and the host state's consent to arbitrate	14
II. The recourse to the Emergency Arbitrator within the cooling-off period	18
III. May due process principles be at risk?	20
E. CONCLUSION: THE SUITABILITY OF THE EMERGENCY ARBITRATOR FOR INVESTMENT DISPUTES	25
F. BIBLIOGRAPHY	27

Resumo: A proteção cautelar antes da constituição do tribunal arbitral materializou-se, no passado, em diversos institutos jurídicos. Por uma ou outra razão, todos eles acabariam eventualmente por fracassar. Em 2006, porém, o paradigma alterar-se-ia definitivamente com a criação do Árbitro de Emergência. Hoje, todas as principais instituições internacionais de arbitragem, com raras exceções, disponibilizam aos seus utilizadores a possibilidade de obterem tal proteção cautelar. A arquitetura normativa deste novo instituto – idealizada e estruturada para litígios entre entidades de direito privado – acabaria também por ser aplicada a litígios que envolvem estados, entidades estatais e empresas públicas. Em face das características destes intervenientes, bem como dos litígios em que participam, levanta-se a questão de saber se este sistema, tal qual existe, lhes pode ser aplicado sem qualquer necessidade de adaptação. Propõe-se, por isso, analisar atentamente a jurisprudência arbitral internacional sobre a matéria que, embora escassa, começa finalmente a disponibilizar elementos relevantes.

A. INTRODUCTION

1. It is undisputed that two of the most important advantages of international arbitration are its efficiency and promptness,³ and that the length of an arbitration may vary considerably depending on several different criteria. However, the time between the submission of a request for arbitration and the rendering of the final award has been increasing, mostly due to the swelling complexity, bureaucratisation, and institutionalisation of arbitral proceedings. In the words of A. Yeşilirmak, “[t]he period between the appearance of a dispute and the formation of an arbitral tribunal ‘is now often measured in weeks or even months’.”⁴ The constitution of the arbitral tribunal is often the procedural stage that requires more time to complete.

2. Different stakeholders, most notably arbitral institutions, have been particularly mindful of the importance of providing the parties with emergency mechanisms. Particularly, those to be resorted to before the constitution of the arbitral tribunal by parties seeking to react to an urgent situation.⁵ Otherwise, national courts would be the only remedy left available to them. This is something which may be neither desirable nor possible, particularly if national courts are in the home jurisdiction of the respondent.⁶ As explained by the London Court of International Arbitration (the “LCIA”):

[...] where parties have agreed to resolve their dispute by arbitration, they may prefer to make such an application within the arbitration. Therefore, the Emergency Arbitrator provisions, while not prejudicing a party’s right to seek interim relief from any available court, allow parties to commence emergency proceedings within the framework of their arbitration.⁷

3. Arbitral institutions sought different solutions to provide parties with mechanisms that would grant them the right to seek emergency relief.⁸ On 1 January 1990, the Pre-Arbitral Referee – a new mechanism created by the

3. The relationship between efficiency and due process rights has been extensively addressed in the last decade, be it in written articles, conferences, or seminars.

4. A. Yeşilirmak, “Provisional Measures in International Commercial Arbitration”, International Arbitration Law Library, Volume 12 (© Kluwer Law International; Kluwer Law International 2005), paras. 4-77

5. M. Feigerlová, “Emergency Measures of Protection in International Arbitration”, *18 International and Comparative Law Review* 1, 2018, p. 158.

6. F. Santacroce, “The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?”, *31 Arbitration International* 283 (2015), p. 284.

7. See, <https://www.lcia.org/adr-services/lcia-notes-on-emergency-procedures.aspx>.

8. Apart from any ad hoc mechanism that parties may agree to adopt. One of the cornerstones of arbitration is the well-known principle of parties’ private autonomy, under which all procedural-related mechanisms are admissible provided they do not constitute a breach of fundamental principles of the seat of arbitration or place of recognition and enforcement, such as the parties’ right to fully present their case. The violation of such rights could lead to the annulment of the arbitral award. See, for instance, S. Wittich, “The Limits of Party Autonomy in Investment Arbitration”, in *Investment and Commercial Arbitration – Similarities And Divergences* 47 (Christina Knahr, Christian Koller, Walter Rechberger & August Reinisch eds., Eleven International Publishing 2010), pp. 62-63.

International Chamber of Commerce (the “**ICC**”) – entered into force. In the words of the ICC, “*the pre-arbitral procedure allows parties to apply for a “referee” for urgent provisionals (sic) measures – prior to referral to arbitration.*”⁹ However, starting these proceedings was dependent upon a written agreement between the two parties and this is the main reason for its unsuccessful outcome and the reluctance of parties to rely in it.¹⁰

4. Later, several arbitral institutions, such as the Stockholm Chamber of Commerce (the “**SCC**”) and the ICC, created a new legal figure, that of the emergency arbitrator (the “**Emergency Arbitrator Rules**”). The ICC explains that “[t]his procedure offers a short-term solution for parties that are unable to wait for the constitution of the Arbitral Tribunal.”¹¹

5. From this moment, parties could resort to an emergency arbitrator to issue an interim measure on an emergency basis prior to the constitution of the arbitral tribunal. The Emergency Arbitrator Rules are aimed at providing an efficient and appropriate mechanism to parties that seek to avoid irreparable damage and do not wish to resort to national courts for interim relief. It should be stressed, however, that by resorting to an emergency arbitrator, the parties are not generally prevented from seeking interim relief from a court of the seat of arbitration.

6. However, in parallel with this new figure, the number of arbitral proceedings between a private party vis-à-vis a state, a state entity, or a state enterprise has also increased.¹² In this context, legal solutions initially created to be applied to private disputes frequently began to be applied to arbitrations in which one of the parties is a state, a state entity, or a state enterprise acting in its capacity as a sovereign (*jure imperii*).¹³ The Emergency Arbitrator Rules were no exception.

9. See, <https://iccwbo.org/dispute-resolution-services/pre-arbitral-referee/>.

10. G. Born, “Chapter 17: Provisional Relief in International Arbitration”, in *International Commercial Arbitration*, Second Edition, Kluwer Law International, 2014, pp. 2451-2452; M. Feigerlová, *ob. cit.*, pp. 157-158.

11. See, <https://iccwbo.org/dispute-resolution-services/arbitration/emergency-arbitrator/>.

12. In this article, the notion of *state, state entity, or state enterprise* must be read as having the meaning provided for in Articles 4 and 5 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2011, available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf. Therefore, all different concepts of *state, state entity, or state enterprise* resulting from private international law, which are entirely dependent on the legal solutions adopted by each jurisdiction, are irrelevant.

13. This new paradigm has obviously not occurred by accident. As correctly put by V. Heiskanen, “*as a result of the recent emergence of investment treaty arbitration, the distinction between public and private international law arbitration has gained new currency. Indeed, while international arbitration practitioners tend to draw a distinction between investment treaty arbitration and international commercial arbitration and often consider these as two different fields of professional practice, the fact that one of the parties to investment treaty arbitration is a private party has forced arbitration scholars and practitioners to rethink the issues relating to the interface between public and private international law arbitration.*” (“State As A Private: The Participation of States in International Commercial Arbitration”, 7(1) *Transnational Dispute Settlement* 1, p. 2) Considering that by consenting to arbitration, a state waives its immunity from jurisdiction (both with respect to arbitral tribunal and national courts with jurisdiction to review and control the arbitral proceedings alike), the reference to “acting in its capacity as a sovereign” is meant to be interpreted restrictively. It is a reference to the nature of the relationship between the host state and the foreign investor during the time the dispute has

7. The Report of the *Institute of International Law on Arbitration Between States, States Enterprises, or State Entities, and Foreign Enterprises* (the “**IIA Resolution**”) aims to draw “attention to other principles which are of special importance to arbitration between States, state enterprises, or state entities, on the one hand, and foreign enterprises, on the other.” Although the IIA Resolution’s scope “has in view only the authority and duties of arbitrators” in such disputes, it enhances the fundamental idea behind this article: disputes between States, state entities, or state enterprises vis-à-vis private parties, including foreign investors, entail particular challenges that ought to be carefully considered and addressed. As accurately put by K. Hobér,

[...] it is equally clear that arbitrations involving States do present certain distinctive features, primarily as a result of the simple fact that one of the parties is a State, or a State entity, rather than a commercial enterprise.¹⁴

8. Considering the above, the authors will briefly elaborate upon the scope, main features and legal requirements of the most important international arbitration rules on the emergency arbitrator (**Section B**). Thereafter, the authors will discuss whether the main features of the Emergency Arbitrator Rules have been tailored-made to commercial disputes between private parties (**Section C**). Once these analyses have been concluded, the authors will then address several issues of the relationship between the Emergency Arbitrator Rules and the specific characteristics of disputes involving states, state entities, or state enterprises (**Section D**), without any attempt at being exclusive. Finally, the authors will draw conclusions as to whether they believe the Emergency Arbitrator Rules with their current format and the way they are currently being applied are suitable for disputes involving states, state entities, or state enterprises, particularly in investment disputes (**Section E**).

9. A final note: although particular attention will be paid to the relationship between the Emergency Arbitrator Rules and investment disputes, the readers of this article should in no way limit its relevance to the latter category.¹⁵ Indeed, even though investment disputes raise specific problems on their own, some of the problems addressed here remain relevant with respect to disputes arising out of an agreement where one or both parties is a state, a state entity, or a state enterprise, regardless of the subject-matter of the dispute.¹⁶

not yet arisen, and arbitral proceedings have not yet been brought.

14. K. Hobér, “Chapter 8: Arbitration Involving States” in *Essays on International Arbitration*, 2006, p. 141.

15. Disputes where generally a foreign investor initiates an arbitration vis-à-vis a state, a state entity, or a state enterprise pursuant to a BIT, a multilateral investment treaty, an investment chapters in a free trade agreement or a domestic investment law.

16. V. Heiskanen correctly noted that “[w]hile the challenges facing the counsel for the State in the international commercial arbitration context are formidable, they are usually not as daunting as they tend to be in investment treaty arbitration. This is in part because international commercial disputes arise out of contractual arrangements between a private party and a particular State organ or instrumentality, which means that the relevant information and evidence is usually available within that particular agency or instrumentality and need not be collected from several sources.” (ob. cit., p. 9)

B. THE EMERGENCY ARBITRATOR IN INTERNATIONAL RULES: MAIN FEATURES AND LEGAL REQUIREMENTS

10. In the following subsections, the main features of the Emergency Arbitrator Legal Rules of four of the most relevant international arbitration rules will be laid down. The authors will first analyse (i) the International Chamber of Commerce Rules (the “**ICC Rules**”) (Subsection I); (ii) the Arbitration Institute of the Stockholm Chamber of Commerce Rules (the “**SCC Rules**”) (Subsection II); (iii) the London Court of International Arbitration Rules (the “**LCIA Rules**”) (Subsection III).¹⁷

11. These analyses are not meant to critically assess their legal solutions in respect of the Emergency Arbitrator Rules, but simply to provide an overview of the legal solutions they envisage in light of the subject-matter of this article, i.e., whether the Emergency Arbitrator Rules are suitable in disputes where one of the parties is a state, a state entity, or a state enterprise, principally within an investment dispute. An exception will be made, however, in the subsection concerning the ICC Rules and the interpretive guidelines issued by the ICC Commission on this matter.

12. It should be noted, at this stage, that, currently, the rules of the United Nations Commission on International Trade Law (the “**UNCITRAL Rules**”), the International Centre for Settlement of Investment Disputes (the “**ICSID Rules**”), and the Permanent Court of Arbitration (the “**PCA**”) do not grant parties the power to initiate emergency arbitration proceedings.

I. ICC Rules

13. The 2012 ICC Rules entered into force on 1 January 2012 and they introduced something new: legal rules on the emergency arbitrator (the “**ICC Emergency Arbitrator Rules**”). In 2017, the ICC Rules were once again amended, though no substantial modification was made to these rules.

14. The ICC Emergency Arbitrator Rules are established in Articles 29(1) to 29(7) and in Appendix V to the ICC Rules. *First*, under Article 29(1), a party may resort to the emergency arbitrator when it “*needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal.*” The provision is clear and self-explanatory: a party may only seek interim relief from an emergency arbitrator if the measure it seeks cannot await the constitution of the arbitral tribunal. In turn, if the arbitral tribunal is already constituted, a party’s application for interim relief must be pursued under Article 28 of the ICC Rules.

17. In addition, other international arbitral institutions have also adopted legal rules on emergency arbitrators, including the International Center for Dispute Resolution, in 2006, the International Institute for Conflict Prevention and Resolution, in 2009, the Singapore International Arbitration Centre, in 2010, the Australian Centre for International Commercial Arbitration, in 2011, the Swiss Chambers’ Arbitration Institution, in 2012, the Japan Commercial Arbitration Association and the World Intellectual Property Organization, in 2014, the China International Economic and Trade Arbitration Commission, in 2015.

15. *Second*, “[t]he emergency arbitrator’s decision shall take the form of an order.” [Article 29(2) and Article 6(1) of Appendix V, both of the ICC Rules]. The rationale of this provision relates principally to the application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”). Under Article I(1) of the New York Convention, only *arbitral awards* may be recognised and enforced. Within this context and according to a literal interpretation, the ICC sought to resolve a long-lasting discussion about whether a decision (in the case of a decision issued under the ICC Rules, an *order*) issued by an emergency arbitrator may be recognised and enforced under the New York Convention.¹⁸ In light of the solution envisaged in Article 29(2) of the ICC Rules, it is highly doubtful that such a decision in tandem with the prevailing international opinion is recognisable and enforceable.¹⁹

16. *Third*, the order issued by an emergency arbitrator is not final in the sense that it does not settle the dispute. Indeed, the arbitral tribunal once constituted may, under Article 29(2) of the ICC Rules, “*modify, terminate or annul the order or any modification thereto made by the emergency arbitrator.*” This legal solution is similar to that of the interim relief after the constitution of the arbitral tribunal.

17. *Fourth*, the ICC Emergency Arbitrator Rules are only applicable to parties that “*are either signatories of the arbitration agreement [...] or successors to such signatories*” [Article 29(5) of the ICC Rules]. However, even if the parties in a given dispute meet one of these requirements, the ICC Emergency Arbitrator Rules are still not applicable where (i) the arbitration agreement was concluded before 1 January 2012; (ii) the parties have agreed to opt out of the ICC Emergency Arbitrator Rules and not to apply them automatically; and (iii) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures [see, Article 29(6)(a) to (c) of the ICC Rules].

18. In contrast, it is interesting to note that, under Article 28(1) of the 2017 ICC Rules, an interim or conservatory measure can take the form of an order or of an award, as the arbitral tribunal considers appropriate.

19. M. Feigerlová, *ob. cit.*, p. 169. See also, among others, B. Steindl, “The 2012 ICC Arbitration Rules – Origin, Development and Practicability”, in: Klausegger, Klein, Kremsehner, Petsche, Pitkowitz, Power, Welser & Zeiler (eds.), *Austrian Yearbook on International Arbitration 2012*, p. 160; I. Welser, “Fast Track Proceedings, Expedited Procedure and Emergency Arbitrator”, in B. Gessel-Kalinowska *vel* Kalisz (ed.), *The Challenges and the Future of Commercial and Investment Arbitration*, Warsaw, 2015, p. 221. Adopting the opposing view, among others, see, G. Born, *ob. cit.*, p. 2515; A. Yeşilirmak, *ob. cit.*, paras. 4-77 (“[t]he law of some jurisdictions may require that a decision must be considered under the law as final and binding to be considered an award. However, the decision is binding so long as parties agreed in advance to accept it as binding. (171) Which would leave only the question concerning the finality of the decision. In this respect, it can be argued that the decision is final in respect to the issue of which it addresses. (172) Nonetheless, the enforcement regime of the decision could, in any case, be improved on both national and international level.”); P. Shaughnessy, “Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules”, *27 International Arbitration* 337, 2010, p. 338, p. 345.

18. *Fifth*, the relevant stages of the proceedings are the following:

- (i) A party seeking interim relief on an emergency basis before the constitution of the arbitral tribunal must submit its corresponding submission under Article 1 of Appendix V to the ICC Rules;
- (ii) As from the receipt of the application by the ICC Secretariat, its President must appoint an emergency arbitrator as soon as possible, normally within two days of that receipt.²⁰ In addition, at this stage, the ICC President will also conduct a *prima facie* analysis of whether the emergency arbitrator has jurisdiction to hear the claim;²¹
- (iii) In the event the ICC President believes there are no obstacle with respect to the jurisdiction of the emergency arbitrator, the ICC Secretariat must then send the file to the emergency arbitrator;²²
- (iv) The emergency arbitrator must then “*establish a procedural timetable [...] within as short a time as possible, normally within two days from the transmission of the file.*”²³ It must be noted that, under the ICC Rules, the emergency arbitrator is empowered with a broad range of powers to conduct the proceedings, as happens in standard arbitral proceedings.²⁴ In particular, Article 5(2) of Appendix V to the ICC Rules establishes that “[t]he emergency arbitrator shall conduct the proceedings in the manner which the emergency arbitrator considers to be appropriate, taking into account the nature and the urgency of the Application. In all cases, the emergency arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case;”
- (v) After the parties have presented their cases, the emergency arbitrator must then issue an order within 15 days of the date on which they received the file from the ICC Secretariat. In any case, this time limit may be extended by the ICC President of their own motion, or pursuant to a reasoned request submitted by the emergency arbitrator.²⁵ The order issued by the emergency arbitrator may be subject to any conditions they think fit, including requiring the provision of appropriate security.²⁶

19. *Finally*, attention should be drawn to the interpretive guidelines issued by the ICC Commission with respect to the application of Article 29 of the ICC Rules to

20. See, Article 2(1) of Appendix V to the 2017 ICC Rules.

21. See, Article 1(5) of Appendix V to the 2017 ICC Rules. In any case, under Article 6(2) of Appendix V to the 2017 ICC Rules, the emergency arbitrator is not bound by the decision of the ICC President.

22. See, Article 2(3) of Appendix V to the 2017 ICC Rules.

23. See, Article 5(1) of Appendix V to the 2017 ICC Rules.

24. See, Article 22(2) of the 2017 ICC Rules.

25. See, Article 6(4) of Appendix V to the 2017 ICC Rules.

26. See, Article 6(7) of Appendix V to the 2017 ICC Rules.

arbitral proceedings relating to an investment dispute – where one of the parties is a state, a state entity, or a state enterprise. Particularly, the ICC Commission Report on State, State Entities and ICC Arbitration noted that “[w]hen drafting this provision, the ICC considered that the investor and the host state are not signatories of the arbitration agreement formed by the state’s offer contained in the BIT and the investor’s acceptance contained in its notice of claim or request for arbitration.”

20. In other words, the result is the non-application of Article 29 of the ICC Rules altogether to any investment dispute. However, it is worth mentioning that, pursuant to a BIT, a multilateral investment treaty, an investment chapter in a free trade agreement or a domestic investment law containing an arbitration agreement, states often offer investors of the home state the right to start arbitral proceedings in the event a dispute arises.

21. Upon the acceptance of the standing offer to arbitrate by the foreign investor, however, both the host state and the investor become signatories of the arbitration agreement.²⁷ Therefore, it is difficult to understand why the ICC considers that the investor and the host state cannot be construed as signatories of the arbitration agreement in the first place. The rationale underlying that guideline is perhaps not to allow the application of Article 29 of the ICC Rules to investment disputes. However, should that be the reason, either the ICC or one of its commissions could have made it expressly clear that the ICC Emergency Arbitrator Rules cannot apply to investment disputes.

II. SCC Rules

22. On 1 January 2010, the SCC amended its rules and, for the first in its history, adopted legal rules that grant parties the right to apply for the appointment of an emergency arbitrator until the case has been referred to an arbitral tribunal.²⁸ These rules may be found in Appendix II – Emergency Arbitrator to the SCC Rules (the “**SCC Emergency Arbitrator Rules**”).²⁹

23. The structure of these rules is akin to that of the ICC Emergency Arbitrator

27. J. D. Amado, J. S. Kern and M. D. Rodriguez, “Arbitrating the Conduct of International Investors”, Cambridge University Press, 2018, p. 12, fn.20, citing *Lanco International Inc. v. The Republic of Argentina*, ICSID Case No. ARB/97/6, Decision on Jurisdiction, 8 December 1998, para. 40 (“[i]n our case, the Parties have given their consent to ICSID arbitration, consent that is valid, there thus being a presumption in consent to ICSID arbitration, without having first to exhaust domestic remedies. [...] The investor’s consent, which comes from its written consent by letter of September 17, 1997, and its request for arbitration of OCTOBER 1, 1997, and the consent of the State which comes directly from the ARGENTINA U.S Treaty, which gives the investor the choice of forum for settling its disputes, indicate that there is no stipulation contrary to the consent of the parties. It should be recalled that Article 25(1) in fine establishes: ‘When the parties have given their consent, no party may withdraw its consent unilaterally,’ in our case by the Republic of Argentina after the investor has accepted ICSID arbitration.”)

28. See, Article 1 of Appendix II to the 2017 SCC Rules.

29. The 2017 2017 SCC Rules are available at https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf.

Rules, including with respect to their scope of application, the adoption of an opt-out approach, the non-binding effect of the emergency decision on the arbitral tribunal to be constituted, and the power of the SCC to conduct a *prima facie* assessment on whether it has jurisdiction to hear the claim.³⁰ There are, however, some caveats that ought to be considered, some of which may have a substantial impact on how the mechanism is relied upon and on how it may be potentially misused.

24. For instance, it is the case of the deadline within which the emergency arbitrator must render its decision or the decision on which proceedings they may be applied to in the first place. With respect to the latter, it should be noted that, in contrast with any other institutional rules, the SCC Emergency Arbitrator Rules are applicable to all arbitrations commenced after the entry into force of the 2010 SCC Rules. There is an important consequence resulting from this solution relating to the fundamental notion of consent to arbitrate (see below, Subsection D.1).

25. Under the SCC Emergency Arbitrator Rules, the standard procedure has the following stages:

- (i) a party seeking interim relief on an emergency basis before the constitution of the arbitral tribunal must submit its corresponding submission;³¹
- (ii) as soon as this application is received, the Secretariat must send the application to the opposing party;³²
- (iii) within 24 hours, the board of the SCC must appoint an emergency arbitrator,³³ after which the Secretariat must refer the application to it;³⁴
- (iv) although the emergency arbitrator is granted broad powers to conduct the proceedings,³⁵ they must nonetheless render a decision within 5 days of the date on which the application was referred to them. This deadline may be nonetheless extended by the SCC Board if the emergency arbitrator so requires or if it is otherwise deemed necessary.³⁶

30. See, Article 9(5) of Appendix II to the 2017 SCC Rules. See, for instance, *Evrobalt LLC v. The Republic of Moldova*, SCC Case No. 2016/082, Award on Emergency Measures, dated 30 May 2016, para. 8.

31. See, Article 2 of Appendix II to the 2017 SCC Rules.

32. See, Article 3 of Appendix II to the 2017 SCC Rules.

33. See, Article 4(1) of Appendix II to the 2017 SCC Rules.

34. See, Article 6 of Appendix II to the 2017 SCC Rules.

35. See, Article 23(1) of the 2017 SCC Rules ex vi Article 7 of Appendix II to the 2017 SCC Rules.

36. See, Article 8(1) of Appendix II to the 2017 SCC Rules.

III. LCIA Rules

26. As of 1 October 2014, the LCIA Rules incorporated a set of rules entitling parties to apply to the LCIA Court prior to the formation of the expedited formation of the arbitral tribunal for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings (the “**LCIA Emergency Arbitrator Rules**”).³⁷ These rules can be found in Article 9B of the LCIA Rules.³⁸

27. The LCIA Emergency Arbitrator Rules incorporate similar solutions to those of the ICC and SCC Emergency Arbitrator Rules. In fact, as mentioned in the previous paragraph, parties can only resort to an emergency arbitrator if the arbitral tribunal, which will settle the merits of the dispute, is not yet constituted. Furthermore, the LCIA Emergency Arbitrator Rules are automatically applicable, provided that (i) the parties concluded their arbitration agreement before 1 October 2014 and the parties have not agreed in writing to opt in to Article 9B; or (ii) the parties have agreed in writing at any time to opt out of Article 9B.³⁹ Finally, an order or award rendered under the LCIA Emergency Arbitrator Rules is not binding on the arbitral tribunal to be constituted. Indeed, the arbitral tribunal may render an order or award confirming, varying, discharging, or revoking, in whole or in part, the order or award issued by the emergency arbitrator.⁴⁰

28. As to the standard procedure under the LCIA Emergency Arbitrator Rules, the following steps enhance its main characteristics:

- (i) upon receipt by the LCIA Registrar of the claimant’s submission, the LCIA Court will determine the application as soon as possible and, should it be granted, it must appoint an emergency arbitrator within 3 days of that receipt;⁴¹
- (ii) while the emergency arbitrator has broad discretion with respect to the conduct of the proceedings, they must nonetheless adapt an appropriate approach in light of the circumstances, including the nature of emergency of the proceedings. There is, however, an important caveat: the emergency arbitrator ought to afford each party, if possible, an opportunity to be consulted on the claim and underlying reasons for emergency relief and the parties’ further submissions;⁴²
- (iii) following the emergency arbitrator’s appointment, a decision must be rendered within 14 days. Exceptionally, this deadline may be extended by the LCIA Court, pursuant to Article 22.5 of the LCIA Rules or by written agreement of all parties to the emergency proceedings – contrary to the ICC Emergency Arbitrator Rules, the emergency arbitrator’s decision may take the form of an order or of an award.⁴³

37. See, Article 9B(9.4) of the 2014 LCIA Rules.

38. The 2014 LCIA Rules are available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

39. See, Article 9B(9.14) of the 2014 LCIA Rules.

40. See, Article 9B(9.11) of the 2014 LCIA Rules.

41. See, Article 9B(9.6) of the 2014 LCIA Rules.

42. See, Article 9B(9.7) of the 2014 LCIA Rules.

43. See, Article 9B(9.8) of the 2014 LCIA Rules.

C. THE EMERGENCY ARBITRATOR: A TAILORED-MADE MECHANISM FOR COMMERCIAL ARBITRATION?

29. The differences between international commercial arbitration and international investment arbitration pose different questions, although “*many problems and issues in State arbitrations are similar to those that arise in private commercial arbitration.*”⁴⁴ However, there are distinctive features with respect to arbitrations involving states, state entities, and state enterprises, particularly within investment disputes.⁴⁵ These differences, which have been addressed by practitioners and scholars alike – there is extensive and rich literature on the subject – are mostly based on the fact that these actors have a sovereign nature and pursue a public interest.⁴⁶

30. One could argue that, by entering into an arbitration agreement, a state, a state entity, or a state enterprise agrees to play the game by the existing rules. However, the opposite case can also be made. Indeed, even though arbitration has historically been a way to resolve commercial disputes between private parties, there has been a substantial increase in the numbers of arbitrations involving states, state entities, and state enterprises since the beginning of the century. In light of the current paradigm, the procedural rules available and the solutions they envisage must take into consideration the needs and demands of the new players and stakeholders. If private arbitral institutions wish to provide arbitral services in arbitrations involving states, state entities, and state enterprises, it is important that they adapt their rules to such new demands. Ignoring them may well be a mistake.

31. features of the Emergency Arbitrator Rules have been first and foremost tailored in light of the needs of commercial disputes involving only private commercial parties. The objective is to clarify whether the Emergency Arbitrator Rules in their current formulation are, therefore, suited to being applied to disputes involving states, state enterprises, or state entities.

32. As initially highlighted, the reason for the creation of the Emergency Arbitrator Rules was to provide parties with a legal mechanism to which they could resort on an emergency basis prior to the constitution of the arbitral tribunal. The goal was, therefore, to strengthen international arbitration by improving its effectiveness and readiness, and it was mainly a business-driven development.⁴⁷

44. K. Holér, ob. cit., p. 141.

45. L. Willis, “International Investment and Commercial Arbitration: An Industry Perspective”, *Volume 3 Yearbook on Arbitration and Mediation*, Article 40, *Arbitration Law Review*, p. 542.

46. One may find such differences with respect to the matter of confidentiality vis-à-vis transparency, to the growing importance of public international law in the arbitral community, or simply to the procedural solutions available to the parties. See, for instance, L. Willis, ob. cit., pp. 543-565; K.H. Böckstiegel, “Commercial and Investment Arbitration: How Different are they Today? The Lalive Lecture 2012”, *28(4) Journal of the London Court of International Arbitration* 577, pp. 586-587.

47. K. Chung, “Emergency Arbitration in Investment Treaty Disputes”, LL.M. Program 2015-2016, Harvard Law School, available at <http://hnmcp.law.harvard.edu/wp-content/uploads/2012/02/Kyongwha-Chung-Winnerpdf.pdf>, p. 5. It should be once again stressed that the

As explained by F. Santacroce,

*[t]he introduction of provisions on emergency relief was prompted by the increasing need of the business community to obtain quick arbitral interim relief at the outset of a dispute.*⁴⁸

33. However, unlike commercial disputes involving private parties, an arbitration with a state, a state entity, or a state enterprise, principally within an investment dispute, often raises new challenges that normally relate to existing conflicts between public and private interests. Each one of the procedural and substantial solutions available will have an impact on either one of them. It is, therefore, important to find balanced solutions that make it possible to fulfil both to the greatest extent possible. However, achieving such a balance may not always be possible and, in that scenario, it is necessary to determine which one of those interests will prevail. Be that as it may, under these legal conditions, even emergency arbitrators with their relatively broad discretion will have a difficult task in reconciling these conflicting goals.

34. In the following section, we will analyse several issues based on four investment-related decisions issued by emergency arbitrators,⁴⁹ namely in *Tskinvest LLC v. The Republic of Moldova*,⁵⁰ *Evrobalt LLC v. The Republic of Moldova*,⁵¹ *Kompozit LLC v. Republic of Moldova*,⁵² and *Mohammed Munshi v. The State of Mongolia*,⁵³ all of which were issued under the SCC Rules. Without any intention of being exhaustive, the following issues will now be addressed: (i) the relationship between the temporal application of a treaty and the host state's consent to arbitrate (**Subsection D.I**); (ii) the recourse to the Emergency Arbitrator under the cooling-off provision (**Subsection D.II**); and (iii) whether Emergency Arbitrator Rules are jeopardising due process rights (**Subsection D.III**).

most important and more often applied international rules to investment disputes, the UNCITRAL and ICSID rules, do not provide for Emergency Arbitrator Rules. In turn, as previously explained, the ICC excluded the application of its ICC Emergency Arbitrator Rules to investment disputes. But the SCC, and LCIA Rules allow for their Emergency Arbitrator Rules to be applied to investment disputes.

48. F. Santacroce, ob. cit., p. 284.

49. There is a fifth investment-related decision issued by an emergency arbitrator in *Griffin v. Poland*, SCC Case No. 2014/168, but at the time of writing this article, it had not yet been made public.

50. *skinvest LLC v. The Republic of Moldova*, Emergency Arbitration No. EA 2014/053, dated 29 April 2014. For further factual and procedural details, see, K. Chung, ob. cit., p. 15.

51. *Evrobalt LLC v. The Republic of Moldova*, SCC Case No. 2016/082, Award on Emergency Measures, dated 30 May 2016.

52. *Kompozit LLC v Republic of Moldova*, SCC Arbitration EA 2016/095, Emergency Award on Interim Measures, dated 14 June 2016.

53. *Mohammed Munshi v. The State of Mongolia*, Emergency Arbitration No. EA 2018/007, dated 5 February 2018.

D. CHALLENGES IN RELYING ON THE EMERGENCY ARBITRATOR IN INVESTMENT DISPUTES

1. The relationship between the temporal application of a treaty and the host state's consent to arbitrate

35. As previously noted, most international arbitral rules establish that the Emergency Arbitrator Rules only apply to arbitration agreements concluded after their entry into force.⁵⁴ The purpose of this solution is to avoid the application of the Emergency Arbitrator Rules to disputes in relation to which the parties had agreed to refer them to arbitration at a moment when those rules did not yet exist.

36. Above all, it is a question of balancing expectations – if parties had known that the Emergency Arbitrator Rules be available to them, would they have opted out of them? As a general rule, this solution contrasts with the approach adopted when a new version of arbitral rules enters into force. In fact, by agreeing to apply a specific set of rules, the parties, regardless of their nature, are implicitly accepting the application of the new version of the rules. For instance, upon the entry into force of the 2014 LCIA Rules,⁵⁵ they were automatically applicable to all proceedings beginning after that date. However, considering the underlying implications arising from the entry into force of legal rules, such as those on the emergency arbitrator, arbitral institutions believed that the consent to arbitrate would not encompass the application of this mechanism.

37. The authors of this article agree, even more so in the event the parties to the arbitration agreement were states, state entities, or state enterprises. In the abstract, one could reasonably argue that there are higher expectations of private parties being more willing to accept and prepared to face certain legal innovations in comparison to states, state entities, or state enterprises. Moreover, as explained elsewhere,⁵⁶ the Emergency Arbitrator Rules were mostly a business-driven innovation to which those players made no contribution for the most part.

38. However, the SCC Emergency Arbitrator Rules thought otherwise and adopted a different approach. As noted in *Tskinvest LLC v. The Republic of Moldova*,

[...] under any arbitration agreement referring to the SCC Rules the parties shall be deemed to have agreed that the rules in force on the date of the commencement of the arbitration shall

54. See, for instance, Article 29(6)(a) of the 2017 ICC Rules; Article 9B(9.14) of the 2014 LCIA Rules.

55. See, Preamble of the 2014 LCIA Rules (“[w]here any agreement, submission or reference howsoever made or evidenced in writing (whether signed or not) provides in whatsoever manner for arbitration under the rules of or by the LCIA, the London Court of International Arbitration, the London Court of Arbitration or the London Court, the parties thereto shall be taken to have agreed in writing that any arbitration between them shall be conducted in accordance with **the 2014 LCIA Rules or such amended rules as the LCIA may have adopted hereafter to take effect before the commencement of the arbitration** and that such 2014 LCIA Rules form part of their agreement.”) (emphasis added)

56. See, para. 34 above.

*be applied unless otherwise agreed by the parties. Accordingly, the rules to be applied to the Application are the SCC Rules in force as of 1 January 2010, including Appendix II thereof, which provides for the appointment of an Emergency Arbitrator upon the application of a party.*⁵⁷

39. In this respect, it should be noted that, in 2006, for the first time, the Emergency Arbitrator Rules became a reality.⁵⁸ As from this moment, parties could resort to a set of Emergency Arbitrator Rules. However, by that time, more than 2000 bilateral investment treaties already provided for arbitration as one of the dispute settlement mechanisms – not to mention other multilateral treaties of utmost relevance, such as the Energy Charter Treaty (the “ECT”).

40. For instance, the dispute settlement mechanism provided for in the ECT is somewhat paradigmatic. Article 26(4)(c) of the ECT provides that

In the event that an investor chooses to submit the dispute for resolution under paragraph 2(c), the Investor shall further provide its consent in writing for the dispute to be submitted to: [...]

c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

41. The wording of the provision is made in broad terms, given that the contracting parties did not determine the version of the SCC Rules that ought to be applied in the event a dispute arises. Questions in respect of the scope and extent of the consent given by a contracting party upon the signature and ratification of, or adherence to, the ECT arises. The answer lies, therefore, (i) in the intertemporal interpretive rule provided for in the 2017 SCC Rules;⁵⁹ and (ii) in interpreting Article 26(4)(c) of the ECT, which requires the application of Article 31 of the Vienna Convention.⁶⁰

42. Under Article 31(1) of the Vienna Convention, any attempt to interpret a legal provision contained in a treaty must be made in good faith and according to the meaning of the text, provided that “*the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in light of its object and purpose.*”⁶¹

57. *Tskinvest LLC v. The Republic of Moldova*, Emergency Arbitration No. EA 2014/053, dated 29 April 2014, para. 3.

58. The International Center for Dispute Resolution was the first arbitral institution to incorporate these rules.

59. *Evrobalt LLC v. The Republic of Moldova*, SCC Case No. 2016/082, Award on Emergency Measures, dated 30 May 2016, para. 28.

60. K.H. Böckstiegel, *ob. cit.*, p. 583.

61. International Law Commission, Draft Articles on the Law of Treaties with commentaries (1966), available at http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf. See also, *Evrobalt LLC v. The Republic of Moldova*, SCC Case No. 2016/082, Award on Emergency Measures, dated 30 May 2016, para. 25; *Kompozit LLC v Republic of Moldova*, SCC Arbitration EA 2016/095, Emergency Award on Interim Measures, dated 14 June 2016, para. 40.

43. Therefore, once the relevant treaty provisions have been interpreted according to the abovementioned criteria, the solutions will most surely vary depending on the wording of the treaty, the context in which it was concluded, and the underlying objectives that the contracting parties to it meant to achieve.⁶² For instance, in *Evrobalt LLC v. The Republic of Moldova*, the emergency arbitrator stated that

*[i]t is therefore arguable that by 2001, when both Contracting Parties had indicated their consent to be bound by the Treaty, it was within the reasonable contemplation of the Republic of Moldova and the Russian Federation that arbitration pursuant to the Arbitration Rules of the “Arbitration Court of the Stockholm Chamber”, in the terms of Article 10(2)(b) of the Treaty, meant arbitration pursuant to the version of the SCC Rules extant at the time the arbitration was commenced.*⁶³

44. Apart from other arguments, the emergency arbitrator reached this conclusion on the grounds that, upon the entry into force of previous versions of the SCC Rules, there was already that interpretive rule – also used in the 2010 SCC Rules (which established the Emergency Arbitrator Rules) – according to which the new version of the rules would be applied to any arbitration commenced on or after that date, unless otherwise agreed by the parties.⁶⁴ Therefore, in its understanding, the contracting parties to the ECT, upon ratification, were aware that the SCC Rules adopted such an approach.

45. In *Kompozit LLC v Republic of Moldova*, the emergency arbitrator simply stated that the contracting parties to the ECT, while aware that the SCC Rules could be amended, did not specifically mention the version of the SCC Rules that should apply in the event a dispute.⁶⁵ Therefore, it decided that

*[s]ince Article 10 of the Treaty refers to the SCC Arbitration Rules and its Preamble provides that the parties are deemed to have agreed to the rules contained therein, the contracting parties to the Treaty are deemed to have agreed to the provisions contained in Appendix II of the 2010 SCC Arbitration Rules, in the absence of an opt-out agreement between the contracting parties, as this is the case in this emergency arbitration.*⁶⁶

46. These are two possible interpretations, with which the authors do not agree. It

62. There is a tendency to seek solutions that can be applied to each and every treaty. Considering that each investment treaty has its own features and characteristics, it is important to adopt a case-by-case, or a treaty-by-treaty, analysis.

63. *Evrobalt LLC v. The Republic of Moldova*, SCC Case No. 2016/082, Award on Emergency Measures, dated 30 May 2016, para. 29.

64. *Evrobalt LLC v. The Republic of Moldova*, SCC Case No. 2016/082, Award on Emergency Measures, dated 30 May 2016, para. 28.

65. *Kompozit LLC v Republic of Moldova*, SCC Arbitration EA 2016/095, Emergency Award on Interim Measures, dated 14 June 2016, paras. 38-39.

66. *Kompozit LLC v Republic of Moldova*, SCC Arbitration EA 2016/095, Emergency Award on Interim Measures, dated 14 June 2016, para. 44.

is true that the intertemporal interpretative rule had been already used in previous version of the SCC Rules. It is, however, doubtful that one could argue that, at the moment of ratification of the ECT, the Contracting Parties could have expected that, almost 10 years later, Emergency Arbitrator Rules would enter into force. If anything, at that moment, the pre-arbitral procedures in force required independent (from the arbitration agreement) written consent by the parties to be applied.

47. In any case, the offer to arbitrate made by states in a BIT, a multilateral investment treaty, an investment chapter, or in a free trade agreement needs to be carefully interpreted according to the Vienna Convention. It would be superficial to simply say that, in light of the awareness of the Contracting Parties with respect to the possibility of the SCC Rules being amended, any amendment, irrespective of its scope, would be within their consent to arbitrate.

II. The recourse to the Emergency Arbitrator within the cooling-off period

48. The cooling-off provision is a clause contained in a substantial number of BITs, multilateral investment treaties, investment chapters in free trade agreements, or domestic investment laws containing arbitration agreements.⁶⁷ Normally, the purpose of a cooling-off provision is “to allow parties to amicably settle a dispute before it escalates to adversarial proceedings.”⁶⁸ It is, therefore, a pre-arbitral procedure.

49. Plenty has been written with respect to cooling-off provisions by arbitral tribunals and scholars alike, there being little consensus on whether the cooling-off provision is “mandatory or aspirational.”⁶⁹ In summary, for those who believe that a cooling-off provision is mandatory, non-compliance by claimants has the effect of the arbitral tribunal not having jurisdiction to hear the parties’ case.⁷⁰ In turn, for those who believe otherwise, claimants are not barred from beginning arbitral proceedings even if the cooling-off period has not yet ended.⁷¹ However, while the problem arises with respect to the Emergency Arbitrator Mechanism, where the idea of urgency is at the core, the questions and considerations it raises may be of a different nature.

67. J. Pohl, et al., “Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey”, *OECD Working Papers on International Investment*, 2012/02, OECD Publishing 2012, pp. 17-18. See, for instance, Article 26(1) and (2) of the ECT.

68. A. Sharma, “The Cooling-off Period in the Energy Charter Treaty: Existing Problems and the Way Forward” (April 24, 2018), p. 1, available at: <https://ssrn.com/abstract=3272322>.

69. A. Sharma, ob. cit., p. 3, citing opposing jurisprudence on the issue, namely *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008; *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010.

70. See, for instance, *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, paras. 140-157.

71. See, for instance, *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras. 342-343.

50. With relevance, in *Tskinvest LLC v. The Republic of Moldova*, the emergency arbitrator decided that

The Emergency Arbitrator further concludes that the Cooling-Off Period of six months set forth in Article 10 of the Treaty does not prevent Claimant from making the present Application. One of the reasons for this conclusion is that it would be procedurally unfair to Claimant and contrary to the purpose of the Emergency Arbitrator procedure to apply the Cooling-Off Period to the appointment of an Emergency Arbitrator or to an emergency decision on interim measures to be made by the Emergency Arbitrator, not least since Claimant seems to be facing a serious risk of suffering irreparable harm before the expiry of the Cooling-Off Period if interim measures are not granted.⁷²

51. The emergency arbitrator considered that preventing the claimant from applying to it on the grounds of a cooling-off period would be (i) procedurally unfair to the claimant; and (ii) contrary to the purpose of the emergency arbitrator procedure to apply the cooling-off period to the appointment of an emergency arbitrator. Both reasons are correct, but some considerations are nonetheless welcomed.

52. Is interim relief incompatible with the purpose of the cooling-off provision? While the cooling-off provisions were created to establish the objective and subjective conditions for parties to amicably settle the dispute before resorting to arbitration or litigation, the emergency arbitrator serves the purpose of granting emergency interim relief. Thus, would seeking interim relief be inadmissible on the grounds of incompatibility? The answer is no, although with a caveat. On the one hand, by engaging in a negotiation, conciliation or arbitration, parties seek to definitively settle the dispute on the merits. On the other hand, by resorting to an emergency arbitrator, parties are merely seeking to face an emergency situation that cannot wait for the constitution of the arbitral tribunal. There is no structural contradiction between the two.⁷³

53. However, the emergency arbitrator must be careful in reaching such a conclusion because there may be times where resorting to the emergency arbitrator within a cooling-off period is inadmissible. That is the case, for instance, when claimants make an application to the emergency arbitrator seeking interim relief with the sole purpose of disrupting or weakening the opposing party in the negotiation or conciliation processes. This obviously requires a case-by-case assessment, but, in the event it occurs, the emergency arbitrator ought to negate the claimant's claim, normally on the grounds of the absence of urgency. Nevertheless, even in these cases, it would be procedurally unfair to the claimant not to have any possibility whatsoever to resort to the emergency arbitrator within the cooling-off period.

⁷² *Tskinvest LLC v. The Republic of Moldova*, Emergency Arbitration No. EA 2014/053, dated 29 April 2014, para. 66.

⁷³ K. Chung, ob. cit., p. 47.

III. May due process principles be at risk?

54. The authors are well aware that so much has been written about the relationship between due process rights and arbitral proceedings that the notion of *due process paranoia* has entered into the arbitral vocabulary. Indeed, according to a QMUL survey, “[d]ue process paranoia” continues to be one of the main issues that users believe is preventing arbitral proceedings from being more efficient.”⁷⁴

55. The idea of due process is based on three basic principle, i.e., an equal opportunity for the parties to present their case, a fair hearing, and an impartial tribunal.⁷⁵ Within this context, it is interesting to look at how emergency arbitrator proceedings have been conducted so far. In *Tskinvest LLC v. The Republic of Moldova*, while summarising the procedural history, the emergency arbitrator noted as follows:

*7. The Procedural Order No. 1 was sent to the Parties by email. With respect to Respondent, the email addresses used were the ones to which Claimant sent its letters dated 31 March 2014 and 16 April 2014 respectively, namely: **secretariat@justice.gov.md and secdep@mfa.md**. In addition, at Claimant’s request, the Procedural Order No. 1 was sent to the Embassy of the Republic of Moldova in Sweden at **office@moldovaembassy.se and ambassador@moldovaembassy.se**.*

8. All the subsequent correspondence in these proceedings have been sent to the email addresses referred to above. Moreover, the SCC Institute sent the Application and its exhibits by courier to the respective addresses of the Ministry of Justice of the Republic of Moldova and the Ministry of Foreign Affairs and European Integration of the Republic of Moldova on 24 April 2014, as well as to the email addresses referred to above. Receipts of service of process with respect to the aforementioned couriers were submitted to the Emergency Arbitrator on 28 April 2014.

*9. Under the provisional timetable set forth in the Procedural Order No. 1, Respondent was to have filed its response to Claimant’s Application by 25 April 2014. However, **Respondent has not submitted such a response, nor has it made any other contacts with the Emergency Arbitrator or the SCC Institute in these emergency proceedings.***

*10. On 26 April 2014, the Emergency Arbitrator sent an email to the Parties, inviting Respondent forthwith to submit its response to Claimant’s Application.*⁷⁶

74. 2018 International Arbitration Survey: The Evolution of International Arbitration, p. 3, available at <http://www.arbitration.qmul.ac.uk/research/2018/>.

75. S. Wittich, ob. cit., p. 62.

76. *Tskinvest LLC v. The Republic of Moldova*, Emergency Arbitration No. EA 2014/053,

56. In *Mohammed Munshi v. The State of Mongolia*,

1. The Application was served by the SCC on the Respondent, the State of Mongolia [...], on 31 January 2018, pursuant to Article 3 of Appendix II of the SCC Rules. [...]

8. On 31 January 2018, the Emergency Arbitrator issued Procedural Order No. 1.

9. On 2 February 2018, the Emergency Arbitrator wrote to Mongolia asking it to confirm whether it had received Procedural Order No. 1 and whether it intended to make submissions to the Emergency Arbitrator.

10. On 4 February 2018, the Claimant made further submissions to the Emergency Arbitrator.

*11. **Mongolia has not made any submissions to the Emergency Arbitrator and has not acknowledged receipt of the Claimant's Application.** The Emergency Arbitrator must therefore decide on the Application without hearing from Mongolia.⁷⁷*

57. In *Evrobalt LLC v. The Republic of Moldova*,

2. [the emergency proceedings] were commenced by the Claimant, Evrobalt LLC, on 24 May 2016, by an “Application for the Appointment of an Emergency Arbitrator and for an Emergency Decision on Interim Measures” submitted pursuant Article 1 of Appendix II of the Rules. The Application was served by the SCC on the Respondent, the Republic of Moldova, on 26 May 2016. The SCC has obtained proof of delivery of the Application to the Ministry of Justice and the Ministry of Foreign Affairs of Moldova.

*3. The Emergency Arbitrator was appointed by the Board of the Arbitration Institute of the SCC (the Board) on 25 May 2016. **The matter was submitted to him within the day.** Pursuant to Article 8 of Appendix II to the Rules, a decision must be rendered within five days of that date. [...]*

5. The Emergency Arbitrator has made several efforts to ensure that the Application has received attention by competent authorities of the Respondent. He has also “strongly invited” the Respondent to participate in the proceedings, by communications of 25 and 26 May 2016. The Emergency Arbitrator’s communications were addressed simultaneously to both Parties – in the Respondent’s

dated 29 April 2014, paras. 7-10.

⁷⁷ *Mohammed Munshi v. The State of Mongolia*, Emergency Arbitration No. EA 2018/007, dated 5 February 2018, paras. 1 and 8-11. (emphasis added)

case, directed to two email addresses provided by the Claimant and associated with the Ministry of Justice and the Ministry of Foreign Affairs of Moldova (secretariat@justice.gov.md and secdep@mfa.md). Nevertheless, **the Respondent has not participated in these proceedings.**

6. The proceedings unfolded as follows. Following the Claimant's Application, a conference was held with counsel on 26 May 2016. A summary of the conference, together with a list of issues for each Party to address, was circulated to the Parties by email later the same day. Pursuant to the Emergency Arbitrator's directions, the Claimant submitted Observations on its Application on 27 May 2016. **The Respondent did not make any submissions or answer the Claimant's Observations.** The Emergency Arbitrator scheduled tentatively a second conference for 29 May 2016, but in the end there was no need to hold one.⁷⁸

58. Finally, in *Kompozit LLC v Republic of Moldova*,

4. On 9 June 2016, the Claimant filed an Application for the Appointment of an Emergency Arbitrator and for an Emergency Decision on Interim Measures with the Arbitration Institute of the Stockholm Chamber of Commerce, pursuant to Appendix II of the 2010 SCC Arbitration Rules. [...]

6. On 9 June 2016, the SCC Secretariat sent the Application and its exhibits to the Respondent by courier and by email, pursuant to Article 3 of Appendix II of the 2010 SCC Arbitration Rules. The receipts issued by the courier service provider and the corresponding signatures of the recipients apposed on the delivery order sheet of the courier service provider, together with the reading receipts of the emails sent by the SCC, which the SCC has communicated to the Emergency Arbitrator, show that the SCC's notification of the Application was received by the Respondent. Copies of these receipts are attached hereto. According to the SCC Secretariat **the Respondent did not make any contact with the SCC further to the SCC's notification.** [...]

10. By letter dated 10 June 2016, the Emergency Arbitrator: (a) invited the Respondent to inform the Emergency Arbitrator, the Claimant and the SCC, as to whether the Respondent would be represented by an outside counsel in the emergency proceedings, no later than 10 June 2016; (b) directed the Respondent to submit an answer to the Claimant's Application, no later than 11 June 2016; [...]

⁷⁸ *Evrobalt LLC v. The Republic of Moldova*, SCC Case No. 2016/082, Award on Emergency Measures, dated 30 May 2016, paras. 2-3 and 5-6. (emphasis added)

11. *The said Emergency Arbitrator's letter of 10 June 2016 was sent to the Parties by email. With respect to the Claimant, the Emergency Arbitrator used the email addresses, which were requested by the Claimant in its Application. With respect to the Respondent, the Emergency Arbitrator used the emails addresses proposed by the Claimant, i.e., secretariat@justice.gov.md and secdep@mfa.md. [...] None of the emails sent by the Emergency Arbitrator to the Parties were rejected by the recipients. [...]*

13. *By email dated 11 June 2016, the Emergency Arbitrator took note that the Respondent did not reply to the Emergency Arbitrator's letter of 10 June 2016, and asked the Respondent whether it wished to submit any comments.*

14. *By email of the same date, i.e., 11 June 2016, the Respondent stated that it had no further comments. [...]*

16. *By email dated 12 June 2016, the Emergency Arbitrator took note that the Respondent had decided not to submit a reply to the Application within the time frame fixed in the Emergency Arbitrator's letter of 10 June 2016, and declared the emergency proceedings closed.*

17. *The Respondent has not participated in these emergency proceedings and has not made any contact with the Emergency Arbitrator; consequently the Emergency Arbitrator will solely refer herein to the positions expressed by the Claimant in the Application, and to the exhibits it has submitted in support of its allegations.*⁷⁹

59. A careful analysis of the above excerpts allows one to note several interesting aspects. *First*, both the Republic of Moldova and Mongolia did not submit any comments or make any submissions objecting to the claimant's applications for emergency interim relief.⁸⁰ *Second*, in all three cases against the Republic of Moldova, the claimants' applications were sent to general contact email addresses (*secretariat@justice.gov.md, secdep@mfa.md, office@moldovaembassy.se, and ambassador@moldovaembassy.se*).

60. However, one could state that any state, state entity, or state enterprise must take the necessary efforts to face any potential application, such as one aimed at an emergency interim relief. However, as accurately explained by V. Heiskanen,

79. *Kompozit LLC v Republic of Moldova*, SCC Arbitration EA 2016/095, Emergency Award on Interim Measures, dated 14 June 2016, paras. 4, 6, 10-11, 13-14, 16-17. (emphasis added)

80. In *Kompozit LLC v Republic of Moldova*, it is not clear whether Moldova participated in the proceedings. On the one hand, at para. 14, the emergency arbitrator refers to an email sent by the respondent stating it had no further comments. On the other hand, at para. 17, it is noted that the Moldova "*has not participated in these emergency proceedings and has not made any contact with the Emergency Arbitrator.*"

It is well known that, because of the need to coordinate between various State agencies, the State often needs more time than a private party to collect the relevant information and evidence, identify potential witnesses and other sources of information, and to instruct their counsel on key strategic, procedural and substantive issues.⁸¹

[...]

In investment treaty arbitration, however, the dispute may arise, and often does arise, as a result of actions or omissions of a variety of State organs and agencies, which obviously complicates the defense of the State and requires more coordination work both on the part of both the client and the counsel. Obtaining instructions also tends to be more complicated and often requires interventions at the highest level of the government. All this takes not only more time but also requires a more concerted effort by the counsel when communicating with the client.⁸²

61. There is no doubt that, as part of the right to effective judicial protection, interim relief implies that a decision be issued on an emergency basis – this being the underlying idea behind the mechanism. It is also true that some international rules permit interim relief to be granted on an *ex parte* basis.⁸³ Therefore, even states, state entities, and state enterprises cannot demand that the right to present their case be exercised as it would within a standard procedure. Nonetheless, it is important to note that, under most international arbitration rules, from the moment the institution’s secretariat sends the claimant’s submission to the emergency arbitrator for them to render the interim decision, only a rather short period of time passes.⁸⁴ It is during this period that the parties are invited to present their cases.

62. However, even if a state, a state entity, or a state enterprise is provided successfully and in a timely manner with a claimant’s application before the expiry of that deadline, there is no reason to believe that the former have been given sufficient objective conditions to fully present their cases.⁸⁵ In order for a party to efficiently present its case in an international arbitration, be it commercial or investment-related, a substantial level of expertise is required. Most of the times, such expertise is only held by international law firms, which

81. V. Heiskanen, *ob. cit.*, p. 9. Even though these words have been written in the context of the state’s participation in international commercial arbitration, they are relevant with respect to investment dispute too.

82. V. Heiskanen, *ob. cit.*, pp. 9-10. Adopting the same reasoning, K.H. Böckstiegel noted that, despite the similarities, there are certain differences, such as “*state parties will often request longer periods for submitting their memorials and evidence, because the decision process between counsel and the various state agencies involved may be more complex and time consuming.*” (*ob. cit.*, p. 585)

83. See, Article 9B(7) of the 2014 LCIA Rules.

84. Article 8(1) of Appendix II to the 2017 SCC Rules.

85. Probably not even Argentinian authorities, after accumulating such substantial expertise in investment arbitration, would be able to fully present their case.

are not always easily accessible to states, state entities, and state enterprises, at least within such a short period of time.

63. As argued elsewhere,⁸⁶ a particular feature of arbitrating vis-à-vis states, states entities, and state enterprises, principally within investment disputes, is that there is a permanent conflict between private and public interests. It is, therefore, important to find the right balance between these interests in all procedural and substantial solutions – on the one hand, the claimants’ desire to be granted emergency interim relief; on the other, the public interest that the claimants’ desire would affect.

E. CONCLUSION: THE SUITABILITY OF THE EMERGENCY ARBITRATOR FOR INVESTMENT DISPUTES

64. Faced with the need to further improve the effectiveness and reliability of international arbitration, different stakeholders, most notably arbitral institutions, sought a new mechanism aimed at providing interim protection prior to the constitution of the arbitral tribunal. The Emergency Arbitrator emerged from this context and, from this moment onwards, arbitration users were no longer compelled to resort to national courts to seek this relief.

65. The incorporation of the Emergency Arbitrator mechanism into the most important arbitration rules, such as the ICC, the LCIA, and SCC, became then a generalised trend. All of them share a specific set of features and this implies that the solutions arising from their application may also be rather similar. There are, however, a few exceptions, including with respect to (i) the application of such rules to states, states entities, or states enterprises; (ii) whether such rules remain applicable where the arbitration agreement agreed upon by states, state entities, and state enterprises was signed before the entry into force of the Emergency Arbitrator Rules; and (iii) specific procedural options, principally in terms of time limits.

66. Furthermore, it is however undisputed that, as from the beginning, the foundational principles of the Emergency Arbitrator were intended to meet the needs of those arbitration users acting in their private capacity.

67. But, even assuming that interim protection may be construed as a general principle of international law, and that a mechanism that grants interim relief prior to the constitution of the arbitral tribunal ought to be put in place, it remains to be seen whether current Emergency Arbitrator Rules either offer solutions suitable for states, state entities or states enterprises, or guarantee their due process rights.⁸⁷

⁸⁶. See, para. 32 above.

⁸⁷. For those who believe the decision issued by the emergency arbitrator is enforceable under the New York Convention, Article V(1)(b) of the New York Convention provides that the recognition and enforcement of an award may be refused if the party against whom it is invoked has been unable to present its case.

68. It is interesting to note that, while the UNCITRAL and the ICSID Rules are the most relied upon by parties in disputes involving states, state entities, and state enterprises, they do not incorporate any provisions on the Emergency Arbitrator. The PCA, which has extensive experience in providing administrative assistance to arbitral tribunals in such arbitral proceedings,⁸⁸ also adopted a similar approach in its institutional rules.

69. In any case, even though the case law already available does provide interesting insights into this question, it is not enough to allow for assertive conclusions. But serious concerns may be found just around the corner. Be that as it may, there are no reasons to simply negate by and in principle the possibility of applying Emergency Arbitrator Rules to disputes involving state, state entities, or state enterprises. However, nor does it mean that *carte blanche* should be given, particularly to arbitral institutions. In turn, a more balanced approach is required: one where the application of the Emergency Arbitrator Rules in such situations is always accompanied by a case-by-case critical analysis. Depending on the conclusions reached, a tailored-made emergency arbitrator mechanism for disputes involving states, states entities, and state enterprises ought to be made available.

F. BIBLIOGRAPHY

A. Sharma, “The Cooling-off Period in the Energy Charter Treaty: Existing Problems and the Way Forward” (April 24, 2018), available at: <https://ssrn.com/abstract=3272322>;

A. Yeşilirmak, “Provisional Measures in International Commercial Arbitration”, 2005;

B. Steindl, “The 2012 ICC Arbitration Rules – Origin, Development and Practicability”, in: Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler (eds.), *Austrian Yearbook on International Arbitration 2012*;

F. Santacroce, “The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?”, *31 Arbitration International* 283 (2015);

G. Born, “Chapter 17: Provisional Relief in International Arbitration”, in *International Commercial Arbitration*, Second Edition, Kluwer Law International, 2014;

88. Articles 20 and 41 of the 1899 and 1907 Conventions for the Pacific Settlement for International Disputes established the Permanent Court of Arbitration by providing that: “[w]ith the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention.”

J. D. Amado, J. S. Kern and M. D. Rodriguez, “Arbitrating the Conduct of International Investors”, Cambridge University Press, 2018;

J. Pohl, et al., “Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey”, *OECD Working Papers on International Investment*, 2012/02, OECD Publishing 2012;

K. Chung, “Emergency Arbitration in Investment Treaty Disputes”, LL.M. Program 2015-2016, Harvard Law School, available at <http://hnmcp.law.harvard.edu/wp-content/uploads/2012/02/Kyongwha-Chung-Winnerpdf.pdf>;

K.H. Böckstiegel, “Commercial and Investment Arbitration: How Different are they Today? The Lalive Lecture 2012”, 28(4) *Journal of the London Court of International Arbitration* 577;

K. Hobér, “Chapter 8: Arbitration Involving States” in *Essays on International Arbitration*, 2006;

I. Welser, “Fast Track Proceedings, Expedited Procedure and Emergency Arbitrator”, in *B. Gessel-Kalinowska vel Kalisz (ed.), The Challenges and the Future of Commercial and Investment Arbitration*, Warsaw, 2015;

M. Feigerlová, “Emergency Measures of Protection in International Arbitration”, 18 *International and Comparative Law Review* 1, 2018;

P. Shaughnessy, “Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules”, 27 *International Arbitration* 337, 2010;

S. Wittich, “The Limits of Party Autonomy in Investment Arbitration”, in *Investment and Commercial Arbitration – Similarities And Divergences* 47 (Christina Knahr, Christian Koller, Walter Rechberger & August Reinisch eds., Eleven International Publishing 2010);

Heiskanen, “State As A Private: The Participation of States in International Commercial Arbitration”, 7(1) *Transnational Dispute Settlement* 1.
