

Chapter 4, Part II: Commentary on the ICC Rules, Appendix V [Emergency arbitrator rules]

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Article 1. Application for Emergency Measures

1 A party wishing to have recourse to an emergency arbitrator pursuant to Article 29 of the Rules of Arbitration of the ICC (the “Rules”) shall submit its Application for Emergency Measures (the “Application”) to the Secretariat at any of the offices specified in the Internal Rules of the Court in Appendix II to the Rules.

2 The Application shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for the emergency arbitrator, and one for the Secretariat.

3 The Application shall contain the following information:

- a) the name in full, description, address and other contact details of each of the parties;
- b) the name in full, address and other contact details of any person(s) representing the applicant;
- c) a description of the circumstances giving rise to the Application and of the underlying dispute referred or to be referred to arbitration;
- d) a statement of the Emergency Measures sought;
- e) the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal;
- f) any relevant agreements and, in particular, the arbitration agreement;
- g) any agreement as to the place of the arbitration, the applicable rules of law or the language of the arbitration;
- h) proof of payment of the amount referred to in Article 7(1) of this Appendix; and
- i) any Request for Arbitration and any other submissions in connection with the underlying dispute, which have been filed with the Secretariat by any of the parties to the emergency arbitrator proceedings prior to the making of the Application.

The Application may contain such other documents or information as the applicant considers appropriate or as may contribute to the efficient examination of the Application.

4 The Application shall be drawn up in the language of the arbitration if agreed upon by the parties or, in the absence of

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Jurisdiction

Switzerland

Organization

International Court of Arbitration of the International Chamber of Commerce

Legis in effect

1 January 2012

Source

Christopher Boog, **Chapter 4, Part II: Commentary on the ICC Rules, Appendix V [Emergency arbitrator rules]** in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, (© Kluwer Law International; Kluwer Law International 2013) pp. 826 - 847

any such agreement, in the language of the arbitration agreement.

5 If and to the extent that the President of the Court (the “President”) considers, on the basis of the information contained in the Application, that the Emergency Arbitrator Provisions apply with reference to Article 29(5) and Article 29(6) of the Rules, the Secretariat shall transmit a copy of the Application and the documents annexed thereto to the responding party. If and to the extent that the President considers otherwise, the Secretariat shall inform the parties that the emergency arbitrator proceedings shall not take place with respect to some or all of the parties and shall transmit a copy of the Application to them for information.

6 The President shall terminate the emergency arbitrator proceedings if a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days of the Secretariat’s receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary.

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I. Purpose of Appendix V

Appendix V contains the Emergency Arbitrator Rules as defined in Art. 29(1) and (5) of the 2012 ICC Rules.⁽¹⁾ The Emergency Arbitrator Rules govern the proceedings for obtaining Emergency Measures in terms of Art. 29(1) of the 2012 ICC Rules.

Article 1 of Appendix V to the 2012 ICC Rules sets out the steps for the initiation of an emergency arbitrator procedure by governing the application for Emergency Measures. It also provides for a “gatekeeper” test in Art. 1(5) which ensures that only such applications for Emergency Measures which pass a preliminary applicability test undertaken by the President of the Court shall move forward. Finally, the provision deals with the requirement to submit a Request for Arbitration in the event that such request has not been filed prior to or together with the application for Emergency Measures.

II. The Application for Emergency Measures (Article 1(1)-(4))

Article 1(1) of Appendix V prescribes that a party wishing to have recourse to an emergency arbitrator pursuant to Art. 29 of the 2012 ICC Rules shall submit its application for Emergency Measures – defined as the “Application” – to the Secretariat at any of the offices specified in the Internal Rules of the Court in Appendix II to the ICC Rules. In other words, as of the date of this publication, an Application can be submitted to the ICC offices in Paris or Hong Kong.⁽²⁾ In accordance with Art. 1(2) of Appendix V, the Application must be supplied in a number of copies sufficient to provide one copy for each party, plus one for the emergency arbitrator, and one for the Secretariat. Given the urgency inherent in emergency arbitrator proceedings, applicants will usually submit their request by email to the email address especially set up by the Secretariat for this purpose⁽³⁾ and may telephone the Secretariat to inform it of the Application.⁽⁴⁾

The minimum content of the Application is set out in Art. 1(3) of Appendix V.⁽⁵⁾ The wording of this provision is based on Art. 4(3) of the Rules regarding the Request for Arbitration, but takes into account the specificities of the emergency arbitrator proceedings. Accordingly, the Application must contain a description of the

circumstances giving rise to the Application and of the underlying dispute referred or to be referred to arbitration, a statement of the Emergency Measures sought and the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal. The Application must also include any relevant agreements and, in particular, the arbitration agreement, as well as any agreement as to the place of the arbitration, the applicable rules of law or the language of the arbitration. Importantly, the Application must be accompanied by proof of payment of the amount referred to in Art. 7(1) of Appendix V, absent which the emergency arbitrator proceedings will not proceed.⁽⁶⁾ And finally, the Application should include information as to any Request for Arbitration and any other submissions in connection with the underlying dispute, which have been filed with the Secretariat by any of the parties to the emergency arbitrator proceedings prior to the making of the Application. This is particularly important in terms of the Art. 1(6) of Appendix V.⁽⁷⁾

The enumeration in Art. 1(3) of Appendix V is not exhaustive. In fact, Art. 1(3) expressly provides that the Application may contain such other documents or information as the applicant considers appropriate or as may contribute to the efficient examination of the Application. In other words, the applicant should include in its Application any information necessary for the President to take a decision pursuant to Art. 1(5) of Appendix V⁽⁸⁾ and for the Emergency Arbitrator to rule on the requested Emergency Measures.

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This latter point in conjunction with Art. 1(3)(e) of Appendix V, providing that the applicant shall give reason why it requests Emergency Measures, underlines an important issue, being that the Application shall be as comprehensive as possible in terms of the relief sought and shall contain all information the applicant deems necessary for the emergency arbitrator to take a decision on the requested relief. In this regard, the Application is not comparable to the Request for Arbitration which will usually be a mere summary of the claimant's position, which position will be further elaborated in later submissions in the arbitration. Due to the urgency inherent in emergency arbitrator proceedings, the accordingly short period of time in which the emergency arbitrator shall take its decision⁽⁹⁾ and the discretion given to the emergency arbitrator in conducting the emergency arbitrator proceedings in order to meet this short deadline,⁽¹⁰⁾ the applicant cannot rely on having a further opportunity to plead its case.⁽¹¹⁾

Pursuant to Art. 1(4) of Appendix V, the Application shall be drawn up in the language of the arbitration if agreed upon by the parties or, in the absence of any such agreement, in the language of the arbitration agreement.

III. The President's Preliminary Assessment and Notification of the Application to the Responding Party pursuant to Article 1(5)

Article 1(5) of Appendix V provides for one of the most important procedural features of the new ICC Emergency Arbitrator Rules, namely the preliminary assessment by the President as to whether the Emergency Arbitrator Provisions are applicable and the initiated emergency arbitrator proceedings may proceed.⁽¹²⁾ This is one of the key safeguard provisions intended to provide a certain level of protection to the responding party faced with an Application for Emergency Measures. The purpose of Art. 1(5) is to provide a simple substitute test for the gatekeeper test in Art. 6(3) and (4) of

the 2012 ICC Rules regarding the arbitral proceedings.⁽¹³⁾

Pursuant to Art. 1(5), the emergency arbitrator proceedings will only continue “if and to the extent that the President of the Court [...] considers, on the basis of the information contained in the Application, that the Emergency Arbitrator Provisions apply with reference to Article 29(5) and Article 29(6) of the Rules”. In other words, the President's preliminary assessment is based exclusively on the information provided by the applicant, without the responding party having had an opportunity to present its case.

The *subject* of the President's assessment is whether the Emergency Arbitrator Provisions as defined in Art. 29(5) of the 2012 ICC Rules are applicable. The *criteria* which the President will consider in undertaking the assessment under Art. 1(5) of Appendix V are those prescribed in Art. 29(5) and (6) of the Rules. The President will therefore examine whether

- (1) the parties named in the Application are signatories to the arbitration agreement or successors to such signatories;
- (2) the arbitration agreement based on which Emergency Measures are sought was concluded on or after 1 January 2012;
- (3) the parties have opted out of Emergency Arbitrator Provisions; and
- (4) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.

Only if these criteria are comprehensively met will the President proceed to appoint an emergency arbitrator.⁽¹⁴⁾

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If and to the extent that the President considers that the aforementioned criteria are *not* met, however, the President will advise the Secretariat of such decision, and the Secretariat will inform the parties that the emergency arbitrator proceedings will not take place with respect to some or all parties. In such case, the Secretariat will transmit a copy of the Application to the discarded parties for their information.

A negative decision by the President under Art. 1(5) of Appendix V will in all likelihood be a definite decision. Whether there is recourse against such a decision before a state court will be subject to the law of the jurisdiction where such action is sought, however it is safe to assume that courts will not admit an appeal or request for setting aside such a decision. In other words, much like most – if not all – administrative decisions of the ICC, decisions under Art. 1(5) of Appendix V are not appealable.

The consequence of a negative decision by the President under Art. 1(5) is that a party seeking urgent relief will have to turn to another body, whether a state court or any other body agreed among the parties to deal with pre-arbitral interim relief. This being said, it is not excluded at least from the viewpoint of the ICC Rules that – much like pursuant to Art. 6(6) and (7) of the 2012 ICC Rules – the applicant could have a competent state court rule on the applicability of the Emergency Arbitrator Provisions and then bring a new Application. However, given the urgency in such cases, this is unlikely to be a real option in practice.

Aside from the above-described preliminary assessment by the President, Art. 1(5) of Appendix V also governs the notification of the Application by the Secretariat to all parties named in the Application as responding parties. In this respect two issues are

particularly noteworthy. First, the Application is notified in any event, i.e., even if the President's preliminary assessment results in the emergency arbitrator proceedings *not* taking place with respect to some or all parties.⁽¹⁵⁾ In other words, even if the Application fails to meet the prerequisites of Art. 29(5) and (6) of the Rules, any responding party will be made aware that an application for Emergency Measures was filed against it. This was a conscious decision by the drafters of the Rules to deter applicants from lodging unwarranted applications.

Second, according to the wording of Art. 1(5) of Appendix V ("shall"), the notification of the Application to all responding parties in case the emergency arbitrator proceedings shall take place is mandatory, as is the notification of the appointment of an emergency arbitrator (see Art. 2(2) of Appendix V).⁽¹⁶⁾ This notification prerequisite excludes *ex parte* or preliminary Emergency Measures in the sense that the emergency arbitrator orders such relief without the responding party being aware of the Application. Given the very purpose of emergency relief, namely to effectively protect the rights of the party seeking such relief,⁽¹⁷⁾ it might be deemed regrettable that the emergency arbitrator under the ICC Rules cannot order such *ex parte* or preliminary measures at least in extraordinary circumstances, particularly if prior notification of the request risks frustrating the purpose of the measure.⁽¹⁸⁾ This being said, the solution under the ICC Rules is in line with the similar provisions of Art. 37(2) of the ICDR Rules, Art. 1(1) of Schedule 1 to the SIAC Rules and Art. 3 of Appendix II to the SCC Rules, which all contain notification requirements and are all deemed to exclude *ex parte* or preliminary relief by emergency arbitrators.⁽¹⁹⁾

IV. Requirement to Submit a Request for Arbitration (Article 1(6))

The ICC Rules do not require that the party seeking Emergency Measures has filed a Request for Arbitration prior to or together with the Application for Emergency Measures.⁽²⁰⁾

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While the drafters felt that it was necessary in urgent situations for the applicant to be able to submit its Application immediately without having to first draw up a Request for Arbitration, at the same time it was felt that the responding party needed a certain level of protection against potential abuse of the emergency arbitrator procedure by applicants who might wish to put undue pressure on the responding party by filing an Application and then sitting idle. Therefore, the drafters introduced the safeguard of Art. 1(6) of Appendix V, which stipulates that the applicant must submit a Request for Arbitration within 10 days of the Secretariat's receipt of the application for Emergency Measures, absent which the President will terminate the emergency arbitrator proceedings.

The President's decision to terminate the emergency arbitrator proceedings pursuant to Art. 1(6) of Appendix V is a final decision which is not appealable within the ICC system. As an administrative decision of an ICC organ, in all likelihood there will also be no recourse against such decision in a state court. However, the President's decision does not *per se* hinder the applicant from bringing a new request for Emergency Measures under the Rules, even where there is no change in the circumstances allegedly calling for emergency relief. Whether, in such an instance, there will still be a case of "true urgency" in terms of Art. 29(1) of the Rules,⁽²¹⁾ though, is questionable.

The 10-day time limit for filing the Request for Arbitration can be extended by the emergency arbitrator if he or she determines that a longer period of time for the filing of a Request for Arbitration is necessary. ⁽²²⁾ This competence was given to the emergency arbitrator and not the President, the Court or the Secretariat, since it was felt that the emergency arbitrator seized with the Application for Emergency Measures would be in a better position to judge whether the applicant should be granted more time. ⁽²³⁾ Art. 1(6) of Appendix V does not state whether the emergency arbitrator may only extend the time limit upon an application of a party – most likely the applicant – or also in its own motion. In practice, an application will be the more likely scenario, however it is not excluded that the emergency arbitrator extends the time limit *sua sponte* if the circumstances so warrant.

Although this is not expressly provided in Art. 1(6) of Appendix V, the emergency arbitrator should take the decision whether or not to extend the deadline for filing a Request for Arbitration in the form of an order. Such an order is final and there is no recourse against it within the ICC system, and in all likelihood there will also be no recourse in state courts.

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Article 2. Appointment of the Emergency Arbitrator; Transmission of the File

1 The President shall appoint an emergency arbitrator within as short a time as possible, normally within two days from the Secretariat's receipt of the Application.

2 No emergency arbitrator shall be appointed after the file has been transmitted to the arbitral tribunal pursuant to Article 16 of the Rules. An emergency arbitrator appointed prior thereto shall retain the power to make an order within the time limit permitted by Article 6(4) of this Appendix.

3 Once the emergency arbitrator has been appointed, the Secretariat shall so notify the parties and shall transmit the file to the emergency arbitrator. Thereafter, all written communications from the parties shall be submitted directly to the emergency arbitrator with a copy to the other party and the Secretariat. A copy of any written communications from the emergency arbitrator to the parties shall be submitted to the Secretariat.

4 Every emergency arbitrator shall be and remain impartial and independent of the parties involved in the dispute.

5 Before being appointed, a prospective emergency arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The Secretariat shall provide a copy of such statement to the parties.

6 An emergency arbitrator shall not act as an arbitrator in any arbitration relating to the dispute that gave rise to the Application.

1. Purpose of the Provision

Article 2 of Appendix V governs the appointment of the emergency arbitrator and the transmission of the file to the emergency arbitrator. This article also deals with the notification of the Application to the parties and the requirements as to the person of

the emergency arbitrator and the emergency arbitrator's availability. Finally, it regulates the emergency arbitrator's role in a potential subsequent arbitration.

II. Appointment of the Emergency Arbitrator

Once the President has determined pursuant to Art. 1(5) of Appendix V that the emergency arbitrator proceedings shall move forward, Art. 2(1) of Appendix V provides that the President shall appoint an emergency arbitrator. Such appointment shall be made within as short a time as possible, normally within two days from the Secretariat's receipt of the Application. What happens in practice is that the Secretariat will advise the President as to suitable candidates to act as emergency arbitrators.⁽²⁴⁾ In other words, the Emergency Arbitrator Rules do not set a fixed deadline for the appointment of the emergency arbitrator, and in all likelihood there will be no consequence if, in exceptional cases, it takes the President longer to appoint an emergency arbitrator.

Pursuant to Art. 2(2) of Appendix V, the President shall not appoint an emergency arbitrator after the file has been transmitted to the arbitral tribunal pursuant to Art. 16 of the Rules. It is submitted that this is a purely administrative determination made by the Secretariat, which is also the reason why such determination is not referred to in Art. 1(5) as one of the issues which the President shall assess pursuant to said provision.

Article 2(2) of Appendix V also clarifies that if the emergency arbitrator has already been appointed prior to the transmission of the file to the arbitral tribunal, the emergency arbitrator shall retain the power to grant Emergency Measures within the time limit prescribed in Art. 6(4) of Appendix V. In [page "831"](#) situations where an Application for Emergency Measures is received around the same time the file is to be transmitted to the arbitral tribunal, this gives the Secretariat a certain amount of flexibility to either transmit the file to the tribunal and thus to "create" the arbitral tribunal's competence to deal with the interim relief sought, or to have the President appoint an emergency arbitrator before transmitting the file to the tribunal and thus to have the emergency arbitrator rule on the request for urgent relief. Depending on the circumstances, both paths are conceivable. If the file has been transmitted to the arbitral tribunal, there will at least for the duration of the time limit prescribed in Art. 6(4) of Appendix V be a parallel competence of both the emergency arbitrator and the arbitral tribunal to grant interim relief, the former based on Art. 29 of the Rules read in conjunction with Art. 2(2) of Appendix V, the latter based on Art. 28(1) of the Rules. In such a situation, it is submitted that the emergency arbitrator should liaise with the arbitral tribunal before issuing a decision on the requested Emergency Measure. If the arbitral tribunal has received a request for interim or conservatory measures in terms of Art. 28(1) of the 2012 ICC Rules corresponding to the Emergency Measures requested from the emergency arbitrator and sees itself in a position to deal with the request in due course, the emergency arbitrator might – taking into account the circumstances and particularly the urgency of the Application – in exceptional cases refrain from taking a decision in order to avoid potentially conflicting decisions on the same issues within a matter of weeks or even days.

III. Notification of Appointment and Transmission of the File to the Emergency Arbitrator

Once the emergency arbitrator has been appointed, Art. 2(3) of Appendix V provides that the Secretariat shall so notify the

parties⁽²⁵⁾ and shall transmit the file to the emergency arbitrator. The Secretariat will do so within the shortest time possible, although there is no time limit stipulated in the Rules.

From the point of transmission of the file to the emergency arbitrator, communications from the parties shall be made directly to the emergency arbitrator with a copy to the other parties and the Secretariat. Communications from the emergency arbitrator are to be made directly to the parties with a copy to the Secretariat.

IV. Independence, Impartiality and Availability of the Emergency Arbitrator

The Emergency Arbitrator Rules contain very few provisions as to the person of the emergency arbitrator. All that is provided for is that, pursuant to Art. 2(4) of Appendix V, the emergency arbitrator must be “impartial and independent of the parties involved in the dispute”. The same standards apply in this respect as to the arbitral tribunal pursuant to Art. 11 of the 2012 ICC Rules.

In accordance with Art. 2(5) of Appendix V, before being appointed, the emergency arbitrator shall sign a statement of acceptance, availability, impartiality and independence. Again, the same standards apply as under Art. 11 (2) of the 2012 ICC Rules, however taking into consideration the specificities of the emergency arbitrator proceedings. For example, the emergency arbitrator will have to be available and willing to devote the majority of its time to the emergency arbitrator proceedings during approximately twenty days following the Application in order to render his or her decision within the time limit provided for in Art. 6(4) of Appendix V.⁽²⁶⁾

Article 2(5) of Appendix V provides that the Secretariat shall provide a copy of the statement of acceptance, availability, impartiality and independence to the parties. This gives the parties an opportunity to evaluate whether they might want to challenge the emergency arbitrator appointed by the President pursuant to Art. 3 of Appendix V.⁽²⁷⁾

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It is noteworthy that Art. 2(5) of Appendix V, unlike Art. 11(2) of the Rules, does not expressly contain a duty of disclosure of the emergency arbitrator. Nevertheless, such duty can be understood to be contained in the emergency arbitrator's duty to submit a statement of impartiality and independence. The President will be in a position to determine whether to appoint the emergency arbitrator, and the parties will be in apposition to determine whether to challenge the emergency arbitrator, only if the emergency arbitrator's duty to submit a statement of impartiality and independence includes an obligation to disclose any facts or circumstances which might be of such a nature as to call into question the emergency arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the emergency arbitrator's impartiality.

Aside from the foregoing, there are no other specific requirements as to the person of the emergency arbitrator, such as qualifications etc. This does not mean that the President will not and shall not take into consideration whether, based on the relief sought, the emergency arbitrator should have special qualifications or meet any other specific requirements. Moreover, the parties are free to agree on such requirements before or after the initiation of emergency arbitrator proceedings. Where such an agreement exists, the President will seek to comply with it to the extent possible.⁽²⁸⁾ The

applicant is also free to comment on the person of the emergency arbitrator in the Application (see Art. 1(3) last paragraph of Appendix V). The President should take such comments into consideration when appointing the emergency arbitrator, thereby taking into account that normally the responding party will not have an opportunity to comment on the Application prior to the appointment of the emergency arbitrator. This being said, where the Application contains specific comments as to the person of the emergency arbitrator, the Rules do not preclude the President from setting a very short deadline for the responding party to comment on the person of the emergency arbitrator prior to the latter's appointment. Finally, it should be pointed out that, unlike other institutional rules, ⁽²⁹⁾ the ICC does not have a fixed list of emergency arbitrators, so at least in theory anyone can be appointed emergency arbitrator under the ICC Rules. ⁽³⁰⁾

V. The Role of the Emergency Arbitrator in Subsequent Arbitral Proceedings

Article 2(6) of Appendix V makes it plain that, as a matter of principle, an emergency arbitrator shall not act as an arbitrator in any arbitration relating to the dispute that gave rise to an Application for Emergency Measures. It is questionable whether the ICC will accept an agreement of the parties to the contrary. ⁽³¹⁾ Despite the doubts that may exist as to the impartiality of an arbitrator who has previous knowledge of a case from preceding emergency arbitration proceedings, it is submitted that the ICC should look at the circumstances of each individual case and should, whenever possible, give party autonomy precedence in spite of the seemingly clear and mandatory wording of Art. 2(6) of Appendix V.

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Article 3. Challenge of an Emergency Arbitrator

1 A challenge against the emergency arbitrator must be made within three days from receipt by the party making the challenge of the notification of the appointment or from the date when that party was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.

2 The challenge shall be decided by the Court after the Secretariat has afforded an opportunity for the emergency arbitrator and the other party or parties to provide comments in writing within a suitable period of time.

I. Purpose of the Provision

Article 3 of Appendix V deals with a challenge against an emergency arbitrator, including the time limit for such challenge to be brought and the competence to decide on a challenge.

II. Challenge of an Emergency Arbitrator

Pursuant to Art. 3(1) of Appendix V, a challenge against an emergency arbitrator must be made within three days from either the notification of the appointment of the emergency arbitrator to the parties or from the date at which the party seeking to challenge the emergency arbitrator was informed of the relevant facts and circumstances underlying the potential challenge. In the former case, the parties will have a copy of the emergency arbitrator's

statement of acceptance, availability, impartiality and independence, including any disclosure made by the emergency arbitrator, on which to base their decision.⁽³²⁾

The challenge is to be sent to the Secretariat, although this is not expressly stated in Art. 3(1). The challenge will then be decided by the Court, after the Secretariat has afforded an opportunity for the emergency arbitrator and the other party or parties to provide comments in writing within a suitable period of time. This is likely to be no more than a few days.⁽³³⁾ Notably, there is no deadline for the Court to take its decision on the challenge, yet it can be expected that such decision will be taken within the shortest time possible.⁽³⁴⁾ A challenge brought against an emergency arbitrator does not mean that the emergency arbitrator proceedings are automatically suspended.⁽³⁵⁾

The decision of the Court on a challenge is final and there will in all likelihood be no recourse against such decision. Much like in the event of a challenge against an arbitrator under the Rules, the Court will not give reason for its decision to accept or deny a challenge.

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Article 4. Place of the Emergency Arbitrator Proceedings

1 If the parties have agreed upon the place of the arbitration, such place shall be the place of the emergency arbitrator proceedings. In the absence of such agreement, the President shall fix the place of the emergency arbitrator proceedings, without prejudice to the determination of the place of the arbitration pursuant to Article 18(1) of the Rules.

2 Any meetings with the emergency arbitrator may be conducted through a meeting in person at any location the emergency arbitrator considers appropriate or by video conference, telephone or similar means of communication.

I. Purpose of the Provision

The purpose of this provision is twofold. First, it governs the place of the emergency arbitrator proceedings, which might prove relevant where the involvement of state courts is required, e.g., where recourse against the emergency arbitrator's Order is sought or where the prevailing party seeks to enforce the emergency arbitrator's decision in a state court. The second purpose is to clarify that the emergency arbitrator is not bound to hold meetings at the place of the emergency arbitrator proceedings, but may convene meetings, if at all, elsewhere.

II. Place of Emergency Arbitrator Proceedings

Pursuant to Art. 4(1) of Appendix V, if the parties have agreed on the place of the arbitration, such place shall also be the place of the emergency arbitrator proceedings. In turn, where the parties have not agreed on the place of arbitration, the President shall fix the place of the emergency arbitrator proceedings. The President shall do so without prejudice to the determination of the place of the arbitration pursuant to Art. 18(1) of the 2012 ICC Rules.⁽³⁶⁾

III. Meetings with the Emergency Arbitrator

Pursuant to Art. 4(2) of Appendix V, any meetings with the

emergency arbitrator may be conducted through a meeting in person at any location the emergency arbitrator considers appropriate or by video conference, telephone or similar means of communication.

Given the urgency and the short deadline for the emergency arbitrator to render its decision,⁽³⁷⁾ holding meetings or hearings by video or telephone conference or similar means of communication, such as, e.g., web-meeting, will be the most appropriate means in many cases of emergency relief – that is, if a hearing is to be held at all, which is by no means obligatory.⁽³⁸⁾ Nevertheless, the emergency arbitrator is free to hold meetings or hearings in person as long as this is compatible with the nature and the urgency of the Application.⁽³⁹⁾

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Article 5. Proceedings

1 The emergency arbitrator shall establish a procedural timetable for the emergency arbitrator proceedings within as short a time as possible, normally within two days from the transmission of the file to the emergency arbitrator pursuant to Article 2(3) of this Appendix.

2 The 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.

I. Purpose of the Provision

Article 5 deals with the actual proceedings before the emergency arbitrator and sets out some basic principles concerning such proceedings.

II. Proceedings before the Emergency Arbitrator

Article 5(1) of Appendix V requires the emergency arbitrator to establish a procedural timetable for the emergency arbitrator proceedings. The emergency arbitrator shall do so within as short a time as possible, normally within two days from the transmission of the file pursuant to Art. 2(3) of Appendix V. There are no formal requirements as to the procedural timetable. In practice, the timetable will usually be recorded in some kind of written form, e.g., by e-mail, letter or minutes of a phone call or meeting, however the Rules do not exclude that the timetable is only communicated to the parties orally, e.g., on the occasion of a procedural telephone or video conference between the parties and the emergency arbitrator.

In accordance with the principle set out in Art. 22(3) of the Rules regarding the procedural timetable for the arbitral proceedings, the emergency arbitrator may modify the procedural timetable where appropriate, especially if the emergency arbitrator considers this necessary to render its decision within the time limit provided by Art. 6(4) of Appendix V.⁽⁴⁰⁾ Unlike Art. 22(2) of the Rules, Art. 5(1) of Appendix V does not require the procedural timetable for the emergency arbitrator proceedings (or any modifications thereto) to be communicated to the Court – nor is such timetable expressly required to be communicated to the parties, for that matter. Whereas the latter will be inevitable in practice even without an express obligation, the lack of requirement to communicate such

timetable to the Court is justified because, unlike in arbitral proceedings, the Court need not monitor the emergency arbitrator proceedings over a long period of time. Nevertheless, given that any written communication to the parties must be copied to the Secretariat,⁽⁴¹⁾ the Secretariat in most cases will nonetheless be informed about the procedural timetable of the emergency arbitrator proceedings.

Article 5(2) of Appendix V deals with the conduct of the proceedings before the emergency arbitrator. This basic provision gives the emergency arbitrator broad discretion and flexibility in the conduct of the proceedings and is limited to setting some principle guidelines. One such guideline is that the emergency arbitrator shall take into consideration the nature and urgency of the Application when deciding on how to conduct the proceedings. As previously mentioned,⁽⁴²⁾ in many cases this may include holding meetings or hearings by telephone or video conference or similar means of communication rather than convening in person.

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The second basic principle stipulated in Art. 5(2) is that the emergency arbitrator shall in all cases act fairly and impartially and shall ensure that each party has a reasonable opportunity to present its case.⁽⁴³⁾ How the parties are to present their case is left open. This can be by means of written submissions, but also by means of oral pleadings only, or a combination of the two. The limitation in Art. 5(2) for each party to have a "reasonable" opportunity to present its case means that no party has a right to a certain way of presentation, but that the emergency arbitrator is free to determine the most appropriate means. However, if the parties agree on a certain procedure, the emergency arbitrator should respect party autonomy and the procedure proposed by the parties, at least insofar as all parties are treated fairly and equally and the emergency arbitrator proceedings can be brought to a timely decision. Art. 22(2) of the Rules can be applied by analogy in this respect.

As previously described,⁽⁴⁴⁾ an emergency arbitrator under the ICC Rules may not grant *ex parte* or preliminary Emergency Measures in the sense that the Application is not notified to the responding party prior to the ordering of the requested measure. A different question is whether an emergency arbitrator may order Emergency Measures on an *ex parte* or preliminary basis in the sense that – upon the notification of the Application – the requested measure or another requested preliminary measure is immediately ordered without the responding party having been heard (yet). For example, the emergency arbitrator could immediately issue an order enjoining the responding party from taking a specific action pending the duration of the emergency arbitrator proceedings (i.e., until the emergency arbitrator decides on the merits of the Application by an Order pursuant to Art. 6 of Appendix V). It is submitted that nothing in the Emergency Arbitrator Rules prohibits the emergency arbitrator from making such a preliminary order.⁽⁴⁵⁾ It is true that the requirement in Art. 5(2) of Appendix V that the parties to an emergency arbitrator procedure are to be given "a reasonable opportunity to present their case" might call such an approach into question. It is noteworthy, however, that the same wording is included in Art. 15(2) of the 1998 ICC Rules and in Art. 22(4) of the 2012 ICC Rules; nevertheless, it has been suggested by some authors that an arbitral tribunal acting under the ICC Rules is not *per se* precluded from granting an interim or conservatory measure in terms of Art. 28(1) of the Rules on a preliminary or *ex parte* basis, at least in exceptional cases and where the *lex arbitri* (that is, the law at the place of the arbitration) so permits.⁽⁴⁶⁾ Under Swiss law, it is accepted that an arbitral

tribunal is permitted to issue *ex parte* measures, provided that the party against whom the measure is ordered is given the opportunity immediately after the ordering of the *ex parte* or preliminary measure to present its case and thereupon the arbitral tribunal either confirms, lifts or amends its initial order.⁽⁴⁷⁾ The same principle could well be applied under the Emergency Arbitrator Rules, especially since Art. 6(8) of Appendix V expressly provides for the emergency arbitrator's power to modify, terminate or annul its initial decision (i.e., the emergency arbitrator is not *functus officio* upon rendering its decision on Emergency Measures). It is submitted that such an approach would best meet the purpose, nature and inherent urgency of emergency arbitrator proceedings and would not be incompatible with either the nature of the emergency arbitrator proceedings under the ICC Rules nor with arbitration as such. Having made a preliminary order based solely on the Application, the emergency arbitrator would have to immediately hear the responding party and confirm, amend or lift its preliminary order within the time limit of Art. 6(4) of Appendix V. Moreover, the emergency arbitrator should only consider granting a preliminary [page "837"](#) measure where this is expressly requested by the applicant and the applicant has given reason why the circumstances are exceptional so as to warrant a preliminary measure being ordered before the responding party is heard. It might be questioned whether such an approach is practicable, especially since the preliminary order by the emergency arbitrator will not be directly enforceable. Nevertheless, there may well be situations where the responding party will adhere to the preliminary order by the emergency arbitrator as described hereinabove until the "final" Emergency Measure is rendered, and such preliminary order will thus effectively protect the applicant's rights.

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Article 6. Order

- 1 Pursuant to Article 29(2) of the Rules, the emergency arbitrator's decision shall take the form of an order (the "Order").**
- 2 In the Order, the emergency arbitrator shall determine whether the Application is admissible pursuant to Article 29(1) of the Rules and whether the emergency arbitrator has jurisdiction to order Emergency Measures.**
- 3 The Order shall be made in writing and shall state the reasons upon which it is based. It shall be dated and signed by the emergency arbitrator.**
- 4 The Order shall be made no later than 15 days from the date on which the file was transmitted to the emergency arbitrator pursuant to Article 2(3) of this Appendix. The President may extend the time limit pursuant to a reasoned request from the emergency arbitrator or on the President's own initiative if the President decides it is necessary to do so.**
- 5 Within the time limit established pursuant to Article 6(4) of this Appendix, the emergency arbitrator shall send the Order to the parties, with a copy to the Secretariat, by any of the means of communication permitted by Article 3(2) of the Rules that the emergency arbitrator considers will ensure prompt receipt.**
- 6 The Order shall cease to be binding on the parties upon:**
 - a) the President's termination of the emergency arbitrator proceedings pursuant to Article 1(6) of this Appendix;**

- b) the acceptance by the Court of a challenge against the emergency arbitrator pursuant to Article 3 of this Appendix;
- c) the arbitral tribunal's final award, unless the arbitral tribunal expressly decides otherwise; or
- d) the withdrawal of all claims or the termination of the arbitration before the rendering of a final award.

7 The emergency arbitrator may make the Order subject to such conditions as the emergency arbitrator thinks fit, including requiring the provision of appropriate security.

8 Upon a reasoned request by a party made prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 of the Rules, the emergency arbitrator may modify, terminate or annul the Order.

I. Purpose of the Provision

Article 6 deals with the emergency arbitrator's decision. It stipulates the form of such a decision, its content, the time limit within which the decision shall be taken, as well as the effect of the decision upon the parties.

II. Form of the Order (Article 6(1) and (3))

As already set out in Art. 29(2) of the 2012 ICC Rules, Art. 6(1) of Appendix V repeats that the emergency arbitrator's decision shall take the form of an order. Art. 6(1) defines such decision as the "Order".

In other words, unlike the arbitral tribunal under Art. 28(1) of the 2012 ICC Rules, the emergency arbitrator may not choose to grant Emergency Measures in the form of an award. The reason for this limitation is Art. 33 of the 2012 ICC Rules which requires scrutiny by the Court of any award rendered under the ICC Rules. Since the drafters felt that such scrutinizing procedure was not compatible with [page "839"](#) the emergency arbitrator procedure, which requires special urgency, it was decided to limit the form of the emergency arbitrator's decision to an order. It should be added in this context that the practical implications of this limitation are minor, since in any event many jurisdictions apply a strict "substance-over-form" principle⁽⁴⁸⁾ when deciding whether a decision can be challenged or enforced. Therefore, whether an interim measure or Emergency Measure is issued in the form of an order or an award will make no difference.⁽⁴⁹⁾

Article 6(3) of Appendix V stipulates that the Order shall be made in writing and shall be dated and signed by the emergency arbitrator.

III. Time Limit for Rendering the Order (Article 6(4))

Pursuant to Art. 6(4) of Appendix V, the emergency arbitrator shall take its decision no later than 15 days from the date on which the file was transmitted to the emergency arbitrator pursuant to Art. 2(3) of Appendix V. That is unless this time limit is extended by the President, which the President may do pursuant to a reasoned request by the emergency arbitrator or on the President's own initiative if the President deems this necessary. Although it does not expressly say so in Art. 6(4), the deadline for rendering the emergency arbitrator's decision may also be extended upon a common request of the parties.⁽⁵⁰⁾

It is notable that, in comparison with other emergency arbitrator rules which sometimes grant the emergency arbitrator only five days to render its decision,⁽⁵¹⁾ the 15 days provided by the ICC Rules is comparatively long. The drafters felt that – not least to provide some protection to the responding party who will want to defend itself between the time of filing of the Application and the rendering of the emergency arbitrator's decision – 15 days was appropriate.⁽⁵²⁾ Moreover, it must be underscored that the emergency arbitrator's decision shall be rendered *no later than* 15 days after the transmission of the file. In other words, the emergency arbitrator can, and should, decide as early as possible and appropriate.

IV. Content of the Order (Article 6(2)-(3))

Concerning content, it goes without saying that the emergency arbitrator's Order shall contain a decision as to whether the requested Emergency Measures are granted or not.⁽⁵³⁾ As stated in Art. 6(3) of Appendix V, the Order shall include the reasons for the emergency arbitrator's decision.

As to the further content of the emergency arbitrator's Order, Art. 6(2) of Appendix V prescribes that the emergency arbitrator shall determine whether the Application is admissible pursuant to Art. 29(1) of the 2012 ICC Rules and whether the emergency arbitrator has jurisdiction to order Emergency Measures.

The *admissibility test* under Art. 6(2) entails an examination of the substantive prerequisite for granting Emergency Measures expressly stated in Art. 29(1) of the Rules, namely whether there is urgency in the sense that the requested interim or conservatory measures cannot await the constitution of the arbitral tribunal. Although not expressly referred to in Art. 6(2), it is submitted that the admissibility test also includes a determination of any other substantive prerequisites the emergency arbitrator might deem applicable in a given case. As under Art. 28(1) of the 2012 ICC Rules (and under 23(1) of the 1998 ICC Rules) with respect to tribunal-ordered interim measures, the ICC Rules do not determine any prerequisites [page "840"](#) for granting Emergency Measures besides "urgency". It is submitted that the emergency arbitrator shall draw inspiration from Art. 17A of the UNCITRAL Model Law as well as best arbitral practice in this respect, always with a view to the nature and purpose of the emergency arbitrator proceedings and the relief sought in the case before it.⁽⁵⁴⁾

Despite the reference in Art. 6(2) of Appendix V to Art. 29(1) of the 2012 ICC Rules as a whole, this author submits that the admissibility test does *not* include a determination that the Application was received prior to the transmission of the file to the arbitral tribunal pursuant to Art. 16 of the 2012 ICC Rules, although this precondition is also stated in Art. 29(1) of the Rules. This determination is merely an "administrative observation" which is undertaken in a final and conclusive manner by the Secretariat upon receipt of the Application and need not be "decided" by the emergency arbitrator in the Order.

It is less easy to determine exactly what the *jurisdiction* test under Art. 6(2) of Appendix V entails. Foremost, it includes a *prima facie* determination of whether there is a valid arbitration agreement allowing for Emergency Measures pursuant to the 2012 ICC Rules. In addition, it is submitted that it also comprises whether the Emergency Arbitrator Provisions are applicable pursuant to Art. 29(5) and (6) of the 2012 ICC Rules. Although this latter assessment is already made by the President pursuant to Art. 1(5)

of Appendix V, it is done so at that stage based purely on the information contained in the Application, without the responding party having been heard, and therefore only on a preliminary basis.⁽⁵⁵⁾ Therefore, the emergency arbitrator may reassess these issues in the Order, based on the submissions of all parties. However, if they are not contested by the responding party, the emergency arbitrator should limit itself to confirming jurisdiction.

V. Notification of the Order (Article 6(5))

Pursuant to Art. 6(5) of Appendix V, the emergency arbitrator shall notify the Order to the parties within the time limit established in Art. 6(4). The emergency arbitrator shall, at the same time, send a copy of the Order to the Secretariat. In other words, the Order is served directly by the emergency arbitrator and not by the ICC Secretariat like an award under the ICC Rules, but rather like any procedural order by an arbitral tribunal under the ICC Rules.

Notification can be made by any of the means of communication permitted by Art. 3(2) of the 2012 ICC Rules (i.e., by delivery against receipt, registered post, courier, e-mail or any other means of telecommunication that provides a record of the sending and delivery of the Order). Art. 6(5) of Appendix V gives the emergency arbitrator discretion as to the means of notification, provided however that the emergency arbitrator considers which means will ensure prompt receipt of the Order. This, of course, is in line with the purpose of the emergency arbitrator procedure, namely to grant prompt relief in emergency situations.

VI. Binding Nature of the Order (Article 6(6))

Article 6(6) of Appendix V read in conjunction with Art. 29(2) of the 2012 ICC Rules makes plain that the Order is binding on the parties.⁽⁵⁶⁾ Although not expressly stipulated, the Order becomes binding as soon as it is notified to the parties pursuant to Art. 6(5) of Appendix V.

Article 6(6) of Appendix V goes on to set out some situations in which the Order ceases to be binding on the parties. In all these situations, the Order ceases to be binding automatically (i.e., without the party against whom the Order is directed having to take any action or file a request or application in this respect).

First, there is the situation in which the President terminates the emergency arbitrator proceedings pursuant to Art. 1(6) of Appendix V (i.e., where the applicant fails to submit a Request for Arbitration [page "841"](#) either within 10 days of the Secretariat's receipt of the Application or within the deadline extended by the emergency arbitrator).⁽⁵⁷⁾

Second, the Order ceases to be binding on the parties upon the acceptance by the Court of a challenge against the emergency arbitrator pursuant to Art. 3 of Appendix V. As a matter of logic, this applies mainly to situations in which a challenge is accepted subsequent to the rendering of an Order by the emergency arbitrator. If a challenge is accepted prior to the rendering of an Order, the challenged emergency arbitrator normally will not render an Order.

Third, the Order ceases to be binding with the rendering of the arbitral tribunal's final award. However, pursuant to the express wording of Art. 6(6)(c) of Appendix V, the arbitral tribunal may decide otherwise in its award. The arbitral tribunal must do so "expressly". In other words, where the arbitral tribunal has not

modified, terminated or annulled the emergency arbitrator's decision during the course of the arbitration – i.e., where the arbitral tribunal has implicitly confirmed the emergency arbitrator's Order – and where the arbitral tribunal deems it necessary to extend the binding nature of the measures in place beyond its final award (e.g., until such award is enforced), it may do so by expressly ordering in its award that the measures granted by the emergency arbitrator shall continue to bind the parties. Technically, whether such decision by the arbitral tribunal constitutes an element of the dispositive part of the award or whether it is a procedural order rendered alongside the award will depend on the procedural rules applicable to the arbitration. In any event, it is submitted here that by expressly confirming the measure initially granted by the emergency arbitrator and extending the duration of its existence beyond the final award, the Emergency Measure in effect becomes a tribunal-ordered measure and henceforth is enforceable as such.

Finally, pursuant to Art. 6(6)(d) of Appendix V, the Order also ceases to be binding upon the withdrawal of all claims or the termination of the arbitration before the rendering of a final award.

In addition to the foregoing situations, the emergency arbitrator's Order also ceases to be binding in the event that it is terminated or annulled, either by the emergency arbitrator itself upon a reasoned request by one of the parties pursuant to Art. 6(8) of Appendix V,⁽⁵⁸⁾ or by the arbitral tribunal pursuant to Art. 29(3) of the 2012 ICC Rules.⁽⁵⁹⁾

VII. Conditions, Including Security (Article 6(7))

Article 6(7) of Appendix V provides that the emergency arbitrator may make the Order subject to such conditions as the emergency arbitrator thinks fit, including requiring the provision of appropriate security.

The emergency arbitrator has full discretion with respect to making the Order subject to certain specific conditions. Such conditions can be any action or omission imposed on the applicant (or the responding party, for that matter, insofar as such action or omission does not constitute the Emergency Measure itself), cross-undertakings in damages, deadlines for compliance, etc. Whether or not the term “conditions” includes the threat and even the ordering of penalties for non-compliance (such as so-called *astreintes*) is questionable, but it may well be argued that by agreeing to the Emergency Arbitrator Provisions, the parties vest the emergency arbitrator with the power to order such penalties.⁽⁶⁰⁾

Regarding the provision of “appropriate security”, the same principles apply as to Art. 28(1) of the 2012 ICC Rules pertaining to tribunal-ordered interim measures.⁽⁶¹⁾

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VIII. Modification, Termination and Annulment of the Order by the Emergency Arbitrator (Article 6(8))

Much like Art. 29(3) of the 2012 ICC Rules with respect to the arbitral tribunal,⁽⁶²⁾ Art. 6(8) of Appendix V prescribes that the emergency arbitrator may “modify, terminate or annul” the Order.

Unlike the arbitral tribunal, the emergency arbitrator may only do so upon a reasoned request by a party, and only under the condition that such request is made prior to the transmission of the file to the arbitral tribunal pursuant to Art. 16 of the 2012 ICC Rules. It derives

e contrario from the wording of Art. 6(8) of Appendix V that the *actual* modification, termination or annulment of the Order may be made by the emergency arbitrator *after* the transmission of the file to the arbitral tribunal pursuant to Art. 16 of the 2012 ICC Rules.⁽⁶³⁾ This is in line with Art. 2(2) of Appendix V, stipulating that no emergency arbitrator shall be appointed after the file has been transmitted to the arbitral tribunal pursuant to Art. 16 of the 2012 ICC Rules, however an emergency arbitrator appointed prior thereto shall retain the power to make an Order after the file has been transmitted to the arbitral tribunal, at least within the time limit permitted by Art. 6(4) of Appendix V.⁽⁶⁴⁾ Once the file has been transmitted to the arbitral tribunal, the emergency arbitrator should liaise with the arbitral tribunal prior to ordering a modification, termination or annulment of the Order, so as to avoid to the extent possible conflicting decisions on the same issues within a matter of days.⁽⁶⁵⁾

Article 6(8) is silent on the timeframe in which the emergency arbitrator must take a decision on a request for modification, termination or annulment of the Order. Art. 6(4) should apply *mutatis mutandis*, giving the emergency arbitrator a maximum of 15 days to render its decision. An extension of this time limit in accordance with the rules laid out in Art. 6(4) may be warranted in exceptional circumstances. In principle, this time limit also applies where the file is transmitted to the arbitral tribunal following the filing of a request for modification, termination or annulment.⁽⁶⁶⁾ However, since the arbitral tribunal is not bound by any decision taken by the emergency arbitrator (Art. 29(3) of the 2012 ICC Rules), if the arbitral tribunal itself has in the meantime taken a decision based on Art. 29(3) of the 2012 ICC Rules to modify, terminate or annul the Order, a respective later decision by the emergency arbitrator based on Art. 6(8) of Appendix V will be obsolete.

Presumably, a modification, termination or annulment of the Order presupposes that the circumstances have changed since the rendering of the Order in a way that warrants the Order to be amended or lifted. It will be for the party seeking reconsideration of the Order to show that such a change in circumstances has occurred.

Whereas the “modification” of the Order raises no further questions, it is not entirely clear what the difference is between the emergency arbitrator “terminating” or “annulling” the Order. It is submitted that the former term refers to a lifting of the Order with effect *ex nunc*, whereas the latter refers to a lifting of the Order with effect *ex tunc*. In other words, where the emergency arbitrator “terminates” the Order, any actions taken or services or other ordered obligations performed remain in place, whereas if the Order is “annulled”, such actions and/or performance are unwound.⁽⁶⁷⁾

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Article 7. Costs of the Emergency Arbitrator Proceedings

1 The applicant must pay an amount of US\$ 40'000, consisting of US\$ 10'000 for ICC administrative expenses and US\$ 30'000 for the emergency arbitrator's fees and expenses.

Notwithstanding Article 1(5) of this Appendix, the Application shall not be notified until the payment of US\$ 40'000 is received by the Secretariat.

2 The President may, at any time during the emergency arbitrator proceedings, decide to increase the emergency arbitrator's fees or the ICC administrative expenses taking into

account, *inter alia*, the nature of the case and the nature and amount of work performed by the emergency arbitrator, the Court, the President and the Secretariat. If the party which submitted the Application fails to pay the increased costs within the time limit fixed by the Secretariat, the Application shall be considered as withdrawn.

3 The emergency arbitrator's Order shall fix the costs of the emergency arbitrator proceedings and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

4 The costs of the emergency arbitrator proceedings include the ICC administrative expenses, the emergency arbitrator's fees and expenses and the reasonable legal and other costs incurred by the parties for the emergency arbitrator proceedings.

5 In the event that the emergency arbitrator proceedings do not take place pursuant to Article 1(5) of this Appendix or are otherwise terminated prior to the making of an Order, the President shall determine the amount to be reimbursed to the applicant, if any. An amount of US\$ 5'000 for ICC administrative expenses is non-refundable in all cases.

I. Purpose of the Provision

Article 7 of Appendix V deals with the costs of the emergency arbitrator proceedings. Due to the special nature of and the urgency inherent in emergency arbitrator proceedings, the Emergency Arbitrator Provisions contain a self-contained costs system different from the costs system for arbitration under the ICC Rules.⁽⁶⁸⁾

II. Amount of Costs (Article 7(1) and (2))

Pursuant to Art. 7(1) of Appendix V, the party requesting Emergency Measures must pay an amount of USD 40'000 upon filing the Application. Until this amount is received by the Secretariat, the Application will not be notified, "notwithstanding Art. 1(5)" of Appendix V. USD 30'000 of this amount makes up the emergency arbitrator's fees and expenses, whereas USD 10'000 is for the administrative expenses of the ICC.

In accordance with Art. 7(2) of Appendix V, the President may increase both the emergency arbitrator's fees and expenses and the ICC's administrative expenses at any time during the emergency arbitrator proceedings, whichever the President considers appropriate. In doing so, the President shall take into account all circumstances, including (but not limited to) the nature of the case and the nature and amount of work performed by the emergency arbitrator, the Court, the President and the Secretariat. If the applicant fails to pay such increased costs within the time limit fixed by the Secretariat, the Application will be considered withdrawn.

One situation which may justify an increase of the emergency arbitrator's fees and expenses and possibly also the ICC's administrative expenses is a request for modification, termination or annulment of the [page "844"](#) Order pursuant to Art. 6(8) of Appendix V.⁽⁶⁹⁾ The Emergency Arbitrator Rules do not specify how the ICC secretariat shall proceed in practice in such cases. Particularly, it is not stated whether the responding party – or possibly even the applicant – will be requested to provide an advance on such additional costs, and whether the consequence of

non-payment stipulated in Art. 7(2) of Appendix V, namely that the Application shall be considered withdrawn if the applicant fails to pay the increased costs within a time limit set by the Secretariat, shall also apply in case of request for modification, termination or annulment. It would appear opportune that – in an analogous application of Art. 7(2) of Appendix V – the party requesting modification, termination or annulment of the Order advances the additional costs, if any, with the consequence that its requests is considered withdrawn if it does not pay such costs within a time limit set by the Secretariat.⁽⁷⁰⁾

III. Fixing and Allocation of Costs (Article 7(3)-(4))

Article 7(3) of Appendix V provides that the emergency arbitrator shall fix the costs of the emergency arbitrator proceedings in the Order. What constitutes the costs of the emergency arbitrator proceedings is set out in Art. 7(4) of Appendix V, according to which such costs include the ICC administrative expenses, the emergency arbitrator's fees and expenses and the reasonable legal and other costs incurred by the parties for the emergency arbitrator proceedings. The wording of this provision draws on Art. 37(1) of the 2012 ICC Rules and the principles applicable to that provision also apply to Art. 7(4) of Appendix V.⁽⁷¹⁾

Article 7(3) of Appendix V also prescribes that the emergency arbitrator shall decide which of the parties shall bear the costs of the emergency arbitrator proceedings or in what proportion those costs shall be borne by the parties. In other words, the emergency arbitrator is obliged to allocate the costs of the emergency arbitrator proceedings and cannot simply reserve such decision for the arbitral tribunal. This is necessary to avoid a later situation in which the arbitral tribunal fails, for whichever reason, to deal with the costs of the emergency arbitrator proceedings and such costs remain “unallocated” e.g., because an arbitration is never initiated in a situation where an Order is rendered before expiration of the deadline set in Art. 1(6) of Appendix V, or because there is no award in the arbitration due to settlement of the dispute or other reasons.⁽⁷²⁾

In case of a request for modification, termination or annulment pursuant to Art. 6(8) of Appendix V, the emergency arbitrator should also reconsider and amend, where appropriate, its decision on costs in the initial Order, including the apportionment of such costs.⁽⁷³⁾

As is stipulated in Art. 29(4) of the 2012 ICC Rules, the arbitral tribunal is not bound by the emergency arbitrator's decision on the allocation of the costs of the emergency arbitrator proceedings, but may reallocate such costs if the circumstances so warrant. It is questionable whether the emergency arbitrator may do so on its own initiative, or only upon a request by one of the parties. The fact that Art. 29(4) of the Rules speaks of “any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings” might suggest that a party needs to request the reallocation of such costs. However, since – pursuant to Art. 29(3) of the Rules – the arbitral tribunal may modify, terminate or annul the Order in its own motion,⁽⁷⁴⁾ it is submitted that it would make little *page "845"* sense if the arbitral tribunal could not at the same time decide on the reallocation of the costs of the emergency arbitrator proceedings without the express request of a party.

IV. Reimbursement of Costs

In the event that pursuant to Art. 1(5) of Appendix V the emergency arbitrator proceedings do not take place or are otherwise terminated prior to the making of an Order, Art. 7(5) of Appendix V provides that the President shall determine the amount to be reimbursed to the applicant, if any. In other words, depending on the efforts and work already undertaken by the Court, the Secretariat, the President or the emergency arbitrator, the applicant may not receive any reimbursement at all in the event that the emergency arbitrator proceedings are terminated prior to the emergency arbitrator's Order. This applies irrespective of whether the applicant is "at fault" with respect to such termination, e.g., where the applicant has not filed a Request for Arbitration in accordance with Art. 1(6) of Appendix V, or not.

Notwithstanding the above, Art. 7(5) of Appendix V prescribes that an amount of USD 5'000 for ICC administrative expenses is non-refundable in all cases.

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Article 8. General Rule

1 The President shall have the power to decide, at the President's discretion, all matters relating to the administration of the emergency arbitrator proceedings not expressly provided for in this Appendix.

2 In the President's absence or otherwise at the President's request, any of the Vice-Presidents of the Court shall have the power to take decisions on behalf of the President.

3 In all matters concerning emergency arbitrator proceedings not expressly provided for in this Appendix, the Court, the President and the emergency arbitrator shall act in the spirit of the Rules and this Appendix.

I. Purpose of the Provision

Article 8 of Appendix V is the equivalent to Art. 41 of the 2012 ICC Rules, although its scope is broader. It provides for a catch-all clause governing all emergency arbitrator proceedings under the 2012 ICC Rules. On the one hand, it deals with competences with respect to emergency arbitrator proceedings, and on the other hand it provides for a general rule with regard to the conduct of some of the actors involved in emergency arbitrator proceedings.

II. Competences (Article 8(1)-(2))


Article 8(1) of Appendix V vests a general competence in the President to decide, at the President's discretion, all matters relating to the administration of the emergency arbitrator proceedings not expressly provided for in Appendix V.⁽⁷⁵⁾

According to Art. 8(2) of Appendix V, in the President's absence or otherwise at the President's request, any of the Vice-Presidents of the Court shall have the power to take decisions on behalf of the President. In other words, the President may delegate the powers awarded to him or her under the Emergency Arbitrator Provisions to any of the Vice-Presidents. This includes the decisions under Arts. 1(5), 1(6), 4(1), 6(4) and 7(1) of Appendix V.

III. Conduct of the Emergency Arbitrator Procedure

Article 8(3) of Appendix V is the direct equivalent to Art. 41 of the 2012 ICC Rules and prescribes that the Court, the President and the emergency arbitrator shall act in the spirit of the Rules and Appendix V in all matters concerning emergency arbitrator proceedings not expressly provided for in Appendix V (nor in Art. 29 of the 2012 ICC Rules, for that matter). It is noteworthy that, just like Art. 41 of the Rules, Art. 8(3) of Appendix V does not impose an obligation on *the parties* to emergency arbitrator proceedings. The parties' obligations, especially any obligation to conduct the proceedings in good faith or alike, derive from other sources.

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- ¹ See the commentary above on Art. 29 ICC Rules, para. 4.
 - ² With an office in New York soon to be opened.
 - ³ For more information see <  <http://www.iccarbitration.org> >.
 - ⁴ Fry/Greenberg/Mazza, para. 3-1065.
 - ⁵ For further detail on the content of the Application, see Fry/Greenberg/Mazza, paras. 3-1067 to 3-1077.
 - ⁶ See para. 77 below.
 - ⁷ See paras. 16-20 below.
 - ⁸ See paras. 8-16 below; Fry/Greenberg/Mazza, para. 3-1078.
 - ⁹ See the commentary below on Art. 6 of Appendix V ICC Rules.
 - ¹⁰ See the commentary below on Art. 5 of Appendix V ICC Rules.
 - ¹¹ Fry/Greenberg/Mazza, para. 3-1071, pointing out that this applies particularly where a Request for Arbitration has not yet been submitted.
 - ¹² See further Voser/Boog, *ICC Arb. Bull. Special Supplement 2011*, p. 89.
 - ¹³ See the commentaries above on Arts. 6 and 29 ICC Rules.
 - ¹⁴ See paras. 22-24 below.
 - ¹⁵ See para. 11 above.
 - ¹⁶ See para. 25 below.
 - ¹⁷ Boog, *ASA Bull. 2010*, pp. 464-465.
 - ¹⁸ See the Special Topic on Interim Measures in Chapter 13 below, paras. 38-41, with regard to tribunal-ordered interim relief. For the situation under the emergency arbitrator procedure of the Swiss Rules, see the commentary on Art. 43 Swiss Rules.
 - ¹⁹ Gusy/Hosking/Schwarz, para. 37.13; Lemenez/Quigley, *Disp. Res. J., Part II*, p. 4 with regard to the ICDR Rules; Shaughnessy, pp. 339, 342, with regard to the SCC Rules.
 - ²⁰ See the commentary above on Art. 29 ICC Rules.
 - ²¹ See the commentary above on Art. 29 ICC Rules.
 - ²² Although not stipulated in Appendix V, Arts. 3(2)-3(4) of the ICC Rules apply to the time limits provided for in Appendix V; Fry/Greenberg/Mazza, para. 3-1056 c).
 - ²³ See, in turn, Art. 43(3) of the 2012 Swiss Rules.
 - ²⁴ Fry/Greenberg/Mazza, para. 3-1056 e), stating that such candidates will be drawn "from the pool of individuals who are serving or have served as arbitrators in ICC proceedings".
 - ²⁵ See para. 11 above.
 - ²⁶ See para. 51 below.
 - ²⁷ See paras. 34-36 below.
 - ²⁸ Fry/Greenberg/Mazza, para. 3-1056 e).
 - ²⁹ For the ICDR Rules, see Gusy/Hosking/Franz, para. 37.15,

according to which the ICDR has a “standing panel of qualified emergency arbitrators”, which list is however not open to the public.

³⁰ According to Fry/Greenberg/Mazza, para. 3-1056 e), when appointing an emergency arbitrator, the President will “select a person with the necessary experience who is able to meet the challenging demands that the Emergency Arbitrator provisions will place on him or her”.

³¹ See the commentary above on Art. 29 of the ICC Rules, para. 49.

³² See para. 28 above.

³³ According to Fry/Greenberg/Mazza, para. 3-1056 f), comments will usually be requested within three days.

³⁴ Which will normally be the next possible session of the Court; Fry/Greenberg/Mazza, para. 3-1056 f).

³⁵ Fry/Greenberg/Mazza, para. 3-1056 f).

³⁶ Fry/Greenberg/Mazza, para. 3-1056 g), stating further that the President will normally take a decision on the place of the emergency arbitrator proceedings when making the determination pursuant to Art. 1(5) of Appendix V and that the President will take into account similar factors as the Court would upon determining the place of arbitration pursuant to Art. 18 of the ICC Rules.

³⁷ See para. 51 below.

³⁸ See para. 45 below.

³⁹ See para. 44 below.

⁴⁰ See para. 51 below.

⁴¹ See para. 26 above.

⁴² See para. 40 above.

⁴³ With respect to non-participating parties, see Fry/Greenberg/Mazza, para. 3-1058 d).

⁴⁴ See para. 15 above.

⁴⁵ Fry/Greenberg/Mazza, para. 3-1058 d), remarking that such preliminary orders are “conceivable” under the ICC Emergency Arbitrator Rules.

⁴⁶ See, e.g., Bühler/Webster, para. 23-22. It is also interesting to note in this context that Art. 43(6) of the 2012 Swiss Rules contains a very similar wording (“[...] ensuring that each party has a reasonable opportunity to be heard on the Application”). This wording is understood *not* to hinder the emergency arbitrator from granting preliminary emergency relief where the circumstances so warrant, provided that all responding parties are heard immediately after the preliminary measure is ordered and that the emergency arbitrator confirms, amends or lifts the preliminary order within the shortest time possible after having heard the responding parties; see above the commentary on Art. 43 of the Swiss Rules.

⁴⁷ See the Special Topic on Interim Measures in Chapter 13 below, paras. 38-41.

⁴⁸ See the Special Topic on Interim Measures in Chapter 13 below, para. 42.

⁴⁹ See the commentary above on Art. 29 of the ICC Rules, para. 47; with respect to the emergency arbitrator's decision under the ICDR Rules, see Lemenez/Quigley, *Disp.Res.J. 2008*, p. 6; Lemenez/Quigley, *Disp.Res.J. 2008, Part II*, pp. 3-4, 5.

⁵⁰ See, e.g., Art. 43(7) of the 2012 Swiss Rules.

⁵¹ See, e.g., Art. 8(1) of Appendix II to the SCC Rules; Art. 3(1) of Schedule 2 to the ACICA Rules.

⁵² The same time limit applies under the 2012 Swiss Rules (see Art. 43(7) Swiss Rules).

⁵³ As regards the types of measures which an emergency arbitrator may order under the ICC Rules, see the above commentary on Art. 29 ICC Rules, para. 34.

⁵⁴ See the Special Topic on Interim Measures in Chapter 13 below, paras. 28-33.

- ⁵⁵ See para. 9 above.
- ⁵⁶ See the commentary above on Art. 29 ICC Rules, para. 35.
- ⁵⁷ See para. 19 above.
- ⁵⁸ See paras. 70-74 below.
- ⁵⁹ See the commentary above on Art. 29 ICC Rules, paras. 37-40.
- ⁶⁰ See the Special Topic on Interim Measures in Chapter 13 below, para. 50.
- ⁶¹ See the commentary above on Art. 28 ICC Rules.
- ⁶² See the commentary above on Art. 29 ICC Rules, para. 36.
- ⁶³ See para. 72 below.
- ⁶⁴ See para. 24 above.
- ⁶⁵ See para. 24 above.
- ⁶⁶ See para. 71 above.
- ⁶⁷ As regards the consequences of a request for modification, termination and annulment pursuant to Art. 6(8) of Appendix V in terms of costs, see paras. 79 and 82 below.
- ⁶⁸ Fry/Greenberg/Mazza, para. 3-1056.
- ⁶⁹ See paras. 70-75 above.
- ⁷⁰ See further para. 82 below.
- ⁷¹ See the commentary below on Art. 37 ICC Rules.
- ⁷² Cf. the different approach taken by the Swiss Rules in Art. 43(9), according to which the decision on the Application shall include only a determination of costs as referred to in Art. 38(g) of the Swiss Rules, whereas the determination of costs pursuant to Art. 38(d) and (e) of the Swiss Rules, as well as the apportionment of costs among the parties, is left to the arbitral tribunal, unless no arbitral tribunal is constituted. In this event, these determinations are made by the emergency arbitrator in a separate award.
- ⁷³ See para. 79 above.
- ⁷⁴ See the commentary above on Art. 29 ICC Rules, para. 36.
- ⁷⁵ The President will consult with the Secretariat when taking any decision in connection with emergency arbitrator proceedings and any decision taken by the President will be reported to the Court in order to maintain checks and balances on the exercise of the President's powers; Fry/Greenberg/Mazza, para. 3-1056 d).

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