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EMERGENCY ARBITRATOR – IS HE OR SHE A TRUE ARBITRATOR? THE SINGLE ROW CONSENT OF PARTIES[1] AND PORTUGUESE OVERVIEW

By Ana Caetano

Summary

1. There is an increase demand for interim measures prior to the constitution of the Arbitral Tribunal (hereinafter AT) and Institutions now provide such interim measures at an earlier stage in arbitration proceedings. However, if such provisions are to be effective the only available option is to include these within the Rules themselves which, with the provision of this new figure, may raise several dogmatic issues.

One issue relates to the qualification of the Emergency Arbitrator (hereinafter EA) as a true arbitrator, as the EA is not selected by the parties and is also appointed prior to the commencement of the arbitration.

2. The EA's power is limited in scope to the decisions regarding interim measures and ceases when the AT takes charge of the case.

Introduction

Do you have an emergency in arbitration... please dial one and get an emergency arbitrator...

3. In the last decades of the twentieth century and in the early twenty-first century, the methods of ADR have achieved a growing acceptance in several countries, including both in developed and developing nations. Within the list of the most utilized methods of ADR we may include arbitration, as a viable alternative to litigation.

Arbitration has continuously had the merit of being a new method in the resolution of disputes, which have become increasingly complex, prolonged and costly. Furthermore, arbitration has spread to almost every country and has contributed positively to the harmonization of international law, especially in what regards international trade. In fact, the resort to arbitration has increased in what concerns the

resolution of commercial disputes, notably international commercial transactions and contracts, becoming one of the preferred forms of settling disputes between importers and exporters of different nationalities, due to such aspects as the neutral role of the arbitrator and the desire to avoid judicial courts with judges that have the same nationality of the parties to the dispute.

4. Also, market players seek to ensure that their business is risk free, as such, one way to ensure that negotiation is viable and that justice may be obtained should the business / contract go wrong is that the dispute be decided fairly, i.e. on a neutral field and not within the countries from which the parties are originally from.

Part I – Consent of EA

A) Background

5. The future of arbitration appears to be a positive one for the following years and even decades, due in part to its increasing usage, popularity and applicable model to business disputes. More and more organizations, entities, companies, persons and states are making use of arbitration to settle disputes of any type, through the development of new models and methods of arbitration, requiring increased investment in the training of both the arbitrators and the parties involved, as well as in relation to lawyers, jurists and specialists in this area. It is in this context for the promotion of business and the rapid resolution of disputes, that arbitration has developed and has grown exponentially. Though it is true that arbitration had to grow and did so with the support of both the courts and the state, it is also true that as arbitration has grown, it has becomes more autonomous and has developed its own specific procedure. Nevertheless, though still relatively similar to the procedures used throughout the court systems, this procedure, developed alongside and due to the necessities and specificities of arbitration, is new and innovative. However, with new and innovative procedures have come "grey" areas, one of which is the figure of the EA. How it was created and how it now exists, it is this new figure that I will be addressing and analyzing.

6. As the name suggests the goal of this new figure is to allow parties to obtain interim measures[2], throwing this new set of Emergency Rules into the continuing debate[3] regarding the changing of both the legislation and the Rules dealing with interim measures in the arbitration framework.

7. These new procedures make it possible for parties to get emergency relief prior to the constitution of the AT and even prior to the beginning of arbitral proceedings itself. This new procedure provides parties, as users of institutionalized arbitration, with the chance to get a hold of premature interim measures so as to ensure the efficacy of an eventual arbitral award, stopping parties from seeking such measures before the courts. However, depending on the use that parties will give to this new arbitration tool, they can use EA to either speed up the arbitration proceedings or to make it more quarrelsome.

B) Question – Is the EA indeed a true Arbitrator and what limitations are applied to this so-called new trend in international arbitration?

In fact, in some international arbitration proceedings it may take weeks or months to set up an AT. Therefore, for Parties, the main alternative has been to apply to national courts, when there is an urgent need for interim measures.

If we agree that Parties give their consent, either expressly or implicitly to go to arbitration, would be considered the same as consenting to[4] the appointment of the arbitrator? Can parties rely in the qualities of an Arbitrator that has not been scrutinized or chosen by any of such parties? The other question that can arise from the EA figure is if the decisions of the EA should be in a form of an "order" or an "award". This article will address the matter of the validity of an arbitration agreement and whether the party actually consented to arbitration when one has decided to request interim relief through an EA.

C) Consent of the parties in the EA figure?

8. Arbitration is an exception to the national court's jurisdiction and therefore consent is of utmost importance. Therefore, Art 3(1), regarding the writing requirement within the New York Convention (hereinafter NYC) refering indirectly to consent, will be analyzed. However, before answering the question as to whether or not there is consent, we must analyze the issue of what consent is in itself.

Consent is a cornerstone principle of arbitration, due to the fact that unless the parties have consented to arbitrate they cannot be compelled to arbitrate a dispute. Such a principle is not only a cornerstone of arbitrations, it is highly important given that arbitration is an exception to national courts' jurisdiction, in relation to which parties' consent automatically implies the relinquishing of the right to go to court, and normally the arbitral award is both final and binding.

According to Section 1 of the Swedish Arbitration Act nothing is specifically established in relation to oral or written consent of the Parties: "*Disputes concerning matters in respect of which the parties may reach a settlement may, by agreement, be referred to one or several arbitrators for resolution*."

However, such a stance is entirely different from the rule provided in Art.II (1) of the New York Convention wherein: "*Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*"

9. Therefore, it is clear that we must be able to interpret whether or not consent was given. Rau[5] argues that we should take into account: (i) whether or not the party agreed to arbitrate at all; (ii) if there is consent with whom they agreed to arbitrate; and (iii) what type of disputes did they agree to resolve through arbitration. Rau' claims that, as the ripples increase outward, the "*insistence on a strict requirement of consent*

become[s] progressively less appropriate."

Also, Fouchard, Gaillard, Goldman[6] identify five principals of consent: good faith, effective interpretation, contra preferentem, strict interpretation and in favourem validitatis. For these authors, good faith is the true intention that should prevail over declared intention. It is expected to look for the parties intention through several requisites.

Therefore we must analyze the reasonable expectations and the attitude of parties after signing to be able to interpret the agreement as whole as well as the party's conduct. Regarding effective interpretation, Fouchard, Gaillard, Goldman considers that when parties intentions can be interpreted in two different ways, the interpretation that gives a clause effect and validity should be the one adopted. On the other hand, when Fouchard, Gaillard, Goldman talk about contra preferentem they consider that the arbitration agreement should be interpreted against the party that drafted it.

Same authors go even further and explain that strict interpretation means that the contract should be interpreted restrictively due to the fact that the parties of the agreement don't wish to end up in an arbitration proceeding at all.

10. Also, favourem validitatis[7] means an expansive interpretation. For Born[8] there are several standards of proof in interpretation, and as a rule, the party seeking to prove the existence of the agreement bears the burden of proof. Therefore we have (i) a heightened standard, where it is especially clear that evidence is required to prove the existence of consent by the parties; (ii) a reduced standard, in such cases wherein a presumption in favour of giving effect to arbitrate (what we may call a pro-arbitration policy) may be found, and there is (iii) a neutral standard in which standard Rules for interpretation may be applied. It is clear that Born's view sponsors a reduced standard of proof. Thus, Born argues in favourem validitatis because commercial business man knows what they are doing[9].

Articles 8 and 16 of the ML state that: (i) Courts must refer the case to arbitration, unless they find the agreement is null and void, inoperative or incapable of being performed and (ii) Arbitrators get first say on jurisdiction, though the decision can go immediately to a court for review. If we look at U.S. law it seems to be long-winded because it depends on the claim, and courts or arbitrators[10] have first say. In this matter is it not a surprise that First Options[11] is regarded as a milestone. The supporters of arbitration created a defense mechanism titled doctrine of separability[12][13] as well as the well-known known principle of Kompetenz-Kompetenz[14].

11. Allegations as to the invalidity or inapplicability[15] of the arbitration agreement can be decided by the arbitrators, as well as the existence of the arbitration agreement[16].

D) Finding the parties consent - How can we determine what the parties intended when they sat around the negotiating table?

12. While it is clear that one must use the principles of interpretation, these should be applied over time and so as to assist in finding the true intention of the parties at the conclusion of business, particularly in relation to the negotiation of the arbitration clause and the inclusion of a reference to the Rules of an institution binding the parties to these Rules. If we truly are trying to determine the parties' intent, then how do we demonstrate such intent with evidence. Thus, the evidence assumes a key role for the party alleging the existence of an arbitration agreement as well as the party denying the existence of that very same agreement. Therefore, the interests of the parties are clearly contradictory in this situation. In search of the will of the parties, it is nececcary to use the traditional means at their disposal for discovery, such as witness testimony, letters, e-mails or SMS messages, etc.

Although experience reminds us that arbitration agreements may not always be negotiated, such negotiations are common in arbitration agreements in which choice is viewed as a crucial element for negotiation. The safe way is nevertheless be to keep a written record of all negotiations.

13. As a result, it may be stated that consent is of the utmost importance, given that the main goal is to avoid challenges to the Tribunal's jurisdiction.

E) Consentinthe EA–should we apply the same rules of interpretation?

14. There is a variety of interim measures though particular note should be taken in relation to the following: (i) protection of the right to arbitrate; (ii) preservation of evidence/assets; (iii) early disclosure; (iv) preservation of assets (freezing injunctions/disclosure of assets). Universal international arbitration Rules allow the AT to grant orders and provide a procedure for appointment of EA when it is needed. Nevertheless, some parties occasionally prefer to request relief from a national court, as it might be attained with greater ease and promptness, it's effective and binding nature against third parties and it also tends to have a greater deterrent effect.

Nevertheless, parties will have to establish that relief from a Tribunal is neither accessible nor effective and the EA may request that one of the Parties pay security or relief may only be accessible in case of urgency or with permission of the Tribunal[17].

Art.26 (2) of Uncitral Model Law establishes a range of measures: (i) maintain or restore the status quo; (ii) action to prevent or restrain action that cause current or imminent harm or prejudice arbitral process; (iii) means of preserving assets; and (iv) preserving evidence.

Of course, parties also have to demonstrate to the court that there is harm which is not reparable by damages and there is a reasonable prospect of success by the party that argues the right. From the analysis of the Rules of the institutions[18], such as the LCIA Rules[19], the SIAC Rules[20], the ICC Rules[21] and the SCC Rules 2010[22][23] we can state clearly that the Rules generally provide that the request to a judicial authority for

interim measures will not be deemed incompatible with the agreement to arbitrate.

15. Most of the prestigious institutions have adopted the emergency arbitrator[24], notably the ICC Rules 2012, Art.29 and Appendix V; the SIAC Rules 2010, Art.26 and Schedule 1; the ICDR Rules 2009[25], Art.37; the SCC Rules 2010, Appendix II and the Swiss Rules 2012, Art.43. Absence of procedure does not prevent the parties of agreeing to their own expedited timetable and it may be limited to lower value disputes[26].

Regarding the procedure we can state that the difficulty with interim measures from the Tribunal is the time allied with a consensual process, though major sets of arbitration Rules from highly regarded institutions are moving towards procedures such as the procedure for the appointment of an emergency arbitrator. Also, most of these major sets of arbitration Rules allow for the appointment of an EA to grant urgent relief before the AT has been constituted.

16. Contractual disputes are to be settled by the court unless parties select arbitration. The main purpose why parties choose arbitration to litigation is that arbitration is led in a confidential (or private) way and has swift proceedings, in addition parties appoint knowledgeable and experienced arbitrators on the matter in question.

In structuring the arbitration proceeding there are a lot of example of pieces of party autonomy for arbitration, notably and among others: (i) parties may agree on an arbitration institution or ad hoc arbitration; (ii) appointment of arbitrator (one or three, normally); (iii) the arbitration rules of an arbitration institution or the UNCITRAL Arbitration Rules; (iv) arbitration procedure; (v) place of arbitration; and (vi) governing law. Thus, the parties may structure the arbitration as negotiated in accordance with party autonomy and the national governing law regarding contracts.

Party autonomy means consent given by the parties to arbitrate under a set of rules and those rules may or may not include the EA Rules. If parties agree to arbitrate choosing arbitration Rules as governing any dispute between the parties should also state the explicit consent to the EA procedure because normally the Rules from the institution are available to the parties in a package[27], i.e. when parties chose the ICC Rules they cannot opt out from scrutiny of the award.

17. Parties may opt out on the Rules regarding EA and may only opt in once again in the Parties agree to such at a later period.

Another question that most Rules have not addressed is whether or not it is applicable to EA confidentiality[28]. We believe that if this provision is missing in the Rules, then the parties have to agree on confidentiality[29] for it to be binding in relation to the EA. One of the major arguments in favour that there be consent when the parties chose certain and specific Rules of a reputed institution is the fact that the parties can opt out.

18. Consent is also important to the parties due to the fact that the EA procedure is very different from a traditional arbitral procedure. We can also conclude that the Rules, in general, regarding the EA procedure are very time limited if one of the parties wants to challenge to arbitrator[30], also and because the procedure is very efficient, EA has to establish a swift timetable for the decision[31]. EA may require security if it deems necessary to assure the equal right to be heard and equal treatment of the parties. It is also undisputed that the emergency arbitrator's jurisdiction is withdrawn once a Tribunal is appointed.

Of course, the EA orders are subject to review by the AT and the EA procedure does not prevent an application to a national court. In relation to enforcement, this will be addressed in the following chapters, along with some thoughts / controversy[32] on the enforceability of an order by an EA, which under the NYC wording is the 'final award'.

F) Is the EA a true arbitrator?

If parties choose the rules of institutions which provide for EA proceedings, one may assume that parties are allowed to use this figure. The parties consent is evident. Patricia Shaughnessy argues that "The parties are deemed to consent to the application of the rules in existence at the time they commence arbitral proceedings and not the rules in effect at the time that they entered into the arbitration agreement."[33]

19. Article 2(2) (Draft) Revised UNCITRAL Arbitration Rules[34] provides: "The parties to an arbitration agreement concluded after [date of adoption by UNCITRAL of the revised version of the Rules] shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after [date of adoption by UNCITRAL of the revised version of the Rules] an offer made before that date."

In case of imprecise clauses where there is only a mere reference to the rules of the institution we could have two sets of rules potentially applicable; the first set of rules applies to the date on which the parties entered into the arbitration agreement and a second on the date on which the party initiated the arbitration proceedings or requested the appointment of the EA from the institution.

For Patricia Shaughnessy: "It is often accepted today that, when arbitration rules are revised, the new rules will apply to arbitrations commenced after the date of the applicability of the new rules, unless the parties have specifically agreed otherwise."[35] Nevertheless, parties can also argue that they had expectations regarding the timelessness of such Rules and in this sense – parties resistant to arbitrate[36] – will evoke lack of consent.[37]

Patricia Shaughnessy commenting a Swedish[38] case argues that: "In a recent Swedish case, the Svea Court of Appeal confirmed this approach when it held that the current SCC Rules were applicable to an arbitration commenced after the date of entry into force of the new Rules, although the Rules were revised after the parties entered into the arbitration agreement."[39]

20. One dangerous area for EA users is that the appointment of the arbitrator is a fundamental principle of arbitration[40] and a solid expression of the consent of the parties. Therefore pre-arbitral relief, prior to the commencing[41] of arbitration proceedings it may not reflect the existence of consent in relation to the[42] arbitration Rules.

21. We can also come to have arbitrators who refuse to accept the appointment of an EA, as these have limited knowledge of the case or parties, which may be a concern regarding independence, impartiality and duty of disclosure. It may be a matter of reputation[43].

Fraraccio argues that: "The authors of the New York Convention did not intend that it apply to preliminary or interim measures, as it is a Convention for the enforcement of arbitral awards, not orders") and at 265 arguing that: "ex parte measures in international arbitration are contradictory to the consensual nature of arbitration; offend the basic arbitral principle of equality between the parties (...); are difficult to enforce; make prejudiced arbitrators; and are unable to meet the timely demands of the parties. As a result of these problems (...) ex parte provisions (...) run (...) the risk of adversely affecting the proper development of international arbitration.".[44]

On the other hand, Born suggests that ex parte relief in arbitration "(...) virtually never makes any sense or accomplishes any serious purpose (...)"[45] since an arbitral tribunal cannot issue immediately effective coercive relief.

22. Consent is commonly withdrawn from lex arbitri and Rules that provide for such powers, but not from the application for interim measures. Parties settling to arbitrate may be deemed to have acknowledged such powers of the EA accordingly to party autonomy.

Part II – The consent of EA - party autonomy

G) The tenuous line of consent - arbitration and party autonomy:

23. Party autonomy is both essential and a pillar of arbitration. Arbitration is carefully chosen and designed by an agreement of the parties. For Redfern: "Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitration institutions and organizations. The legislative history of the Model Law shows that the principle was adopted without opposition...".[46]

UNCITRAL Model Law in its Art. 19(1) sets forth the following provisions on party autonomy: "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". Some restrictions apply to the arbitration procedure because it must comply with mandatory rules of lex arbitri and law of the place of arbitration, in the event that they are different from each other. Parties have to respect the form and content and also indicate with accuracy the correct name of the arbitral institution and its rules.

Patricia Shaughnessy argues that that the EA relief proceeding may be seen as a "separate arbitral procedure".[47] However, she goesahead and states that "It could be argued that when agreeing to SCC arbitration, parties actually agree to two separate but relatedarbitrations. They agree to arbitrate pre-arbitral interim relief requests in a special expedited proceeding and they also agree to arbitrate themain claims."[48]

24. Therefore we could have two lines (figures 1 and 2, page 45) of consent in relation to the SCC rules.

25. On the other hand, we believe that there is just one line of consent (figure 3, page 45).

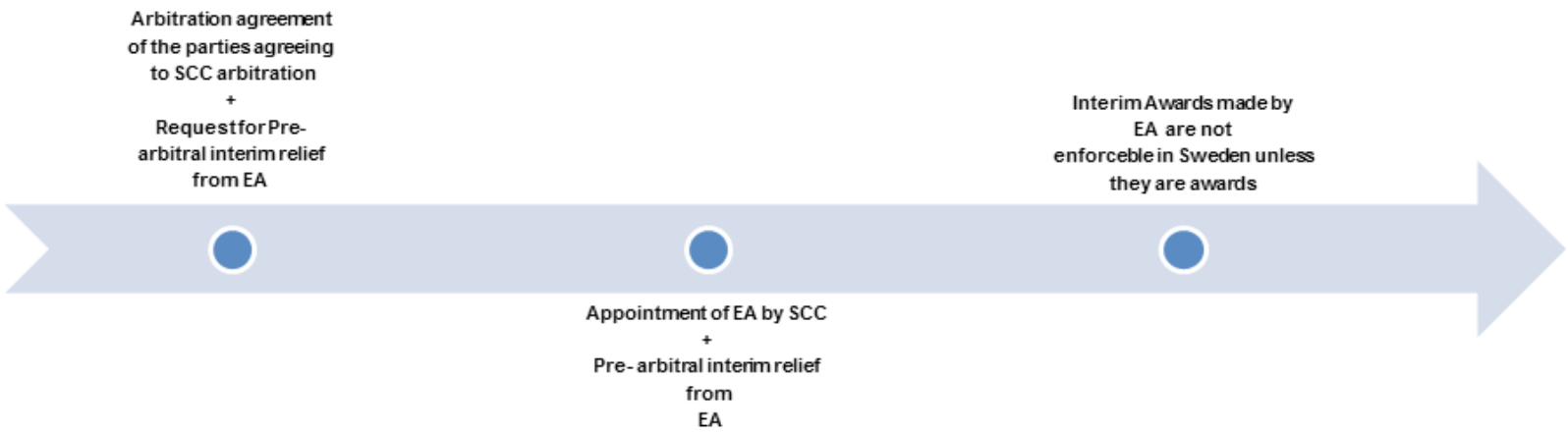

FIGURE 1 – First Arbitration[49] Agreement SCC

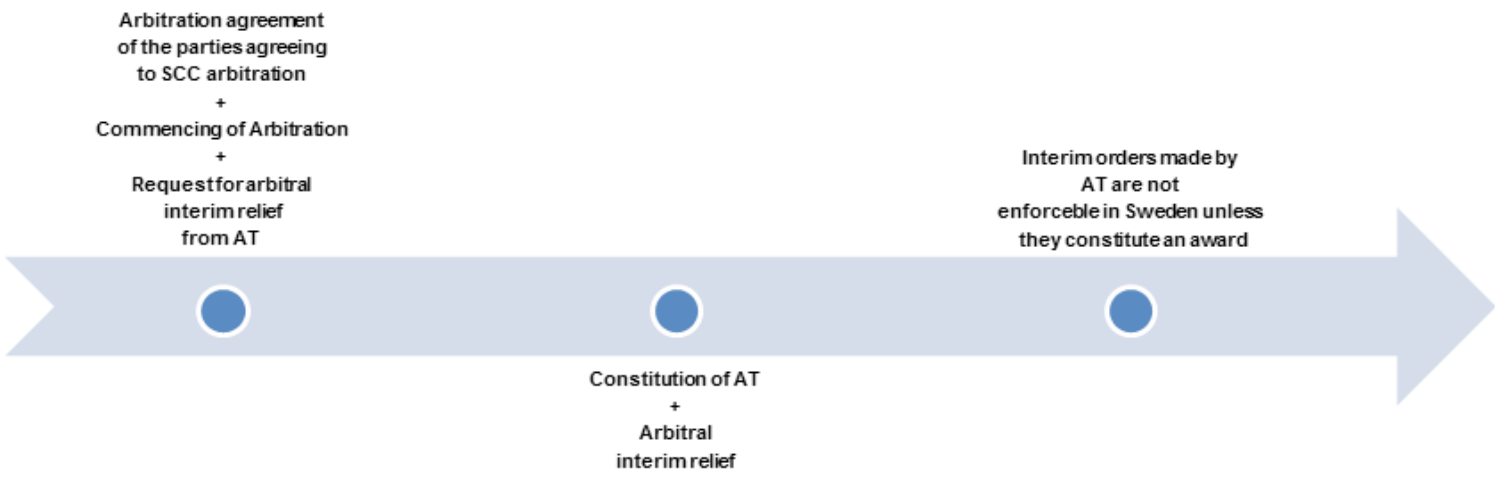

FIGURE 2 – Second Arbitration[50] Agreement SCC

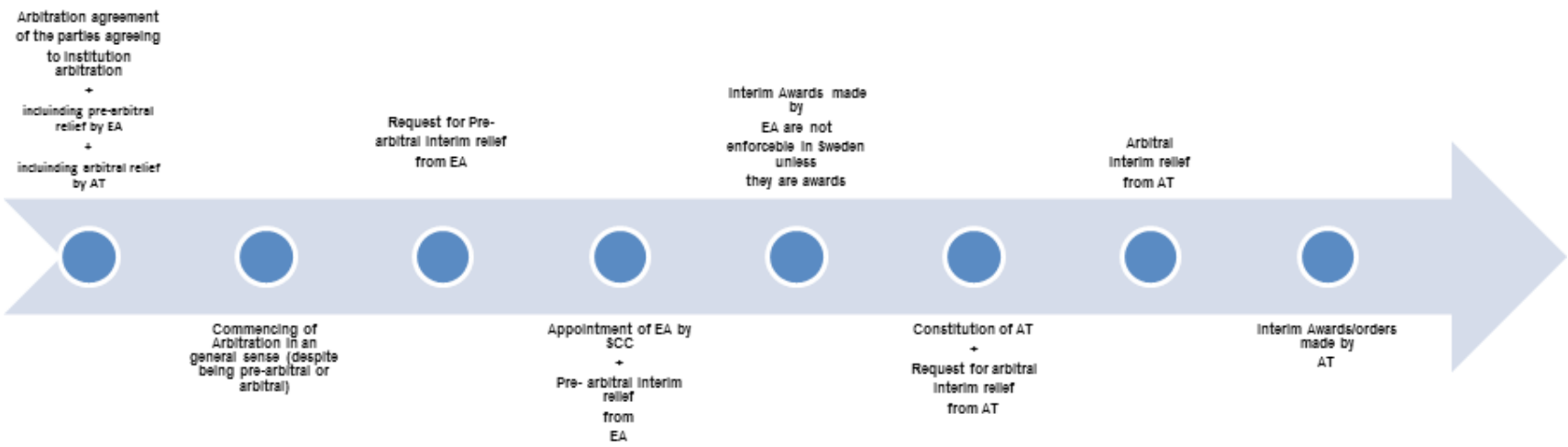

FIGURE 3 – A SINGLE ROW OF CONSENT.

Part III - Interim relief prior to the constitution of the AT

H) In general

26. It is known that the constitution of an AT may take a considerable amount of time. Before the AT is constituted, the party seeking to impose interim measures often has no choice but to attempt to obtain relief from a judicial court of the competent state. In many cases, the party will find their needs met if the court grants the relief requested and such relief may be implemented accordingly. In other cases, however, the application of a state court cannot be an option. In some cases, it may be impossible, e.g. where the parties validly excluded any jurisdiction of the State, including the power to grant interim measures.

To grant interim relief by the AT, there are two commonly established requirements:(i) the lack of a judgment in relation to the case, and (ii) the threat of irreversible or considerable harm which cannot be fully compensated by damages.

The requirement of a worthy arguable case on the merits, is a less important prerequisite for interim relief, due to the fact that in arbitration the same AT will deal with both issues: granting interim relief and dealing with the merits on the case.

Contrasting to the arbitration reality in court proceedings the judge granting interim relief will frequently be different from the judge dealing with the merits of the case. As a result, the merits of the case hardly ever play a direct role in deciding whether or not interim relief is granted. Parties must prove with the request for an interim measures that it is necessary to grant real protection for the relief required in the main proceedings and to prevent irreversible harm to the Applicant of the request.

27. In this respect, “irreparable” or “irreversible” must be assumed in a pecuniary sense, i.e. parties must take into account the fact that sometimes is not possible to reward damages for concrete costs suffered on business reputation. There has been a lot of discussion on the urgency prerequisite. AT will also try to balance the contradictory interests involved and issue orders

giving possibility for security.

28. We can see at least three essential technical matters for AT on granting interim measures of protection: (i) relief must be requested by a party; (ii) AT must have jurisdiction; (iii) urgency; (iv) the tribunal must guarantee that the parties' right to be heard is respected, therefore it is not possible to grant interim measures ex parte; (v) imminent hazard and severe prejudice if the measure requested is not granted; and (vi) proportionality.

The AT must deny the application for a provisional measure if the so-called negative requirements are fulfilled, namely: (i) If the application should not involve going-over of merits of the case; (ii) AT might abstain from granting final relief in the form of an interim measure; (iii) request maybe repudiated if the measure is not capable of being executed; (iv) measure requested by the parties is not capable of stopping the so-called harm; and (v) request may be denied where it is uncertain.

29.There is a need for urgent interim reliefs in arbitration because parties frequently necessitate urgent interim reliefs at the time of commencement of arbitration proceedings. Normally it has to do with safeguarding assets that are connected with subject matter of the arbitration itself. Parties also seek to request such measures to preserve documents or goods or other form of interim reliefs to guarantee the maintenance of the status quo pending the dispute.

Customarily, a party can only pursue interim relief from an AT when it is suitably established. On the other hand, the constitution of an AT can frequently take months mostly where the AT is not a solo arbitrator but consist of three arbitrators (the most standard number of arbitrators in international arbitration agreements). Indeed, the interim relief request may be essential because assets can be dissipated in the period in-between. Therefore the necessity for a remedy it is important with the very commencement of the arbitration.

Several arbitral institutions have the option for obtaining interim reliefs to domestic courts but parties may wish to avoid litigating in foreign jurisdictions; particularly important in judicial systems known for delays. Another thing that can discourage the parties from using state courts to litigate are the complex characteristics of arbitration.

30. Most countries have mandatory rules regarding arbitration proceedings where courts have the power to grant interim reliefs in support of such proceedings. However, sometimes to pursue interim relief from the courts would be at the cost of delayed and very expensive litigation and most of the times with completely random outcomes.

The recently introduced emergency arbitration procedure in several institutions provides an outstanding option to some of the main problems of seek interim relief in court. It allows a party to seek urgent interim reliefs from an EA, without the already mentioned drawbacks. While an interim order granted by an EA may not by itself be enforceable in most jurisdictions, some countries offer means to make such an order enforceable[51].

The EA along with its procedure addresses a much desirable gap in arbitration law and practice and it is supposed to see parallel rules being duplicated of other international arbitral institutions. It is not mandatory that parties opt-in to an EA. Therefore it is noteworthy that the emergency arbitration procedure applies by default, as a result of which requests for the granting of emergency arbitral relief may become common in an upcoming future. The creation of the emergency arbitration process was much looked-for and is commendable.

31. The EA provisions will only apply to parties that are signatories of the arbitration agreement or successors to the prior signatories. In addition, the EA provisions normally do not apply if: (i) the arbitration agreement under the Rules was concluded before a certain date (date that is normally the date in which the rules come into force); (ii) the parties may or not have opted out of the EA Provisions[52]; and (iii) parties have agreed to another pre-arbitral procedure that may provide similar measures.

The Pre-Arbitral EA procedure is exclusively intended to encounter those emergency cases demanding at very tiny notice a temporary measure. Therefore it should not be taken in any way as a substitute of arbitration itself or state courts with respect to the material of a dispute, but just as a way of getting quickly an urgently required interim measure. The EA has the power of ordering provisional conservatory measures before a court or AT is held on the merits.

The option to the EA procedure must be based on a written arbitration agreement. Therefore, in the absence of any written agreement, the urgent measures may be demanded to a court or to an EA. The EA procedure normally can be separated into four main parts: (i) request for EA; (ii) appointment of the EA; (iii) the proceedings itself and (vi) the order or award.

I) Courts

32. However, even if not impossible, it may be inconvenient or otherwise undesirable for a party to seek interim measures from a state court for interim measures. Applying to a state court is arguably against the original intention of the parties to exclude such courts of their disputes, i.e, against the reason they entered into an arbitration agreement in the first place.

33. This is especially true in cases where the parties have chosen arbitration, because they have a particular wish for confidentiality, or choose arbitration because the nature of their relationship requires special knowledge that the state court cannot have. In other cases, the requested relief may not be available from state court jurisdiction, which will usually be linked to its own lex fori when determining the content of the provisional measures.

Finally, the party seeking interim measures may not be willing to resort to the state courts in the territory of his opponent and the laws of this state, having avoided this situation by opting for arbitration on the ground "neutral" and according to the laws "neutral ".

34. The party in need of urgent interim or precautionary measures that cannot await the constitution of an AT (defined as "emergency measures") may file a request for such measures in accordance with the Rules of the EA[53].

J) Differences between the interim relief issued by an AT and an EA

35. For a long time, the possibility for an AT to issue interim relief was closed off, and most limitations derived from lex fori. Currently, the arbitrators may order interim measures for the production of evidence: (I) preserve assets; (ii) freezing of assets; (iii) orders (status quo) protect i.e. arbitration process; (iv) injunctions; and (v) continue performance.

K) Interim relief issued by an AT

36. Arbitration traditionally does not allow ex-parte orders and pursuant to art. 17 J of Model Law, there are limited circumstances where arbitrators can award interim orders.[54]

Redfern and Hunter also identify five situations where AT powers may be insufficient, therefore favoring national courts: (i) no powers (as a result of domestic legislation); (ii) inability to act prior to the formation of the tribunal; (iii) an order can only affect parties to the arbitration; (iv) enforcement difficulties (no signatory's to the NYC) and (v) no ex parte application.[55]

The Channel Tunnel case[56] states the following: "(...) There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter consideration must prevail (...) If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide. (...)"

37. We can identify some categories of interim measures among others like measures relating to the attendance of witnesses; measures related to preservation of evidence; measures related to documentary disclosure; measures aimed at preserving the status quo; measures aimed at relief in respect of parallel proceedings. Parties must satisfy the three requirements mandatory to obtain a preliminary injunction[57] specifically likelihood of success on the merits, danger of irreparable injury and a balance of the equities in its in favour. No pre-judgment of the case and the threat of irreparable or substantial harm which cannot be compensated for by damages are at least two widely agreed substantive requirements for the granting of interim relief by the AT in International arbitration practice. For an AT to grant interim measures of protection relief they must be requested by a party, the AT must have jurisdiction over the parties and the AT must ensure that the parties' right to be heard is respected.

L) Interim relief issued by an EA

38. Interim relief ordered by an EA allows parties to pursue interim relief prior to the constitution of the AT and prior to the beginning of arbitral proceedings[58].

Normally, arbitral institutions receive the request for

the appointment of an EA and said request is addressed to the Institution secretariat. Then the secretariat is bound with the obligation of notifying the party against whom the application is addressed. The party that requests the appointment of an EA must know the last address of party against whom the application is addressed to be possible for the secretariat of the institution to provide notification of the application by courier service. Interim relief issued by an EA means that ex parte requests are not permissible.

M) The EA in Portugal – is it possible?

39. For purposes of analysis we will consider only the rules of the Portuguese Chamber of the Commerce and Industry - Lisbon Commercial Association[59] Arbitration Centre created in 1834[60], the most prestigious institution to administer arbitrations proceedings in Portugal.

Pursuant to Art. 4 of the ACL[61] regarding interim measures (i) save as otherwise expressly agreed by the parties, acceptance of these rules shall involve granting the AT powers to order appropriate interim measures and (ii) the AT may make the granting of any such measures subject to appropriate security.

The new framework established by Law n. o 63/2011, of 14 December, which approves the Portuguese Act, it is clear that it is possible to consider the adoption of Rules on the EA.

One of the systemic issues that we consider is whether the procedure regarding the creation of rules that incorporated the set of rules already defined or on the contrary may be made to contain the new rules regarding the EA as an Appendix[62]. We believe that the best solution will include the incorporation of rules for the inside of the AE set of rules already established. Thus, it avoids the possibility that the parties may raise an objection later on the grounds that they did not agree on the Rules of the EA in the Appendix.

40. The possible clause to be adopted by the ACL or other institutions in Portugal is as follows:

1.1. Clause Recommend and in force as of (...): *Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Rules for (...) Arbitrations of the Arbitration Institute of the (...) Chamber of Commerce. Unless the parties agree otherwise, the provisions regarding the Emergency Arbitrator shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after (...).*

1.2 Recommended additions: *The seat of arbitration shall be (...). The language to be used in the arbitral proceedings shall be (...). This contract shall be governed by the substantive law of (...)*

1.3 Table: Article (...) Emergency Arbitrator

Article (...) Application for the appointment of an Emergency Arbitrator
Article (...) Notice
Article (...) Appointment of the Emergency Arbitrator
Article (...) Seat of the emergency proceedings
Article (...) Referral to the Emergency Arbitrator
Article (...) Conduct of the emergency proceedings
Article (...) Emergency decisions on interim measures
Article (...) Binding effect of emergency decisions
Article (...) Costs of the emergency proceedings

1.4 Rules proposal:

EMERGENCY ARBITRATOR

Article (...) Emergency Arbitrator

1. A party in need of emergency relief prior to the constitution of the tribunal shall notify the administrator and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis.

2. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by e-mail, facsimile transmission or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

3. The powers of the Emergency Arbitrator shall be those set out in Article (...) of the Rules. Such powers terminate when the case has been referred to the Arbitrator pursuant to Article (...) of the Rules or when an emergency decision ceases to be binding.

Article (...) Application for the appointment of an Emergency Arbitrator

An application for the appointment of an Emergency Arbitrator shall include:

i) a statement of the names and addresses, telephone and facsimile numbers and e-mail addresses of the parties and their counsel;

ii) a summary of the dispute;

iii) a statement of the interim relief sought and the reasons therefor;

iv) a copy or description of the arbitration agreement or clause on the basis of which the dispute is to be settled;

v) comments on the seat of the emergency proceedings, the applicable law(s) and the language(s) of the proceedings; and

vi) proof of payment of the costs for the emergency proceedings pursuant to Article (...).

Article (...) Notice

As soon as an application for the appointment of an

Emergency Arbitrator has been received, the Secretariat shall send the application to the other party.

Article (...) Appointment of the Emergency Arbitrator

1. An Emergency Arbitrator shall not be appointed if the SCC manifestly lacks jurisdiction over the dispute.

2. The Board shall seek to appoint an Emergency Arbitrator within 24 hours of receipt of the application for the appointment of an Emergency Arbitrator[63].

3. Parties may challenge the Emergency Arbitrator but it must be made within 24 hours from when the circumstances giving rise to the challenge of an Emergency Arbitrator became known to the party.

4. Prior to accepting appointment, a prospective Emergency Arbitrator shall disclose to the Registrar any circumstance that may give rise to justifiable doubts as to his impartiality or independence.

5. An Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless otherwise agreed by the parties.

Article (...) Seat of the emergency proceedings

The seat of the emergency proceedings shall be that which has been agreed upon by the parties as the seat of the arbitration. If the seat of the arbitration has not been agreed by the parties, the Board shall determine the seat of the emergency proceedings.

Article (...) Referral to the Emergency Arbitrator

Once an Emergency Arbitrator has been appointed, the Secretariat shall promptly refer the application to the Emergency Arbitrator.

Article (...) Conduct of the emergency proceedings

1. The Emergency Arbitrator shall, as soon as possible but in any event within 48 hours of appointment, establish a schedule for consideration of the application for emergency relief.

2. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceedings by telephone conference or on written submissions as alternatives to a formal hearing.

3. The Emergency Arbitrator shall have the powers vested in the Arbitral Tribunal pursuant to these Rules, including the authority to rule on his own jurisdiction, and shall resolve any disputes over the applicability of the Emergency Arbitrator Rules.

Article (...) Emergency decisions on interim measures

1. The Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary.

2. Any emergency decision on interim measures shall be made not later than 5 days from the date upon which the application was referred to the Emergency Arbitrator pursuant to Article (...). The Board may extend this time limit upon a reasoned request from the Emergency Arbitrator, or if otherwise deemed necessary.

3. The Emergency Arbitrator shall give reasons for his decision in writing, state the date when it was made, the seat

of the emergency proceedings and the reasons upon which the decision is based and be signed by the Emergency Arbitrator.

4. The Emergency Arbitrator shall promptly deliver a copy of the emergency decision to each of the parties and to the "name of the institution".

5. The Emergency Arbitrator may modify or vacate the interim award or order for good cause shown.

6. The Emergency Arbitrator shall have no further power to act after the Arbitral Tribunal is constituted.

7. The Arbitral Tribunal may reconsider, modify or vacate the interim award or order of emergency relief issued by the Emergency Arbitrator. The Arbitral Tribunal is not bound by the reasons given by the Emergency Arbitrator.

8. Any interim award or order of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.

9. These Rules shall apply as appropriate to any proceeding pursuant taking into account the inherent urgency of such a proceeding.

10. The Emergency Arbitrator may decide in what manner these Rules shall apply as appropriate, and his decision as to such matters is final and not subject to appeal.

Article (...) Binding effect of emergency decisions

1. An emergency decision shall be binding on the parties when rendered.

2. The emergency decision may be amended or revoked by the Emergency Arbitrator upon a reasoned request by a party.

3. By agreeing to arbitration under the Rules the parties undertake to comply with any emergency decision without delay.

4. The emergency decision ceases to be binding if:

i) the Emergency Arbitrator or an Arbitrator so decides;

ii) an Arbitrator makes a final award;

iii) arbitration is not commenced within 30 days from the date of the emergency decision; or

iv) the case is not referred to an Arbitrator within 90 days from the date of the emergency decision.

5. An Arbitrator is not bound by the decision(s) and reasons of the Emergency Arbitrator.

Article (...) Costs of the emergency proceedings

1. The party applying for the appointment of an Emergency Arbitrator shall pay the costs of the emergency proceedings upon filing the application.

2. The costs of the emergency proceedings include:

i) the fee of the Emergency Arbitrator which amounts to EUR (...); and

ii) the application fee which amounts to EUR (....)

iii) Upon a request from the Emergency Arbitrator or if otherwise deemed appropriate, the Board may decide to increase orreduce the costs having regard to the nature of the case, the work performed by the Emergency Arbitrator and the "name of institution", and other relevant circumstances.

iv) If payment of the costs of the emergency proceedings is not made in due time, the Secretariat shall dismiss the application.

v) At the request of a party, the costs of the emergency proceedings may be apportioned between the parties by an Arbitrator in a final award.

41. At this time and due to the recent legislative changes in Portugal (the Portuguese Arbitration Act), there are no legal obstacles for institutions adopt this new instrument that is the EA in its rules. In this way, the institutions help parties resort to arbitration to resolve disputes achieve justice and promote the liberation and independence of international and domestic arbitration.

N) Brief conclusions

42. The EA is assumed to be a true arbitrator. If parties agree within their private autonomy to allow an arbitrator to issue orders or awards - even if these orders or awards are "temporary" and will only last for a certain period of time – they are binding and final for the parties. And here lies the consent from parties to arbitrate the dispute, including rules on EA.

43. During this time they are enforceable and have the same characteristics of an award and respect all the requirements of the NYC. The relief from a EA is concurrent with the courts and it is not consider a waiver. It clear that the parties choose institutions rules and wish to accept a set of rules because they believe that they will better protect their interests.

44. The rules concerning the EA are not mandatory and exclusive; they can be negotiated by the parties. Therefore, nothing prevents two or more parties from entering into a contract containing an arbitration agreement and chose not to adopt the EA Rules.

45. The seat of arbitration may not be the place where the assets are situated and therefore it is easy to go to court because parties may get an award against third parties or where ex parte relief is needed, also, the cost of EA will also to have to be taken into account.

46. The EA is the right tool for the job if the parties wish to obtain relief and they cannot await the commencement of the AT or the lateness of national courts specifically where the measure may be required before the notice for the commencing of arbitration is filed. Parties will be able to use the EA Rules where the applicable rules permit for inter parties relief.

47. Summarizing, the new Rules of the EA are a well-adjusted solution under the auspices of the SCC, ICC, SIAC and ICDR. These institutions have accomplished to improve a device that will encourage the desirability of the arbitration and which will assist the parties that chose to start arbitration proceedings in those institutions. It is an efficient solution to protect parties' rights for many years to come.

48. Clearly, the new Portuguese legal framework (Law n. o 63/2011, of 14 December[64], which approves the Portuguese Act on Voluntary Arbitration), allows that all Portuguese institutions can implement EA and have it available to those who seek to resolve their disputes through arbitration. It will certainly be in the interest of the parties who choose Portugal as the seat of arbitration

49. In short, the new Rules of the EA under the auspices of the SCC, ICC, SIAC and ICDR are a virtuous tool that will endorse the prestige of the arbitration and attend to the party's needs.

Ana Caetano

1. This article is based on the Author's thesis submitted in May 2013 in the LL.M Programme in International Commercial Arbitration Law at University of Stockholm in Sweden - 2012/2013.
2. See Patricia Shaughnessy, "The New SCC Emergency Arbitrator Rules", Chapter 33, Between East and West: Essays in Honour of Ulf Franke, page 461: "Under both the SCC Rules and the Swedish Arbitration Act, the arbitrators have more flexibility to order interim measures than does a Swedish court." And Lars Heuman, Arbitration Law in Sweden: Practice and Procedure, (2003), page 334, "(…) the power of (arbitrator) decision-making may concern measures upon which a Swedish court has no competence to decide."
3. Patricia Shaughnessy argues in "The New SCC Emergency Arbitrator Rules", Chapter 33, Between East and West: Essays in Honour of Ulf Franke, page 464: Some arbitration users have indicated that it is insufficient to have access to interim measures within the arbitration process only after an arbitral tribunal has been constituted. These users claim that there is a need for parties to be able to obtain urgent remedies at the outset or prior to the start of arbitral proceedings without having to resort to a national court."
4. See Patricia Shaughnessy, "The New SCC Emergency Arbitrator Rules", Chapter 33, Between East and West: Essays in Honour of Ulf Franke, page 461: "Certainly, by agreeing to arbitrate parties may be deemed to have agreed to such arbitrator powers, thus having exercised their party autonomy. But this consent is usually inferred from the agreement to arbitrate under the lex arbitri and any rules which provide for such powers, rather than a specific consent to submit to interim proceedings."
5. Rau, Alan Scott, Arbitral Jurisdiction and the Dimensions of "Consent", 24 ARBITRATION INT'L 199 (2008).
6. FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, E. Gallaird and J. Savage (eds.)(1999), pp. 253-280.
7. Fouchard, Gaillard, Goldman rejects the idea that arbitration agreements should not be interpreted restrictively, and likewise, that they should not be interpreted expansively. This is indeed an idea that protects the users' of arbitration, because the arbitral community must protect parties that have undoubtedly chosen to arbitrate, though they must protect the party that is dragged into an arbitral proceeding without wanting.
8. Born, Gary B., INTERNATIONAL COMMERCIAL ARBITRATION VOL. I (2009), pp. 644-649, 653-655.
9. Comandate Marine Corporation v. Pan Australia Shipping [2008] 1 Lloyd's Rep. 119, [2006] FCAFC 192 at para. 165: "This liberal approach is underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places. (…) The benevolent and encouraging approach to consensual alternative non-curial dispute resolution assists in the conclusion that words capable of broad and flexible meaning will be given liberal construction and content. This approach conforms with a common sense approach to commercial agreements, in particular when the parties are operating in a truly international market and come from different countries and legal systems and it provides a appropriate respect for party autonomy."
10. According to the Section 2 of the SAA arbitrators may rule on their own jurisdiction, but parties may take the issue before a court from the outset.
11. First Options of Chicago, Inc. v. Kaplan (94-560), 514 U.S. 938 (1995).
12. The Principle that the arbitration agreement is a separate agreement from the underlying agreement in which it is found.
13. This principle was adopted by SIAC Rules 2010, Art.25.2 and ICC Rules 2012, Art.6.3., were it states clearly that If the underlying agreement is invalid, this will not affect the validity of the arbitration agreement.
14. International agreement now is that challenges to the jurisdiction should be deal with first and foremost by the Tribunal. It is now on SIAC Rule 2010, Art.25, ICC Rules 2012, Art.6, Uncitral Arbitration Rules 2010, Art.23 (Model Law, Art.16) and Arbitration Act 1996 (UK), s.30 and s.32(3)
15. See Bundesgerichtshof decision of 27 Feb 1970 (1990) Arbitration International vol 6, no. 1, p.79 Rules on: "There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising therefore, irrespective of whether their contract is effective or not decided by the same tribunal and not by two different tribunals"
16. For better developed see Vee Networks Ltd. v Econet Wireless International Ltd. [2004] APP.L.R. 12/14.
17. Law of the seat.
18. The arbitration rules of the Netherlands Arbitration Institute (Art. 42a-o) contain similar provisions.
19. Art. 25
20. Art. 26
21. Art. 28
22. CC Rules 2010, Appendix II.
23. See, in general, Magnusson and Shaughnessy, "The 2007 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce," Stockholm International Arbitration Review, 2006:3, pages 33–66.
24. Indeed, these Rules are expedited procedures that the parties may adopt that are not concerned with interim measures per se but mechanism to enable swift resolution of dispute.
25. Established in 1996 as the international division of the American Arbitration Association, the International Centre for Dispute Resolution.
26. See for example KCAB International Arbitration Rules 2011, Art.38.
27. Indeed the basic procedure is that the application is submitted by one party only and then the appointing authority makes appointment of EA from panel.
28. Pursuant to Art. 34 of the ICDR Rules, both arbitrators and administrators are under an ethical obligation to keep information about their cases confidential. Unless they have a separate confidentiality agreement it seems that they are free to disclose and in cases of public governmental entities the award is public.
29. Regarding SCC rules, see Patricia Shaughnessy, "The New SCC Emergency Arbitrator Rules", Chapter 33, Between East and West: Essays in Honour of Ulf Franke, page 466: "Thus, a general rule, such as Article 47 dealing with confidentiality, also applies to the emergency arbitrator proceedings, unless otherwise specifically provided."
30. Normally in one day time.
31. Within two days.
32. See Patricia Shaughnessy, "The New SCC Emergency Arbitrator Rules", Chapter 33, Between East and West: Essays in Honour of Ulf Franke, page 463:"Debates become

especially lively when considering ex-parte interim measures. Opinions also differ as to whether arbitrator-ordered interim relief should be enforceable and whether such decisions should take the form of an order or award."

33. Patricia Shaughnessy, 'Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules' (2010) 27 Journal of International Arbitration, Issue 4, pp. 337–360.
34. Note by the Secretariat, Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, supra note 24, at 3. See also Secretariat's Note on the Revision of the UNCITRAL Rules, Working Group II (Arbitration) 49th Sess., Vienna, Sept. 15–19, 2008, U.N. Doc. A/CN.9/WG.II/WP.151, at 3, available at <http://daccessdds.un.org/doc/UNDOC/LTD/V08/558/46/PDF/V0855846.pdf?OpenElement.
35. Patricia Shaughnessy, 'Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules' (2010) 27 Journal of International Arbitration, Issue 4, pp. 337–360.
36. See, in general, Patricia Shaughnessy, 'Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules' (2010) 27 Journal of International Arbitration, Issue 4, pp. 337–360, specifically: "The key issue is whether the parties have consented to pre-arbitral proceedings when they entered into an arbitration clause prior to the entry into force of the revised rules which include pre-arbitral proceedings. Arbitration requires consent and so do pre-arbitral procedures. Have the parties consented to an emergency arbitrator issuing orders or even awards, especially prior to the commencement of arbitration? The retroactive application of rules generally rests on the assumption that the parties would want to apply the most updated version (which will presumably be the most efficient as the revisions are intended to improve the process) and the further assumption that if they did not want this, they would have provided otherwise. This leads to justifying the application of current rules on a theory of implied consent."
37. Patricia Shaughnessy, 'Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules' (2010) 27 Journal of International Arbitration, Issue 4, pp. 337–360: "In some instances, parties might argue that their agreement to arbitrate may be materially changed by including pre-arbitral relief, thus undermining the consent to "arbitrate" at least as regards the pre-arbitral proceedings."
38. Auto Connect Sweden A.B. v. Consafe IT A.B., T 754-09, 2009-05-18 (Svea Court of Appeal).
39. Patricia Shaughnessy, 'Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules' (2010) 27 Journal of International Arbitration, Issue 4, pp. 337–360.
40. See Peter J.W. Sherwin and Douglas C. Rennie, "INTERIM RELIEF UNDER INTERNATIONAL ARBITRATION RULES AND GUIDELINES: A COMPARATIVE ANALYSIS", American Review of International Arbitration, Vol. 20, p. 330, 2010. States that: "Opponents have noted that ex parte procedures contradict the nature of arbitration, which is a product of the parties' consent, and are otherwise practically unfeasible".
41. See Jarrod Wong, "The Issuance of Interim Measures In International Disputes: A Proposal Requiring a Reasonable Possibility of Success on the Merits", 33 GA. J. INT'L & COMP. L. 605, 615. The Working Group has proposed that "the presumption that parties have referred to the Rules in effect at the date of commencement of the arbitration applies only to arbitration agreements concluded after the adoption of the revised version of the Rules." Id. at 3.
42. See, Patricia Shaughnessy, 'Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules' (2010) 27 Journal of International Arbitration, Issue 4, pp. 337–360 argues that: "A revision of the SCC Rules to include an emergency arbitrator procedure on an opt-out basis applied retroactively to arbitration agreements entered into prior to the existence of the EA Rules may test the limits of consent. When the ICDR introduced its emergency arbitrator procedure, it made its opt-out procedure applicable to all cases based on an arbitration agreement entered into after May 1, 2007, the date that the emergency procedure became effective."
43. See, Jarrod Wong, The Issuance of Interim Measures In International Disputes: A Proposal Requiring a Reasonable Possibility of Success on the Merits, 33 GA. J. INT'L & COMP. L. 605, 615 argues that. "(…) n the case of international arbitration, because arbitrators for the most part sit by appointment on the consent of the parties, their perceived ability to decide disputes impartially is an aspect of their professional reputation that they zealously guard. They may tend, therefore, to be more sensitive to avoiding the appearance of prejudging any dispute.".
44. Victoria M. Fraraccio, Ex Parte Preliminary Orders in the UNCITRAL Model Law on International Commercial Arbitration, 10 VINDOBONA J. INT'L COM. L. & ARB. 263, 271- 72 (2006)
45. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1960-61 (2009) at 2017-19.
46. A. Redfern and M. Hunter, with N. Blackaby and C. Partasides, Law and Practice of International Commercial Arbitration, 4th Edition, 2004 at p. 265.
47. See Patricia Shaughnessy, "The New SCC Emergency Arbitrator Rules", Chapter 33, Between East and West: Essays in Honour of Ulf Franke, page 472.
48. See Patricia Shaughnessy, "The New SCC Emergency Arbitrator Rules", Chapter 33, Between East and West: Essays in Honour of Ulf Franke, page 472.
49. See Patricia Shaughnessy, "The New SCC Emergency Arbitrator Rules", Chapter 33, Between East and West: Essays in Honour of Ulf Franke, page 472.
50. See Patricia Shaughnessy, "The New SCC Emergency Arbitrator Rules", Chapter 33, Between East and West: Essays in Honour of Ulf Franke, page 472.
51. The Singapore Arbitration Act.
52. See the Standard ICC Arbitration Clauses.
53. Institutions that have adopted such Rules, like ICC Rules 2012, Art.29 and Appendix V; SIAC Rules 2010, Art.26 and Schedule 1; ICDR Rules 2009, Art.37, SCC Rules 2010, Appendix II and Swiss Rules 2012, Art. 43.
54. When a request is made to a national court for interim relief, the court may be reluctant to make a decision that would risk jeopardizing the outcome of the arbitration.
55. Redfern and Hunter, Law and Practice of International Commercial Arbitration, Sections 7- 13 a 7-22.
56. Channel Tunnel Group v. Balfour Beatty [1993] AC 334 (HL).
57. On security for cost see Lew, Mistelis, and Kröll, Comparative International Arbitration, Chapter 23, Sections 23 – 1 to 23 – 130, that states: "Due to the time gap between commencement of the proceedings and the substantive hearing, the subject-matter or necessary evidence may disappear; by the time the final relief is to be granted irreparable and non-compensatory harm may occur. Some Rules set out in detail what specific measures a tribunal can order. The fact that the claimant is domiciled in a different country should not be sufficient in itself to justify the granting of security for cost."
58.
59. Hereinafter as ACL.
60. For more detailed information, available at: http://www.acl.org.pt/
61. Approved at the meetings of the Board of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry of 18 June and 29 July 2008.
62. As SCC Rules, Appendix II.
63. It may be added "the administrator shall appoint a single emergency arbitrator from a special panel of emergency arbitrators designated to rule on emergency applications". But only if the Institution has or not a from a special panel of arbitrators or for emergency arbitrators designated to rule on emergency applications.
64. This Act came into force on March 15, 2012.

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