Helsinki Law Review 2013/2 p. 189–204

The Pros and Cons of Emergency Arbitration

Keywords: arbitration, emergency arbitrator, interim measures

Jussi Hakanen[1]

Abstract

This article examines the speed, costs and confidentiality of emergency arbitration, as well as the enforceability of the relief, by comparing emergency arbitration rules and practice with court-ordered interim measures. In Finland and Sweden it is rather easy, quick and inexpensive to apply for and be granted court-ordered interim measures. This article discusses whether arbitration users benefit from the possibility to apply for interim measures from an emergency arbitrator instead of a court.

Court-ordered interim measures have many advantages compared to arbitrator-ordered relief: a court order is also available against third parties, it can be ordered without hearing the counterparty and it can be enforced effectively. Due to these advantages, the parties are likely to prefer court-ordered measures to emergency arbitration. However, in certain situations emergency arbitration may be more attractive to the applicant party: for example the object of the relief may be located in a jurisdiction where effective court assistance is not available and the applicant may be granted the relief without setting an advance security. Confidentiality is also better secured in emergency arbitration.

Full Article

1 Introduction

Emergency arbitration refers to a procedure preceding arbitration where an "emergency arbitrator" (also known as a pre-arbitral referee) is appointed to grant interim measures that are so urgent that they cannot wait for the con-

1 Jussi Hakanen (LL.B., LL.M., University of Helsinki) is a Legal Counsel at Fondia Oy, Helsinki. This article is based on his Master's Thesis.

stitution of the actual tribunal, in order to defend a party against an urgent threat from the counterparty.[2] To secure the efficiency of arbitration, it is of utmost importance that a party has sufficient means to prevent the counterparty's threatening actions. The counterparty could, for example, destroy evidence in his possession or transfer property offshore in order to frustrate the successful enforcement of an award.[3] Nevertheless, it is also important to consider the counterparty's rights and to satisfy the demand of due process. Unless these requirements are met, the award may be challenged and set aside. As arbitrators seek to grant only enforceable and final awards, they tend to be careful in granting interim measures.

During recent years, many of the significant arbitration rules have been revised to include rules on emergency arbitration and it is nowadays a common element in arbitration institutes' set of rules.[4] The Arbitration Institute of the Finland Chamber of Commerce (FCC) updated its arbitration rules to include rules on emergency arbitration as of 1 June 2013. The new emergency arbitration rules are in most provisions similar to the International Court of Arbitration (ICC) Rules. Unless otherwise agreed by the parties, the new rules on interim measures apply to all arbitrations commenced on or after 1 June 2013.[5] There is no case law on FCC emergency arbitration and, as far as I am concerned, it may take a couple of years before there will be, because disputes usually arise a few years after an agreement with a reference to emergency arbitration rules has been concluded. Meanwhile, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has already published four emergency arbitration cases. Due to the similarity between Swedish and Finnish laws and the FCC and the SCC Rules, the

2 The concept is in Finnish "pikavälimies" and in Swedish "interimistisk skiljeman". There is no exact definition for interim measures. As defined by Gary B. Born, they are "issued for the purpose of protecting one or both parties to a dispute from damage during the course of the arbitral process." See Born 2009, p. 1943–1944.

3 See e.g. Lew – Mistelis – Kröll 2003, p. 585.

4 It is available, for example, in the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), The International Court of Arbitration (ICC), The American Arbitration Association's International Centre for Dispute Resolution (ICDR) and The Netherlands Arbitration Institute (NAI). However, there still remain some major institutes that do not have emergency arbitration rules, most notably the LCIA.

5 The rules on emergency arbitration only apply to arbitrations in which the arbitration agreement is concluded on or after 1 June 2013. Similarly in ICC Rules app. V, art. 6(a). Cf. SCC Rules.

practical conclusions from SCC praxis may be applicable in FCC emergency arbitration.[6]

This article discusses why the rules on emergency arbitration are not successful in their current form and whether something could be done to improve the situation.[7]

2 Powers to order interim measures

An arbitrator's power to grant interim measures can be authorized explicitly by the law or implicitly through affirmative practice and case law. In civil law jurisdictions, the power to grant enforceable interim measures would presumably require a statutory provision.[8] In the absence thereof, an arbitrator's power can only be based on the parties' consent and such interim measures are not enforceable.

There are no provisions on arbitrator-ordered interim measures or emergency arbitration in the Finnish Arbitration Act (*Välimiesmenettelylaki, VML*). It is, however, rather well established that arbitrators can grant interim measures that can be effective without coercive powers or enforcement, such as ordering a party to continue the performance of a contract during arbitration.[9] In arbitrations administered by any of the major arbitration institutes, the tribunal has the power to grant interim measures. [10] Since 2000, the FCC Rules have included a provision on arbitrator-ordered interim meas-

6 For the reported SCC emergency arbitration cases, see Lundstedt 2011.
7 Regarding the types of and conditions for the interim measures, the emergency arbitration does not differ from tribunal-ordered interim measures, except that in emergency arbitration the measures shall be so urgent that they cannot wait the constitution of the tribunal. See SCC Rules app. II art. 1 and FCC Rules app. III art. 1. For a more detailed presentation, see e.g. Hakanen 2013.
8 See e.g. Lindskog 2012, p. 342 fn. 80.
9 See Möller 2003, p. 256 and Savola 2011, p. 654.
10 See FCC rules, art. 30 a, SCC Rules, art. 32, ICDR Rules, art. 21, The Hong Kong International Arbitration Centre (HKIAC) Administered arbitration rules, art. 24, The Singapore International Arbitration Centre (SIAC) Rules, art. 26, LCIA Rules, art. 25 and ICC Rules, art. 28. Born argues that the tribunal's powers are even broader in accordance with the rules – such as ICC Rules – providing the powers to grant such interim measures as the tribunal deems "appropriate", compared to the expression of the UNCITRAL Model Law with amendments as adopted in 2006 (Model Law). See also Born 2009, p. 1958 and Yesilirmak 2005, p. 204.

ures. Nevertheless, the measures are not enforceable.[11] Since an arbitrator's powers to order interim measures are solely based on the parties' agreement, the powers only extend to the parties to arbitration. This is an important limitation to an arbitrator's powers compared to national courts. If assets or properties are in the possession of a third party, for example a bank, interim measures shall be sought from the national court.[12]

In Sweden, the framework for arbitrator-ordered interim measures is different from Finland, in the respect that the Swedish Arbitration Act (*Lag om skiljeförfarande, LSF*) Section 25(4) provides arbitrators with the power to order interim measures. When it comes to court-ordered relief, the provisions of the Swedish Code of Judicial Procedure (*Rättegångsbalk, RB*) Chapter 15 Sections 1–3 are almost word for word similar to the Finnish Code of Judicial Procedure (*Oikeudenkäymiskaari, OK*) Chapter 7 Sections 1–3. The Swedish provisions were used as a model for the Finnish provisions, especially for OK Chapter 7 Section 3.[13] It is to be noted that the rules on emergency arbitration in the SCC Rules also apply retroactively to all arbitrations irrespective of their date of commencement.

3 Time, costs and confidentiality

Emergency arbitration may be applied even before the request for arbitration is received by the institute. After the institute has transmitted the case file to the tribunal, the tribunal has primary jurisdiction and the emergency arbitrator has no further power, except that the emergency arbitration decision can also be made after the tribunal proceedings have already begun.[14]

The FCC seeks to appoint an emergency arbitrator within 2 days of receiving the application and a deposit for the costs. The arbitrator shall establish

11 See Möller 2007, p. 91. Similarly in Sweden, see LSF section 25(4), Swedish Government Official Report (SOU) 1994:81 p. 102, Swedish Government Bill 1998/99:35, p. 73, Shaughnessy 2010, p. 355, Lindskog 2012, p. 691, Hobér 2011, p. 249 and Heuman 2003, p. 333.
12 See Hillerström 2008, p. 41.
13 See Savola 2001, p. 436.
14 FCC Rules app. III, art. 6(5). The decision ceases to be binding if the file has not been transmitted to the tribunal within 90 days from the decision, FCC Rules app. III, art. 8(6)(c).

a procedural timetable within two days and then make a decision on the matter within 15 days after receiving the file.[15] The SCC, on the other hand, revised its rules in 2010. The SCC seeks to appoint an emergency arbitrator within 24 hours of receiving an application.[16] The emergency decision shall also be made within 5 days from the arbitrator's receipt of the application.[17]

However quick the procedures may appear, they cannot compete in speed with interim order proceedings in the Nordic national courts.[18] Interim orders are granted in an ex parte hearing, where the counterparty will not be given any prior notice before the enforcement, which can be carried out within 1–3 days – sometimes even within a few hours – after the application to the court.[19] An ex parte hearing is not possible in Nordic arbitration.[20] Therefore emergency arbitration is not to be recommended if the applicant seeks to surprise the counterparty.

Most emergency arbitration rules provide that the applicant party must set an application deposit for the costs of the proceedings. Under the FCC Rules the deposit is 25,000 € and under the SCC Rules 15,000 €.[21] The deposits seem rather high when compared to the administrative and arbitrator's fees in the principal arbitration[22], and especially so when compared to the normal costs of court-ordered interim measures, which only amount to some hundreds of euros.[23]

Emergency arbitration does, however, have one important advantage compared to interim proceedings in national courts: the possibility to be granted

15 FCC Rules app. III, art. 6(1) and 6(4).
16 See also Shaughnessy 2010, p. 340.
17 SCC Rules app. II, art. 8(1). Cf. 15 days in accordance with FCC Rules app. III, art. 6(4).
18 Interim orders are provided by OK Chapter 7 section 5(2) and RB Chapter 15 section 5.
19 See Lappalainen et al. 2008, p. 1075. It must also be noticed that the standard of proof is especially low regarding the interim orders.
20 See SCC app. II, art. 3 and FCC rules app. III, art. 3(2). See also Shaughnessy 2010, p. 339–340. Cf. the Model Law art. 17 B–C. On ex parte hearing, see also Born 2009, p. 2015–2019, Redfern 2008, p. 323–324 and Möller 2003, p. 251.
21 The deposit may be increased, due to "exceptional circumstances", or reduced, in case the proceedings terminate, before the emergency arbitrator renders the decision. See FCC Rules app. III, art. 4(1)–4(4), SCC Rules app. II, art. 10 and ICC Rules app. V, art. 7.
22 See FCC Rules app. II, Table A–B.
23 For costs in Finland, see http://oikeus.fi/5835.htm (visited 1 December 2013). Nevertheless, it must be noticed that the costs increase if the court decision is appealed.

relief without setting a security. In order to enforce a court-ordered interim measure, the applicant must, both in Sweden[24] and in Finland[25], set an adequate security for possible damages caused to the counterparty, for which the applicant has strict liability.[26] The security may be substantial. Thus, it may practically prevent an applicant from applying for relief. Meanwhile, the arbitration rules only provide that the arbitrator "may" order the applicant to provide an appropriate security.[27] As far as I am concerned, arbitrators do not generally require a security. As for the reported SCC emergency arbitration cases, a security has not been required.[28] Therefore, the emergency arbitration applicant risks losing the deposit, but if the application is successful, the party may be granted relief without having to pay the security and can claim the deposit from the counterparty after the proceedings. This is a risk that some applicants are probably willing to take.

Another advantage of emergency arbitration in comparison to court proceedings is the confidentiality of the procedure. There are no special provisions on the confidentiality of interim measures in Finnish law. Thus, the general rule of the publicity of the court proceedings, documents, and decisions applies to interim measure proceedings.[29] This is contrary to the presumption of confidentiality in arbitration under the FCC Rules.[30] The court can order a decision to be kept secret to a necessary extent, excluding the conclusions of the decision and the legal provisions applied, which are always public.[31] However, it must be noted that the court's conclusion on

24 For more detailed illustration of the Swedish model, see Westberg 2004, p. 211–223.
25 OK Chapter 7 section 11 and the Finnish Enforcement Code (*Ulosottokaari, UK*) Chapter 8 section 2. Lappalainen et al. 2008, p. 1077. The exception regarding the security in OK Chapter 7 section 7 is hardly relevant in interim measures connected to arbitration. Cf. the Model Law, art. 17 H (3) that leaves more discretion to the tribunals and courts, see Möller 2007, p. 98.
26 In Sweden, an adequate security decided by the court, which is deposited with the court, is a prerequisite for the court-ordered relief. In Finland, the amount of the security is decided by the execution officer and the security is a prerequisite for the enforcement, not for the court's decision itself. In practice, the applicant may be able to pass the payment of the security if an ignorant respondent complies with the court order even before it is made enforceable.
27 See e.g. SCC Rules, art. 32(2) and app. II, art. 1(2) and FCC Rules app. III, art.6(6). See also Hobér 2007, p. 736–737.
28 See Lundstedt 2011.
29 The Finnish Act on the Publicity of Court Proceedings in General Courts (*Laki oikeudenkäynnin julkisuudesta yleisissä tuomioistuimissa, OikJulkL*) sections 1, 5 and 22.
30 The confidentiality is provided by FCC Rules app. II, art. 10(1).
31 OikJulkL section 11(2). See also the extension of the period in section 11(4).

the secrecy of the decision is always based on case-by-case consideration.[32] Therefore, confidentiality is better protected in arbitration than in court proceedings.[33] Presumably, the publicity of court proceedings also works as pressure for the counterparty to comply with the arbitrator's orders.

4 To enforce or not to enforce

The FCC Rules on emergency arbitration provide that the "decision shall be binding on the parties when rendered" and that the parties shall comply with it without delay.[34] Since the emergency arbitrator's function is to grant interim measures instead of final awards, the emergency arbitrator's decision does not bind the tribunal, and the decision shall cease if the tribunal so decides or by default upon the tribunal's rendering of the final award.[35]

Unless there is a possibility to enforce the arbitrator's order, the effectiveness of the arbitral-decision rests on the benevolence of the counterparty.[36] In practice, the arbitrator's decisions are usually complied with.[37] Nevertheless, this does not mean that the enforceability of interim measures would be trivial. It can be presumed that a party seeks interim relief through emergency arbitration – instead of court proceedings – only when the counterparty's voluntary compliance is expected.[38] The need for enforcement is further emphasized in international arbitration, where the location of the arbitration may not have any connection to the parties or the merits.[39]

Whether an arbitrator's decision can be formed as an enforceable award is a debated issue.[40] For example, the UNCITRAL Model Law and the SCC Rules provide that the form of the decision may be either an order or an award, whereas the new FCC Rules provide that the form shall be that of

32 See Jokela 2005, s. 5.5.13.
33 See FCC Rules app. III, art. 10(1). See also Lindholm 2007, p. 16 and Westberg 2008, p. 622–624.
34 FCC Rules app. III, art. 8(3).
35 FCC Rules app. III, art. 8(6)(d)–(f).
36 See Explanatory Note by the UNCITRAL secretariat, paragraph 4.
37 See Hobér 2007, p. 24–25.
38 Ibid.
39 See UN Doc. A/CN.9/WG.II/WP.108 (UNCITRAL Working Group on Arbitration, 32nd session in Vienna on 20–31 March 2000, Report of the Secretary General), para. 74.
40 See e.g. Yesilirmak 2005, p. 192–195.

an order.[41] In addition to the enforceability, another difference between an award and an order is that the parties cannot challenge an arbitrator's order on interim measures or other procedural decisions, whereas an award can be challenged immediately, without waiting for the final award to be rendered.[42]

Historically, tribunal-ordered interim measures have not been deemed "final and binding"[43] in the sense of the New York Convention, but there has been a tendency towards accepting interim measures as enforceable awards, at least in the United States.[44] Notwithstanding, it seems that the majority view internationally is that the New York Convention does not apply to interim measures.[45] Therefore, an order is usually to be recommended in international arbitration, as it is more simple and quicker to draft, and the arbitrator may amend it at any time.[46]

Arbitral-decisions on interim measures are not deemed enforceable arbitral awards in the sense of Finnish[47] or Swedish[48] law even if formed as awards.[49] However, the commentary in Sweden seems to support an arbitrator's means to grant interim measures by rendering a separate award, pursuant to LSF Section 29, which could be made enforceable – possibly also under

41 See FCC Rules, art. 36(4). Cf. old FCC Rules section 30a, where the wording was "injunction or other order." For the form of tribunal-ordered measures, see the Model Law, art. 17(2), ICC Rules, art. 28(1) and SCC Rules, art. 32(3).
42 See Heuman 2003, p. 527 and VML section 41. See also e.g. Lew–Mistelis–Kröll 2003, p. 530.
43 On the concepts of final and binding, see e.g. Savola 2008, p. 48.
44 See Born 2009, p. 2020–2021, Sherwin–Rennie 2010, p. 325 and Publicis vs. True North, 203 F.3d 725 (7th Cir. 2000). Cf. e.g. Chinmax vs. Alere in U.S. District court (27 May 2011) p. 8.
45 See Born 2009, p. 2022 and Yesilirmak 2005, p. 265. Cf. Poudret–Besson 2007, p. 546–548. It is to be noticed that the Model Law's wording "whether in the form of an award or in another form" wasn't intended to take a stand on the interpretation of the New York Convention, see UN Doc. A/CN.9/WG.II/WP.138 (UNCITRAL Working Group 43rd Session in Vienna on 3-7 October 2005) p. 6.
46 For Sweden, see Shaughnessy 2010, p. 340. For case law in the Model Law jurisdictions, see UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration 2012, p. 137.
47 UK Chapter 2 section 2(1)(3). See also Möller 2003, p. 255–256 and Möller 2007, p. 91.
48 Swedish Enforcement Code Chapter 3 section 1(1)(4). See also SOU 1994:81 p. 102, Swedish Government Bill 1998/99:35, page 73, Shaughnessy 2010, p. 355, Lindskog 2012, p. 691, Hobér 2011, p. 249, Heuman 2003, p. 333.
49 See Savola 2009, p. 42.

the New York Convention.[50] VML contains nearly identical provisions on separate awards but there has not been a similar discussion in Finland regarding the possibility to grant enforceable interim measures.[51] It must be noted that the FCC Rules provide that the form of the interim measures is an order. Hence, the possible enforceability of interim measures in the form of an award does not have practical significance in Finland. Nevertheless, the discussion in Sweden is interesting from a Finnish perspective due to the similarity of the arbitration laws.

According to Swedish commentaries, separate awards are as such final decisions even if they are given temporarily, until the final arbitration award is rendered.[52] They are meanwhile not revocable or amendable.[53] If the request for interim measures concerns procedural questions, the decision shall be an order, pursuant to LSF Section 25(4).[54] If the request is of substantive nature, the prohibition to prejudge the merits can prevent the granting of relief.[55] In such a situation, the decision could be made in the form of an enforceable separate award. Thus, the only difference between a separate award and a final award would be their time in force.[56] It must be noticed that, in practice, it may be very difficult to identify a question as procedural or substantive.[57]

There is no Nordic case law on the matter.[58] Before any affirmative case law exists, arbitrators are probably reluctant to grant interim measures as separate awards due to the risk of the award to be set aside. Indeed, it could well be argued that arbitrators would exceed their authority because the

50 See e.g. Heuman 2003, p. 333. Cf. Swedish Government Bill 1998/99:35, p. 73 and Hobér 2011, p. 360: "Whereas separate awards and partial awards may include enforceable rulings, interim awards on security measures are, as a general rule, not enforceable under Swedish law."
51 See VML sections 33–34.
52 See Heuman 2003, p. 333.
53 See SCC Rules, art. 40.
54 See Heuman 2003, p. 531.
55 See Westberg 2008, p. 631–632. See also Heuman 2003, p. 531 where performance of specified task is given as an example.
56 See Westberg 2008, p. 632.
57 The problem of qualification is even more complicated in international arbitration due to the lack of lex fori, see Poudret–Besson 2007, p. 534–535.
58 See Heuman 2003, p. 334.

lex arbitri or arbitration rules do not permit enforceable arbitral-ordered interim relief.[59]

Regardless of whether the courts accept tribunal-ordered interim measures as enforceable separate awards, it is difficult to see how an emergency arbitrator's decision could be deemed an enforceable award according to Swedish or Finnish law. There is an important difference between tribunal-ordered and emergency arbitrator-ordered interim measures that must be noticed: the emergency arbitrator may later revoke or amend the decision.[60] Thus, as far as I am concerned, an emergency arbitrator's decision lacks the characteristics of an award. Consequently, the hope that the emergency arbitrator's decision could be enforced seems ill founded.[61]

Despite the fact that the UNCITRAL Model Law does not contain rules on emergency arbitration, it offers an alternative perspective to the question of enforceability. According to the Model Law Article 17 H (1), the interim measures ordered by the tribunal are binding and enforceable, although Article 17 D states that "the arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative."[62] As far as I am concerned, the enforceability of the interim measures should be clearly stated by the arbitration laws – as in the UNCITRAL Model Law – instead of trying to apply the provisions on separate awards in VML and LSF to interim measures. [63]

59 See Savola 2011, p. 657.
60 See SCC Rules app. II article 9 and FCC Rules app. III art. 8(4).
61 Cf. Shaughnessy 2010, p. 359: "The SCC EA Rules provide an opportunity to rapidly obtain ostensibly enforceable relief in the form of an award even before arbitration has been commenced. […] While this procedure may enhance the autonomous nature of SCC arbitration and may be a useful tool for SCC users, it rests upon courts to determine whether awards issued by emergency arbitrators will be enforced."
62 The Model Law, art. 17 D and 17 H (1).
63 Also Gustaf Möller and Mika Savola have advocated for an enforcement mechanism. See Möller 2007, p. 100 and Savola 2011, p. 663.

5 Other consequences of non-compliance

If arbitral-ordered interim measures are not enforceable, what other consequences could there be for a party ignoring an emergency arbitrator's orders? Can the parties be contractually obligated to comply with the orders if the orders cannot be enforced?[64] This could be done by claiming either damages or liquidated damages based on a breach of the arbitration agreement. It is quite commonly held that arbitrators can draw adverse inferences from a party's disobedience of an arbitrator's orders.[65] The legal basis for such inferences is not absolutely clear. When it comes to disobedience of interim relief measures, practitioners suggest that the parties are usually not willing to take the risk of irritating the arbitrator and therefore comply with the arbitrator's orders to avoid jeopardizing their case.[66]

It is commonly held that, subject to the arbitration agreement, the tribunal can consider a party's non-compliance with an order for interim measures when rendering the final award and order the non-compliant party to pay damages.[67] It could be argued that a threat of damages or liquidated damages circumvents the main rule of an arbitral-decision on interim measures being legally non-binding.[68] According to Lindskog, the possibility of damages requires that the parties have agreed to be bound by interim reliefs.[69] In that way, non-compliance becomes a breach of the arbitration agreement. Many institutional rules provide the binding nature of the emergency arbitrator decision explicitly.[70] In most cases, the damages could well be claimed and rendered based on the merits, irrespective of whether non-compliance is taken into account.[71]

64 Answer is yes according to Nilsson, see Nilsson 2010, p. 355. Cf. Lindskog 2005, p. 740 fn. 105.
65 See Born 2009, p. 1967, Möller 1997, p. 60, Shaughnessy 2010, p. 345–346, Waincymer 2012, p. 671 and UN Doc. A/CN.9/WG.II/WP.108, para. 75.
66 See Savola 2011, p. 662 and the often cited Schwartz 1993, p. 59.
67 Hochstrasser 2007 p. 26, and D'Agostino 2011 and SOU 1994:81, p. 102.
68 See e.g. Lindskog 2012, p. 690–691 and Westberg 2008, p. 633.
69 see Lindskog 2012, p. 691 fn. 140.
70 See e.g. FCC Rules app. III, art. 8(3), SCC Rules app. II, art. 9(3), ICC Rules, art. 29(2) and SIAC Rules, schedule 1(9).
71 See Westberg 2008, p. 621 and Lindskog 2012, p. 691 fn. 140. Cf. Lindskog ibid: "det kan dock inte uteslutas att I det enskilda fallet ett åsidosättande…skulle kunna leda till en skada som skiljekäranden inte kan få kompenserad genom verkställighet av domen."

Another potential consequence is that the arbitrator can consider a party's non-compliance when deciding on the allocation of costs between the parties.[72] Pursuant to the FCC Rules, an emergency arbitrator can decide the amount of the costs and their allocation between the parties, whereas, according to the SCC Rules, the tribunal sets the costs between the parties, not the emergency arbitrator.[73]

Pursuant to lex arbitri, the threat of a fine is not possible in Nordic arbitration proceedings.[74] In this regard, it must be observed that the prohibition to use the threat of a fine is open to interpretation. It could well be argued that the prohibition concerns only procedural fines, not liquidated damages.[75] Arguably, an arbitrator's powers to order liquidated damages for non-compliance of interim relief would require a provision in the arbitration agreement.[76] However, neither the FCC nor the SCC rules contain provisions on liquidated damages.[77] Consequently, it can be concluded that an emergency arbitrator cannot use the threat of liquidated damages.

6 Conclusions

The need for emergency arbitration has usually been reinforced by the drawbacks of court proceedings. As some authors suggest, "the relief sought may not be available, court proceedings may be public, lengthy, costly, and veer in unexpected directions."[78] However, in Finland and in Sweden, the court proceedings regarding interim measures are very efficient and quite flexible and the courts have a very broad power to order different types of interim relief. The advantages of court-ordered interim reliefs are quick proceedings and efficient enforcement (also against third parties), reasonable costs, and the availability of ex parte relief as well as coercive measures.

72 FCC Rules, art. 25(3). See also VML section 49, OK Chapter 21 section 5 and similarly SCC Rules, art. 43(5) and app. II, art. 10(5) and LSF section 42 and UN Doc. A/CN.9/WG.II/WP.108 para. 75.
73 FCC Rules app. III, art. 9, ICC app. V art. 7(3) and SCC Rules app. II, art. 10(5). See also Shaughnessy 2010, p. 347.
74 VML section 27(2) and LSF section 25(2). Cf. Yesilirmak 2005, p. 212. For the threat of fine in court-ordered interim measures, see Savola 2001, p. 440–441.
75 See Westberg 2008, p. 632.
76 See Lindskog 2012, p. 691–692.
77 For the possibility to order multiple or punitive damage, see Yesilirmak 2005, p. 244. See also Born 2009, p. 2478.
78 Lemenez – Quigley 2008, p. 2.

The main problems with Nordic court-ordered interim measures concern the court's international competence. The court's competence is quite strictly limited to its own territory. When either Sweden or Finland is selected as a "neutral" location for an arbitration, whose merits have little or no connection to the jurisdiction of the seat, the Nordic courts may not be able to grant effective relief if the properties are not located within their jurisdiction.[79] Therefore emergency arbitration can be an advantage to a party, i.e. when the object of the interim measure is located either in a jurisdiction where court assistance for enforceable relief is not a viable option or in a jurisdiction providing the enforcement of foreign arbitral-ordered interim measures.

It is often mentioned that arbitrators are better equipped to grant interim measures than courts due to their better expertise and understanding of a case.[80] However, this does not necessarily apply to an emergency arbitrator because he or she is involved in a case for a very short time. The general expertise of emergency arbitrators depends on how well the institutes manage to attract experienced lawyers to act as emergency arbitrators. Due to the lack of data regarding emergency arbitration, it is too early to draw conclusions regarding the expertise of emergency arbitrators.

Since the emergency arbitration procedure is the same regardless of the jurisdiction where the object of the measure is located, the applicant does not need to review the procedural laws of foreign jurisdictions. Therefore, the simplicity of the emergency arbitration procedure can be attractive in international arbitration, presuming that the counterparty is expected to comply with the relief or that the tribunal can be convinced of drawing adverse inferences from the counterparty's non-compliance.

Otherwise a party is likely to prefer emergency arbitration to court-ordered interim measures only in exceptional cases, for example when the confidentiality of the proceedings is a more important factor than the counterparty's possible non-compliance with the decision and the unenforceability of the relief. In this case, the relief could perhaps be applied more for tactical pur-

79 See also UN Doc. A/CN.9/WG.II/WP.108, para. 76.
80 See Lew – Mistelis – Kröll 2003, p. 588, Berger 2009, p. 348, Westberg 2008, p. 624 and Möller 2003, p. 257.

poses than to prevent truly "irreparable damage". A party may also prefer emergency arbitration because, unlike in court, the relief in emergency arbitration may be granted without requiring the applicant to set an advance security.

Given its limitations compared to court-ordered interim measures, I assume that emergency arbitration will not be very useful in arbitration in Finland. In my view, the emergency arbitration provisions were included since the major institutes had done the same, to convince the international arbitration community and businesses of the FCC Rules being up-to-date, rather than to solve an existing problem. The effectiveness of emergency arbitration relies on the hope that the parties voluntarily comply with the relief or that interim decisions can be enforced. As far as I am concerned, enforceability would require an amendment of the arbitration law.

Bibliography

Berger, B. (2009). The pros and cons of arbitration compared to State court proceedings. *Presentation in AIJA Zurich Arbitration Conference* on 11–13 June 2009. Zurich.

Born, G. B. (2009). *International Commercial Arbitration.* Kluwer Law International.

D'Agostino, J. (2011). *First aid in arbitration: Emergency Arbitrators to the rescue*. Retrieved 4 June 2013 from Kluwer Arbitration Blog: http://kluwerarbitrationblog.com/blog/2011/11/15/first-aid-in-arbitration-emergency-arbitrators-to-the-rescue/.

Hakanen, J. (2013). *Emergency Arbitration*. Retrieved 29 October 2013 from http://hdl.handle.net/10138/40743.

Heuman, L. (2003). *Arbitration Law of Sweden: Practice and Procedure.* New York: Juris Publishing Inc.

Hillerström, P. (2008). Emergency and Pre-Tribunal Arbitral Relief: Current Approaches of the Key Arbitral Institutions. *Stockholm International Arbitration Review (2),* 39–47.

Hobér, K. (2007). Interim Measures by Arbitrators. (A. van den Berg, Ed.) *International Arbitration 2006: Back to Basics?, ICCA Congress Series, 13*, pp. 721–750.

Hobér, K. (2011). *International Commercial Arbitration in Sweden.* Oxford: Oxford University Press.

Hochstrasser, D. (2007). Types of Interim Measures. Conditions for Granting of Interim Measures. *Presentation in Swedish Arbitration Association's seminar on Interim Measures in International Arbitration* on 4 October 2007. Stockholm.

Jokela, A. (2005). *Oikeudenkäynnin perusteet.* Helsinki: Talentum.

Lappalainen, J. et. al. (2008). *Prosessioikeus*. Helsinki: SanomaPro.

Lemenez, G. & Quigley, P. (2008). The ICDR's Emergency Arbitrator Procedure in Action. Part I: A Look at the Empirical Data. *Dispute Resolution Journal* August/October, pp. 1–8.

Lew, J., Mistelis L., & Kröll, S. (2003). *Comparative International Commercial Arbitration*. The Hague : Kluwer Law International.

Lindholm, T. (2007). Interim Measures in International Arbitration. *Presentation for Swedish Arbitration Association's seminar on interim measures in international arbitration* on 4 October 2007. Stockholm.

Lindskog, S. (2005). *Skiljeförfarande. En kommentar.* Stockholm: Norstedts Juridik AB.

Lindskog, S. (2012). *Skiljeförfarande. En kommentar.* Stockholm: Norstedts Juridik AB.

Lundstedt, J. (2011). *SCC Practice: Emergency Arbitrator. Decisions rendered 2010.* Retrieved 16 May 2013 from http://www.sccinstitute.com/filearchive/4/41504/Emergency%20arbitration%20final.pdf.

Möller, G. (2007). UNCITRAL:n välimiesmenettelyä koskevan mallilain uudet säännökset turvaamistoimista. In Waselius &. Wist, *With Wisdom* (pp. 91–100). Porvoo: WS Bookwell Oy.

Möller, G. (2003). Om interimistiska säkerhetsåtgärder och skiljeförfarande. In Juridiska föreningen i Finland, *Festskrift till Edward Andersson* (pp. 247–259). Helsinki: Juridiska göreningen i Finland.

Nilsson, B. G. (2010). Negative Inferences: An Arbitral Tribunal's Powers to Draw Adverse Conclusions from a Party's Failure to Comply with the Tribunal's Orders. In K. Hobér, A. Magnusson, & M. Öhrström, *Between East and West: Essays in Honour of Ulf Franke.* New York: JurisNet, LLC.

Poudret, J.-F., & Besson, S. (2007). *Comparative Law of International Arbitration. Second Edition.* London: Sweet & Maxwell.

Savola, M. (2011). Arbitrator-Ordered Interim Measures of Protection in International Arbitration. *JFT* (4–5), 647–663.

Savola, M. (2001) Oikeudenkäymiskaaren yleisen turvaamistoimisäännöksen soveltamisalasta. *Defensor Legis* (3), 435–468.

Savola, M. (2009). Turvaamistoimet välimiesmenettelyssä. *Presentation in Talentum Lakikoulutus* on 10 March 2009. Helsinki.

Savola, M. (2008). Välityslausekkeen Laadinnasta Kansainvälisluontoisissa Sopimuksissa I. *Defensor Legis* (1), pp. 13–52.

Shaughnessy, P. (2010). Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules. *Journal of International Arbitration , 27* (4), pp. 337–360.

Schwartz, E. A. (1993). The Practices and Experience of the ICC Court. In ICC, *Conservatory and Provisional Measures in International Arbitration*. Paris: ICC Publishing S.A

Sherwin, P. J., & Rennie, D. C. (2010). Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis. *The American Review of International Arbitration , 20* (3), pp. 317–366.

Waincymer, J. (2012). *Procedure and Evidence in International Arbitration.* The Hague: Kluwer Law International.

Westberg, P. (2004). *Det provisoriska rättsskyddet i tvistemål. En funktionsstudie över kvarstad och andra civilprocessuella säkerhetsåtgärder. Bok 4.* Lund: Juristförlaget i Lund.

Westberg, P. (2008). Skiljeförfarande och Avtal om Civilprocessuella och Säkerhetsåtgärder. In E. Lindell-Frantz, *Festskrift till Lars Gorton* (pp. 617–636). Stockholm: Juristförlaget i Lund.

Yesilirmak, A. (2005). *Provisional Measures in International Commercial Arbitration.* The Hague: Kluwer Law International.