

# Institutional Arbitration

Article-by-Article Commentary

von

Rolf A. Schütze, Christian Aschauer, Richard Happ, René-Alexander Hirth, Robert Hunter, Pierre A. Karrer, Thomas R. Klötzel, Sabine Konrad, Susanne Kratzsch, Christoph Liebscher, Michael J. Moser, Tilman Niedermaier, Marie Öhrström, Paolo Michele Patocchi, Andreas Reiner, Sabine Stricker-Kellerer, Ulrich Theune, Roderich C. Thümmel, Alexander Trunk

1. Auflage

[Institutional Arbitration – Schütze / Aschauer / Happ / et al.](#)

schnell und portofrei erhältlich bei [beck-shop.de](http://beck-shop.de) DIE FACHBUCHHANDLUNG

Thematische Gliederung:

[Schiedsgerichtsbarkeit, Streitschlichtung, Mediation](#)



Verlag C.H. Beck München 2013

Verlag C.H. Beck im Internet:

[www.beck.de](http://www.beck.de)

ISBN 978 3 406 63311 9

(Art. 17), for example though an extract from the company register or a copy of the resolution by which they have been appointed.

The Rules leave open the issue whether “duly authorized representatives” 564 necessitate a written power of attorney. Pursuant to Art. 17, the arbitral tribunal has the authority to demand proof of their power. Advisers, who cannot appear without the party and who take no representative role, require no power of attorney. Their right to appear follows from their accompanying of a party, whether such party appears personally or through duly authorized representatives.

#### Article 27 – Closing of the Proceedings and Date for Submission of Draft Awards 565

As soon as possible after the last hearing concerning matters to be decided in an award or the filing of the last authorized submissions concerning such matters, whichever is later, the arbitral tribunal shall:

- a) declare the proceedings closed with respect to the matters to be decided in the award; and
- b) inform the Secretariat and the parties of the date by which it expects to submit its draft award to the Court for approval pursuant to Article 33.

After the proceedings are closed, no further submission or argument may be made, or evidence produced, with respect to the matters to be decided in the award, unless requested or authorized by the arbitral tribunal.

The purpose of this provision is to contribute towards a clear and efficient 566 conduct of the proceedings, to avoid procedural surprises, and to observe due process. The closing is the point at which the arbitral tribunal withdraws to deliberate and render an award. As of this point, **no further written submissions and no further evidence** are permitted.

Closing is a **mandatory** step which is to take place “as soon as possible”<sup>344</sup> after 567 the last hearing or the last submission. However, the arbitral tribunal has a certain leeway and does not have to close “immediately” after the last hearing or submission.

It would be erroneous to deduct from Art. 27 that parties have an unlimited right 568 to submit written submissions and evidence up to the closing of the proceedings. It is not only possible but also very common to “close” the proceedings in **consecutive steps**. If, for example, the Terms of Reference provide for a further round of written submissions, the appointment of witnesses or experts, an oral hearing, and a final round of post-hearing briefs, then it is not permissible to take any of the said steps after expiry of the relevant time-limit.

The arbitral tribunal has the power to **re-open** the proceedings or to depart from 569 the **procedural timetable**, either on its own initiative or upon the request of a party, subject to ensuring equal treatment of all parties. A “re-opening” for purposes of submitting new arguments or producing new evidence may be permitted where a party was prevented from making such arguments or producing such evidence at an earlier stage of the proceedings without being at fault for missing the deadlines, and

---

<sup>344</sup> The term “as soon as possible” was introduced in the 2012 edition of the Rules to put an end to a practice, occasionally applied by arbitral tribunals, according to which the proceedings were declared closed only by such point in time when the arbitral tribunal was about to submit the draft award to the Secretariat.

not only in a scenario where the party might request the setting aside of the award to be rendered on the basis of an action for revision.

- 570 Art. 27 applies not only prior to the rendering of the final award, but also prior to the rendering of **partial or interim awards**.
- 571 The closing should come as no surprise to the parties. If the time of closing does not follow from the procedural timetable, the arbitral tribunal ought to provide the parties with formal **notice** prior to the closing of the proceedings.
- 572 Point (b) serves the purpose of ensuring the efficiency of the last stage of the proceedings. The arbitral tribunal has to inform both the Secretariat and the parties.
- 573 Immediately after the closing, the arbitrators should also fix one or more deliberation meetings. They may also start to assign specific tasks regarding the drafting of the award and schedule one or more conference calls. Sole arbitrators, too, are well advised to plan ahead up until the finalization of the drafting.
- 574 There is no immediate **legal sanction** for unjustified delays in deliberation and rendering of the award. Nonetheless in extreme cases, the ICA has replaced arbitrators who delayed the deliberations process on the basis of Art. 15(2) and 15(5). In practice, the threat of lower fees (Art. 38(2) and Art. 2(2) of Appendix III) as well as the possible negative effects on reputation works as a sufficient incentive to expedite the deliberation process.

575 **Article 28 – Conservatory and Interim Measures**

1 Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.

2 Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.

Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.

- 576 **Specific Bibliography:** *Aschauer* Können schiedsgerichtliche einstweilige Maßnahmen zur Streit-schlichtung beitragen?, in *Konfliktlösung im Konsens*. 7. Fakultätstag der Rechtswissenschaftlichen Fakultät Graz (2011), p. 122 *et seq.*; *Bernardini* The Powers of the Arbitrator, in *Conservatory and Provisional Measures in International Arbitration*, ICC Court Bull. 1993, Special Suppl., p. 21 *et seq.*; *Bernhard Berger*, Security for Costs: Trends and Developments, *ASA Bull.* 2010, p. 7 *et seq.*; *Pörnbacher/Thiel*, Kostensicherheit im Schiedsverfahren, *SchiedsVZ* 2010, p. 14 *et seq.*; *Bond* The Nature of Conservatory and Provisional Measures, in *Conservatory and Provisional Measures in International Arbitration*, ICC Court Bull. 1993, Special Suppl., p. 8 *et seq.*; *Carlevaris* Les pouvoirs des arbitres en matière de mesures conservatoires et provisoires et l'arbitrage international à la lumière du droit italien, *Les Cahiers de l'arbitrage* 2001/2, *Gazette du Palais*, Nov. 2001, p. 27 *et*

*seq.*; *Donovan* Powers of the Arbitrators to Issue Procedural Orders, Including Interim Measures of Protection, and the Obligation of Parties to Abide by Such Orders, ICC Court Bull. 1999, Vol. 10/1, p. 57 *et seq.*; *El-Sharkawi* The Arab Perspective, in *Conservatory and Provisional Measures in International Arbitration*, ICC Court Bull. 1993, Special Suppl., p. 104 *et seq.*; *Grossen* Comments and Conclusions, in *Conservatory and Provisional Measures in International Arbitration*, ICC Court Bull., Special Suppl. 1993, p.115 *et seq.*; *Hory* Mesures d’instruction in futurum et arbitrage, *Revue de l’arbitrage* 1996, p. 191 *et seq.*; *Rechberger/Rami* Kostensicherheit im Schiedsverfahren, *ecolex* 1998, p.387 *et seq.*; *Reiner* Les mesures provisoires et conservatoires et l’arbitrage international, notamment l’Arbitrage CCI, *Journal du droit international* 1998, p. 853 *et seq.*; *Sandrock* Zur Prozesskostensicherheit im internationalen Schiedsverfahren, *Hommages to Gaul (1997)* p. 607 *et seq.*; *Sarre* Security for Costs in ICC arbitration in England – The Ken-Ren Cases ICC Court Bull. 1994, Special Suppl., p.58 *et seq.*; *Schoibl* Zur Sicherheitsleistung für Prozesskosten im schiedsgerichtlichen Verfahren, *Hommage to Jelinek (2002)* p. 263 *et seq.*; *Schwartz* The Practices and Experiences of the ICC Court, in *Conservatory and Provisional Measures in International Arbitration*, ICC Court Bull. 1993, Special Suppl., p. 45 *et seq.*; *von Segesser* Vorsorgliche Massnahmen im Internationalen Schiedsprozess, *ASA Bull.* 2007, p. 473 *et seq.*; *Wirth* Interim or Preventive Measures in Support of International Arbitration in Switzerland, *ASA Bull.* 2000, p. 31 *et seq.*; *Yesilirmak* Interim and Conservatory Measures in ICC Arbitral Practice, 1999–2008, ICC Court Bull. 2011, Special Suppl., p. 5 *et seq.*

ICC arbitrators are empowered to order conservatory and interim measures, 577 unless otherwise agreed by the parties or if **mandatory provisions** applicable at the place of arbitration provide that the local courts have exclusive jurisdiction over such measures. Both of these exceptions are rare in practice.<sup>345</sup>

There is no definition of “conservatory or interim measures” in the Rules. In the 578 majority of cases, such measures aim to prevent the **occurrence or aggravation of damages** and/or the **escalation of the dispute**, seek to secure the **future enforcement of the award**, deal with **cost issues**, or order parties to **withdraw applications for anti-arbitration injunctions**.

Apart from stating that the arbitral tribunal may order any interim or conserva- 579 tory measures which “it deems appropriate”, Art. 28 does not specify the prerequisites for the ordering of conservatory or interim measures. However, generally acknowledged preconditions are

- a certain level of **urgency**, which can, but need not be, the level of urgency required under Art. 29 (“interim or conservatory measures that cannot await the constitution of the arbitral tribunal”);
- a **provisional character** i.e. not pre-judicial to the matter at hand;
- a certain relation to the **subject matter of the arbitration**, i.e. to the merits or the costs of the dispute;<sup>346</sup>

More often than not, the purpose of conservatory or interim measures is to maintain the status quo.<sup>347</sup>

Under no circumstances may the conservatory or interim measure render 580 impossible or unreasonably difficult the further conduct of and participation in the proceedings by the party against whom such measure is directed. This applies especially to measures related to **costs** such as those ordering a party to provide security for costs or the provisional payment of its share of the advance on costs,

<sup>345</sup> Refer, however, to the state of the law in Italy (Art. 818 Italian Civil Procedure Code), which is heavily criticised by Italian writers, e.g. *Briguglio/Salvaneschi* Regolamento di arbitrato della Camera di Commercio Internazionale (2005), p. 413.

<sup>346</sup> This follows from the terms “conservatory and interim”.

<sup>347</sup> See *Reiner* *Journal du droit international* 1998, p. 853 *et seq.*

which indisputably qualify as conservatory or interim measures, as well as those aimed at securing the future enforceability of the award.<sup>348, 349</sup>

581 The lack of enforceability of the cost decision in the country where the other side has its residence will not justify a conservatory or interim measure ordering the provision of a security for costs if that fact was known to the opponent (or ought to have been known) by the time the applicant concluded the arbitration agreement.<sup>350</sup>

582 The provision of appropriate **security** by the applicant party is often advisable.

583 The choice of the **form** of the measure (award or order with reasons) is left to the discretion of the arbitral tribunal, to be exercised in light of the Rules, considering above all that an **award** is subject to the provisions of Art. 33 *et seq.*, including scrutiny by the ICA. In contrast, an **order** is issued by the arbitral tribunal directly to the parties, without any prior approval by the ICA. It is important to note that a conservatory or interim measure, if taking the form of an award within the meaning of the Rules, does not necessarily qualify as an award under the law applicable at the place of arbitration, other national laws, or international treaties such as the New York Convention. Conversely, rendering the decision in the form of an order does not preclude the measure from being qualified as an award under any of the said sources of national or international law.

584 The discretion of the arbitral tribunal to determine the form of the measure is significantly curtailed when the applicant explicitly requests an award, because of a perceived greater likelihood of recognition and enforcement under the applicable national law or the New York Convention; or when the application is based on a substantive provision of the contract<sup>351</sup> and scrutiny by the ICA would not lead to unacceptable delay of the measure.

---

<sup>348</sup> See ICC Case No. 12025, published in ICC Court Bull. 2010 Special Report, p. 28 *et seq.*: “Whilst ICC arbitrators do not hesitate to find that they have the power to grant security for costs, they are extremely reluctant to actually grant the remedy. [...] [I]nsolvency is not sufficient, in itself, to form the basis of a request for security for costs ([...]). Specifically, the Tribunal considers that the party seeking security for costs should establish, on a *prima facie* basis, that the opposing party is organizing its own insolvency in order to avoid the financial risks related to arbitral proceedings ([...]). Again, at this early stage at least, nothing in the record indicates that the Claimant fashioned its insolvency in view of this arbitration or otherwise abusively. [...] Finally, the Tribunal finds that ordering security for costs involves the inherent risk that it may result in precluding access to justice by claimants who are in a precarious economic situation. [...] Claimant has filed for reorganization proceedings in Mexico. This is a business risk that Respondents have to bear and nothing on record shows that Claimant has acted in bad faith”.

<sup>349</sup> See also ICC Case No. 12835, published in ICC Court Bull., 2010 Special Report, p. 80 *et seq.*: “A difficult financial situation is not an indication of a party’s inability or unwillingness to pay the costs of arbitration, and the worries of a party are not sufficient to motivate a preliminary inquiry into the financial situation of the adverse party. [...] Both parties are normally convinced, in good faith, of their rights and the weight of the arguments. Neither of the parties could use such a fundamental premise as a reason to avoid paying its share and to transfer the burden of the advance on costs entirely to the other party”.

<sup>350</sup> Cf. procedural order rendered in the ICC Case No. 12228, published in ICC Court Bull., 2010 Special Report, p. 38 *et seq.*: “In conclusion Respondent could have known the risk of the alleged hindrances to the enforceability of an award of this Tribunal and, therefore, cannot invoke them as a reason for security for costs”.

<sup>351</sup> For example, when calling the bank guarantee is not permitted while arbitration proceedings are pending due to a substantive legal obligation not to cause an escalation of the dispute. See *Reiner Journal du droit international* 1998, p. 898 *et seq.*

Conservatory or interim measures can be ordered by the arbitral tribunal as soon 585 as it has received the file from the Secretariat (Art. 16), and if necessary even before the setting up of the Terms of Reference.<sup>352</sup> The arbitral tribunal's authority to order conservatory or interim measures is particularly advantageous because the arbitral tribunal has the most knowledge of the dispute and therefore is best placed to reach the correct decision and select the most appropriate measure. Conversely, a disadvantage lies in the fact that the arbitrator may prejudge, or appear to have prejudged, the matter for which the measure has been taken, and out of fear of not being seen as **impartial**, will not act with the required rapidity. These reasons speak in favour of allowing the parties to address an authority other than the arbitral tribunal when making applications for conservatory or interim relief.

Whether or not an arbitral tribunal can order a measure pursuant to Art. 23 586 without **prior consultation** of the parties (**ex parte**) is uncertain.<sup>353</sup> Even if one concedes that omissions of due process could be compensated in a later phase of the proceedings,<sup>354</sup> in reality the risk of losing a party's trust as well as the likelihood of such unilateral decisions being unenforceable in most jurisdictions speak against the proposition.

In cases where applications for conservatory or interim measures are dependant 587 upon an element of "surprise" for their effectiveness, or in "other appropriate cases", parties may also make such applications to the state courts, even after transmission of the file to the arbitral tribunal.

#### Article 29 – Emergency Arbitrator

588

1 A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V. Any such application shall be accepted only if it is received by the Secretariat prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 and irrespective of whether the party making the application has already submitted its Request for Arbitration.

2 The emergency arbitrator's decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator.

3 The emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. The arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator.

4 The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or noncompliance with the order.

5 Articles 29(1)–29(4) and the Emergency Arbitrator Rules set forth in Appendix V (collectively the "Emergency Arbitrator Provisions") shall apply only to

<sup>352</sup> Before transmission of the file to the arbitral tribunal, the emergency arbitrator has jurisdiction to order conservatory and interim measures, save where this is excluded by Art. 29(6).

<sup>353</sup> See *Bühler/Jarvin* in Weigand (Ed.) Handbook, p. 255 *et seq.*; cf. Art. 17B of the UNCITRAL Model Law with the amendments adopted in 2006.

<sup>354</sup> As foreseen in various national codes of procedure.

parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories.

6 The Emergency Arbitrator Provisions shall not apply if:

- a) the arbitration agreement under the Rules was concluded before the date on which the Rules came into force;
- b) the parties have agreed to opt out of the Emergency Arbitrator Provisions; or
- c) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.

7 The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat.

- 589 **Specific Bibliography:** *Castineira* The Emergency Arbitrator in the 2012 ICC Rules of Arbitration, *Les Cahiers de l'Arbitrage/The Paris Journal of International Arbitration* 2012, p. 65 *et seq.*; *Craig* The 2012 ICC Rules: Important Changes and Issues for Future Resolution, *Les Cahiers de l'Arbitrage* 2012, p. 15 *et seq.*; *Fry/Greenberg/Mazza* The Secretariat's Guide to ICC Arbitration (2012); *Grierson/Van Hoof* Arbitrating under the 2012 ICC Rules (2012); *Voser* Overview of the Most Important Changes in the Revised ICC Arbitration Rules, *ASA Bulletin* 2011, p. 783 *et seq.*; *de los Santos Lago/Bonín* Emergency Proceedings under the New ICC Rules, *Spain Arbitration Review* 2012, p. 5 *et seq.*

#### Outline:

1. Introduction.....	590
2. Para. 1.....	597
3. Para. 2.....	604
4. Paras. 3–4.....	607
5. Para. 5.....	609
6. Para. 6.....	616
7. Para. 7.....	619

## 1. Introduction

- 590 The Emergency Arbitrator Provisions<sup>355</sup> can be relied upon even if the parties have not expressly agreed on them, provided that the arbitration agreement has been concluded on or after 1 January 2012 and no other exception contained in para. 6 is applicable. Parties who wish to avoid the application of the Emergency Arbitrator Provisions must expressly opt out.<sup>356</sup>
- 591 The Emergency Arbitrator Provisions do not provide for “adjudication”, i.e. a purely contractual (as opposed to judicial) mechanism by which an “adjudicator” or a “dispute adjudication board” renders an interim decision, comparable to a form

<sup>355</sup> See the definition contained in para. 5.

<sup>356</sup> For this purpose, the ICC suggests an alternative standard arbitration clause as follows: “All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The Emergency Arbitrator Provisions shall not apply”.

of expert determination, that is given binding effect.<sup>357</sup> Rather, the Emergency Arbitrator Provisions offer a possibility to obtain **conservatory or interim relief prior to the constitution of the arbitral tribunal**, i.e. prior to the transmission of the file to the arbitral tribunal, when such measures can only be ordered by state courts (which may not always have the required independence and impartiality vis-à-vis the parties or may not always act with the required rapidity),<sup>358</sup> or by the ICC Pre-Arbitral Referee (provided that the parties have actually agreed on the Rules for a Pre-Arbitral Referee Procedure, which is rare in practice). Thus, the Emergency Arbitrator Rules are designed to **complement** the system of pre-arbitral interim relief. They are of great practical significance in particular with regard to the time which may pass between the filing of the Request for Arbitration and the constitution of the arbitral tribunal.

A party may seek interim relief before the constitution of the arbitral tribunal in order to put pressure on its opponent, which unnecessarily exacerbates the dispute. The Emergency Arbitrator Rules contain **safeguards against abuse** by requiring the applicant to initiate the arbitration within 10 days as of the day of the Secretariat's receipt of the application for conservatory or interim relief (Art. 1(6) of Appendix V), and by providing that the applicant must pay an amount of USD 40,000 for the ICC administrative expenses and the emergency arbitrator's fees, failing which the application will not be notified to the opponent (Art. 7(1) of Appendix V). Obviously, an unfounded application will also have to be rejected by the emergency arbitrator with the consequence that the applicant may have to bear the costs of the emergency arbitrator proceedings (Art. 7(3) of Appendix V).

The emergency arbitrator is under the same obligation of **independence and impartiality** as every ICC arbitrator (Art. 2(4) of Appendix V) and must disclose possible conflicts of interest with the same (high) degree of diligence as every ICC arbitrator (see Art. 11(3)). Therefore, if a conflict check cannot be performed within the time allocated for the appointment of the emergency arbitrator, which is normally only two days as of the Secretariat's receipt of the application (Art. 2(1) of Appendix V), the prospective emergency arbitrator must decline the appointment.

The requirement that sole arbitrators or presidents of arbitral tribunals shall be of a nationality other than those of the parties (Art. 13(5)) does not apply to emergency arbitrators. However, whenever possible, the President of the ICA, who appoints all emergency arbitrators, will avoid appointing an emergency arbitrator of the nationality of any of the parties.

As for the challenge of emergency arbitrators, see Art. 3 of Appendix V; if a challenge is successful, the President of the ICA has the power to appoint a new emergency arbitrator on the basis of Art. 8(1) and Art. 8(3) of Appendix V.

Even though not expressly provided for in the Rules, emergency arbitrators are under the same confidentiality obligation as arbitrators.<sup>359</sup>

<sup>357</sup> *Craig* The 2012 ICC Rules: Important Changes and Issues for Future Resolution, *Les Cahiers de l'Arbitrage* 2012, p. 18.

<sup>358</sup> However, the Emergency Arbitrator Provisions leave untouched the concurring competence of the state courts to order conservatory or interim measures: see para. 7.

<sup>359</sup> *Castineira* The Emergency Arbitrator in the 2012 ICC Rules of Arbitration, *Les Cahiers de l'Arbitrage/The Paris Journal of International Arbitration* 2012, p. 78.

## 2. Para. 1

- 597 The Rules prescribe only two fundamental prerequisites for the ordering of Emergency Measures,<sup>360</sup> which are
- **jurisdiction** of the emergency arbitrator (Art. 6(2) of Appendix V);
  - **urgency** to the point that the measure cannot await the constitution of the arbitral tribunal.<sup>361</sup>
- 598 Other possible criteria include the **proportionality** of the requested measure as compared to the possible consequences of the request not being granted, and the degree of likelihood that the applicant will **succeed on the merits** in the subsequent arbitration.<sup>362</sup>
- 599 The required contents of the Application is specified in Art. 1(3) of Appendix V. The Application shall be in the language of the arbitration or, in the absence of an agreement as to the language of the arbitration, in the language of the arbitration agreement (Art. 1(4) of Appendix V).
- 600 The Rules contain no catalogue of available Emergency Measures, which allows the **greatest possible flexibility**. However, the Emergency Measure (like any other provisional remedy) can only be addressed to parties which have submitted to the jurisdiction of the emergency arbitrator; if an urgent measure is to be directed against third parties, the interested party must seek relief with the competent judicial authority (see para. 7).
- 601 In anticipation of an order which makes the requested Emergency Measure subject to the provision of appropriate security, the applicant is free to **offer such security** already in the Application.
- 602 The applicant may also consider requesting an **extension of the time limit** of 10 days for the filing of the Request for Arbitration (Art. 1(6) of Appendix V) together with the Application. If the emergency arbitrator does not extend such time limit, the President of the ICA will have to terminate the emergency arbitrator proceedings.
- 603 As for the place of the emergency arbitrator proceedings, see Art. 4 of Appendix V; the proceedings are governed by Art. 5 of Appendix V. In any case, the emergency arbitrator must act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

---

<sup>360</sup> Emergency Measures are “urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal”, see para. 1.

<sup>361</sup> As explained by *Craig* The 2012 ICC Rules: Important Changes and Issues for Future Resolution, *Les Cahiers de l’Arbitrage* 2012, p. 18, the relevant test is whether “*the measure sought could still be ordered by the arbitral tribunal once constituted*” or whether the measure, if ordered by the arbitral tribunal once constituted, would come too late to prevent the damage (e.g., a request for an injunction to refrain from calling a first-demand bank guarantee).

<sup>362</sup> It is submitted that the emergency arbitrator has to assess these prerequisites with the same diligence as the arbitral tribunal, had it already been constituted. A different view is expressed by *Grierson/Van Hooft* Arbitrating under the 2012 ICC Rules (2012), p. 70, who state that “given the speed with which the decision must be taken, and the fact that (as explained below) the arbitral tribunal will be entitled to have a second look at the question, it seems likely that the emergency arbitrator will spend less time considering the merits of the parties’ respective cases than an arbitral tribunal would do.” This view seems to have no basis in the Rules; furthermore, in the presence of a request for interim relief, an arbitral tribunal may be required to decide with the same speed as an emergency arbitrator.