

Maritime Arbitration and Emergency Interim Reliefs

Switzerland

Lars Gerspacher

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Is the Emergency Arbitrator available?



- **International** arbitration (Art. 176 Private International Law Act, PILA) if at least one party is not domiciled in Switzerland
- **Domestic** arbitration (Art. 353 Civil Procedure Rules, CPR) if both parties are based in Switzerland
- Focus here is on international arbitration.
- PILA provides for means of interim measures but only after the arbitral tribunal has been constituted (Art. 183 [1] PILA).
- Prior to the constitution of the arbitral tribunal, the state judges are competent (Art. 10 PILA).
- But the parties have the right to agree on arbitration rules that govern interim measures before an EA (as set out e.g. in Art. 29 ICC Rules or Art. 43 of the Swiss Rules of Arbitration).
- Parties also need to agree on institutional arbitration.

Available procedure

Overview

- Article 26 Swiss Rules: interim measures **after** the constitution of the arbitral tribunal
- Article 43 Swiss Rules (newly introduced in 2012): urgent interim measures **before** the arbitral tribunal is constituted
- Art. 43 (1) refers to Art. 26.
- Request for emergency relief to be submitted to the Secretariat of the Arbitration Court.
- The Arbitration Court appoints and transmits the file to a sole EA unless
 - the parties have manifestly not agreed on the Swiss Rules, or
 - it appears more appropriate to proceed with the constitution of the arbitral tribunal and refer the request to it.

Available procedure

Overview

- Applicant has to file the Notice of Arbitration within 10 days from the receipt of the Application by the Court.
- The EA has a wide discretion as to how the emergency relief proceedings are conducted provided that each party has a reasonable opportunity to be heard.
- The decision on the request should be made within 15 days from the date on which the file was submitted to the EA by the Secretariat.
- A decision of the EA has the same effects as an interim award pursuant to Art. 26 Swiss Rules.
- The decision may be modified, suspended or terminated by the EA or, after transmission of the file to it, by the arbitral tribunal.

Available procedure

Ex parte proceedings

- Article 26 (3) gives the arbitral tribunal the right to issue preliminary orders before the request has been communicated to any other party if:
 - there are exceptional circumstances
 - the preliminary order is sent together with the request and
 - the other parties are immediately granted an opportunity to be heard.
- No definition of "exceptional", but usually:
 - a case of particular urgency, or
 - a risk of frustration of the required interim measure (e.g. claim for transferring ownership in a vessel), or
 - other?
- Once the Respondent had its say, the EA should reconsider.

Available procedure

Opting out / Precluding recourse to the courts

- Art. 43 (1) Swiss Rules gives the parties the right to opt out.
- Precluding recourse to the courts not possible
- Concurrent jurisdiction of the arbitral tribunal and the state judges
- Reiterated in Art. 26 (5) Swiss Rules
- There is no legal remedy against the interim award of the EA or the arbitral tribunal (Judgment of the Supreme Court, BGE 136 III 200).

Available procedure

Applicable standards for granting interim relief

- No specific requirements stipulated in the Swiss Rules
- The EA needs to establish:
 - prima facie jurisdiction (i.e. an arbitration agreement in writing)
 - prima facie evidence that the claimant may suffer irreparable harm
 - prima facie evidence of urgency
 - reasonable prospects of success on the merits

Enforcement of EA orders

- rendered in Switzerland
 - are in principle enforceable (Art. 183 [2] PILA):
“If the party concerned does not voluntarily comply with these measures, the arbitral tribunal may request the assistance of the state judge; the judge shall apply his or her own law.”
 - The state judge may give other remedies.
- rendered elsewhere
 - In Switzerland the New York Convention applies.
 - Interim awards (rendered by an EA or the Arbitral Tribunal) are not considered to be awards in the sense of the NYC.
 - Separate request to the state judge, however, remains possible.

Practical challenges

- The EA has no power to use any means of coercion.
- State judges can combine their interim measures with the assistance of police and enforcement officers and combine their orders with the threat of criminal penalty for non-compliance (Art. 292 of the Penal Code).
- Experience so far is limited. In 2014, 4 cases were handled by EA (about 0 to 10 interim awards per year).
- Advantages are, however, widely accepted.
- Modern arbitration rules provide for an EA otherwise state judges would be the only option.
- State judges may not grant interim measures because there is an arbitration agreement.

Other features / issues

- EA may not serve as arbitrator in the arbitral tribunal upon the merits.
- Costs (Section 1.6 of Annex B Swiss Rules):
 - CHF 4'500 registration fee (non-refundable)
 - CHF 20'000 (advance for the costs)
 - Fees of the EA will range from CHF 2'000 to CHF 20'000.
- The interim award will determine the fees of the EA and his costs (e.g. for obtaining expert advice).
- The costs of the parties (including the costs for legal representation) will be determined by the arbitral tribunal in its award.

Thank you for your attention!

Lars Gerspacher

Attorney-at-law, LL.M. Maritime Law
gerspacher@gbf-legal.ch

gbf
Attorneys-at-law

P.O. Box 1661
Hegibachstrasse 47
8032 Zurich
Switzerland

T +41 43 500 48 50
F +41 43 500 48 60

P.O. Box 1911
Route de Pré-Bois 20
1215 Geneva Airport
Switzerland

T +41 22 533 48 50
F +41 22 533 48 54

contact@gbf-legal.ch
www.gbf-legal.ch