CHAPTER 8

Emergency Arbitration: A Maturing and Evolving Procedure

Eva Storskrubb

§8.01 THE CONTEXT OF INTERIM RELIEF IN ARBITRATION

Interim relief and the possibility of recourse to proceedings for interim relief is an important aspect of commercial dispute resolution. In cases concerning, for example, industrial action, intellectual property, rights to ownership of, for example, shares, bank guarantees or other security under a contract, or simply the right to payment under a contract, and many more varied circumstances, interim relief can be crucial to preserve assets against dissipation or otherwise safeguard a factual or legal situation in anticipation of a final ruling on the merits. The main and traditional purpose of interim relief is to ensure that enforcement of rights remains possible once a final ruling on the merits is rendered. Thus, interim relief is classically considered to have a conservatory and protective nature and not intended to formally resolve a dispute. However, the purpose has been strategically broadened in many jurisdictions to encompass also a wider pallet of aims and parties also use interim relief strategically for many reasons. These broader aims can for example include to secure evidence or to achieve a de facto summary resolution of the dispute.[1] The critical importance for the parties of interim relief, as well as the strategic power it entails, coupled with the inherently provisional nature of the relief renders it potent but also open to abuse. Thus, it is important that the procedural rules and judicial practices support a well-balanced approach to interim relief, including necessary safeguards.[2]

1. Westberg, *Det provisoriska rättsskyddet i tvistemål: Bok I*, 66–69 and 75–77 (Juristförlaget i Lund 2004).
2. *Ibid.*, 129–139, *see* further in an EU context, E. Storskrubb and G. Cuniberti, 'Provisional Relief', in B. Hess S. Law and P. Ortolani (eds) *Luxembourg Report on European Procedural Law, Volume 1: Impediments of National Procedural Law to the Free Movement of Judgments* (Beck Hart 2018).

In an arbitration context, the power of arbitral tribunals to order interim measures has been highly controversial.[3] It was historically not possible to obtain interim relief from the arbitral tribunal, in particular not before an arbitral tribunal had been constituted under the relevant arbitration rules and framework, which can take several months.[4] Therefore, it was common for parties that had agreed to arbitrate their dispute, to have to seek interim relief from domestic courts. Consequently, the means of urgent interim relief in the domestic courts of the relevant jurisdictions and whether such relief is available also in support of claims that are to be resolved in arbitration, so-called concurrent authority, is an important practical factor to consider for parties finding it necessary to seek interim relief.[5] Depending on the jurisdictions concerned, one significant difference between interim relief granted by arbitral tribunals and that awarded by courts can be the latter's clear enforceability, including coercive powers and the means to force execution against assets.[6] Another main practical difference is that the availability of ex parte interim relief, which is traditionally not available in arbitration.[7] Nevertheless, for various reasons and in different scenarios, the parties may not consider that interim relief sought from domestic courts is a feasible way forward even when it is available. In addition, the concurrent authority, albeit well recognized, is an exception to the principle of arbitral exclusivity and judicial non-interference in arbitration.[8] Commentators have even noted that to the extent a dispute is settled or the main arbitral proceedings are not instituted after court-ordered interim relief, the national court can be held to have played a central role in ending or deciding

3. Croft et al., *A Guide to UNCITRAL Arbitration Rules*, 268 (CUP 2013).
4. *Ibid*., 269 and Born, *International Arbitration: Law and Practice*, 210, 212 and 217 (Kluwer Law International 2nd ed. 2015). Note that in some jurisdictions it remains the exclusive prerogative of domestic courts to provide interim relief and arbitral tribunals are prohibited from doing so.
5. Born, *supra* note 4, 219–226, notably in some jurisdictions national law limits the concurrent authority of courts, e.g., the English Arbitration Act under which it is only possible for a court to grant interim relief under specific circumstances if the arbitral tribunal is unavailable. Another example is courts that are not able to grant interim relief in support of foreign arbitration. *See also* P. Cavalieros and J. Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, 35 Journal of International Arbitration 257, 285–286 (2018), on concurrent jurisdiction with respect to emergency arbitration ('EA') specifically.
6. Born, *supra* note 4, 217–219, some jurisdictions and the UNCITRAL Model Law of 2006 provide also for enforcement of tribunal awarded interim relief. However, there is considerable uncertainty as to international enforcement under the New York Convention. *See* further Cavalieros and Kim, *supra* note 5, 287–297, and G. Hanessian and E.A. Dosman, *Songs of Innocence and Experience: Ten Years of Emergency Arbitration*, 27 American Review of International Arbitration 229–235 (2016), concerning specifically the issue of enforceability of EA interim relief in various jurisdictions. The position in Sweden is negative towards enforcement, *see inter alia* P. Shaughnessy, 'Interim Measures' in U. Franke et al. (eds), *Arbitration in Sweden: A Practitioner's Guide*, 106–108 (Kluwer Law International 2013) and Heuman, *Skiljemannarätt* 346 (Nordstedts Juridik 2010).
7. Most domestic laws and institutional rules explicitly or explicitly exclude ex parte interim relief in arbitration. However, the 2006 version of the UNCITRAL Model Law Art. 17(B) provides for preliminary ex parte orders that are not enforceable, which entail that the effectiveness of the rule is questioned, *see* Born, *supra* note 4, 216–217. In addition, some institutional rules exceptionally provide for ex parte interim relief, *see* SCAI Rules 26(3). *See* further Hanessian and Dosman, *supra* note 6, 222–223, in the EA context.
8. Born, *supra* note 4, 219.

the case. That may be considered to undermine the parties' choice of dispute resolution method, i.e., arbitration.[9]

It is against the above-mentioned backdrop that emergency arbitration (EA) rules have been implemented by arbitration institutes since 2006, with the International Centre for Dispute Resolution (ICDR) being credited for first implementing such rules, and in the decade since then we have gone from considering EA rules an innovation to holding them to be the norm.[10] As a few examples, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) included EA in its rules in 2010, whereas the Court of Arbitration of the International Chamber of Commerce (ICC) did so in 2012.[11] The availability of EA rules is considered to support the autonomy and efficacy of arbitration.[12] An emergency arbitrator is a sole arbitrator appointed by the arbitration institute to render a decision upon an application for emergency interim relief before the arbitral tribunal itself has been constituted. The EA rules differ between arbitration institutes, for example, some of them allow an emergency arbitrator to be appointed even before the request for arbitration has been filed.[13] However, the idea is to enable a highly expedited procedure in the arbitration framework for obtaining interim relief that precedes the constitution of the arbitral tribunal. The emergency arbitrator's powers cease upon the constitution of the arbitral tribunal and, if ordered, the interim relief will have no formally binding effect on the subsequently appointed arbitral tribunal.[14]

In 2019, the Arbitration Commission of the ICC published a report on EA proceedings under the ICC Rules of Arbitration (the 'ICC EA Report').[15] The report is based on eighty EA cases during 2012–2018. Thus, it covers a significant number of cases. The ICC is not the first international arbitration institute to publish information of this sort. For example, the SCC and the Swiss Chambers' Arbitration Institute (SCAI) have published regular case overviews since enacting specific rules on EA.[16] Recently

9. Hanessian and Dosman, *supra* note 6, 215.
10. *Ibid.*, 216–218 provide a brief historic overview of the development of EA including all the central international arbitration institutes.
11. *Ibid*., 217, for a list of multiple arbitration institutes. *See* further I. Knoll-Tudor, 'The Arbitrator and the Arbitration Procedure, Emergency Arbitration: Evidence and Practice from Seven Arbitral Institutions', in C. Klausegger et al. (eds), *Austrian Yearbook on International Arbitration*, 250–252 (Manz'sche Verlags- und Universitätsbuchhandlung 2019), for an overview of the adoption of EA rules by seven institutes and a table of their EA case load.
12. *See* P. Shaughnessy, 'The Emergency Arbitrator', in P. Shaughnessy and S. Tung (eds), *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer*, 340 (Kluwer Law International 2017).
13. In such rules there is often a deadline within which the request for arbitration concerning the main proceedings must be filed, *see inter alia* the ICC Rules, Appendix V Arts 1(6) and 2(1), and the SCC Rules, Appendix II Art. 1(1) and Art. 9(iii)–(iv). *See* further Cavalieros and Kim, *supra* note 5, 280, on the timing of the EA application.
14. *See inter alia* Hanessian and Dosman, *supra* note 6, 219–221.
15. https://iccwbo.org/publication/emergency-arbitrator-proceedings-icc-arbitration-and-adr-commission-report/ (accessed 27 Mar. 2020).
16. Prior SCC Reports can be found here https://sccinstitute.com/media/194250/ea-practice-note-emergency-arbitrator-decisions-rendered-2015-2016.pdf: A. Havedal Ipp, *Practice Note 2015-2016*; L. Knapp, *Practice Note 2014* and J. Lundstedt, *Practice Note 2010-2013*. The most recent report for the Swiss Chambers can be found here https://www.swissarbitration.org/files/620/Emergency%20Proceedings%20Article/SCAI%202020%20Report%20on%20Emergency%20

the SCC reported on the first full decade of its EA cases.[17] Other international arbitration institutes also provide some case studies or limited EA information.[18] This entails that we now have a considerable body of information relating to how EA is applied in practice from tribunals seated in many jurisdictions.

The purpose of this chapter is to reflect on and critically assess EA as a maturing and evolving tool of international arbitration. For this purpose, one of the main themes dealt with in the ICC EA Report is analysed below, namely the requisites for granting emergency relief (section §8.02). As noted above, the need for EA rules has not arisen in a void but relates to the existence of urgent interim relief in courts and whether such relief is effective and available also in the support of claims that are to be resolved in arbitration. It is notable that in the Queen Mary International Arbitration Survey of 2015, 93% of respondents were in favour of arbitration institutes implementing EA rules.[19] Thus, there appears to be a wide acceptance of such a tool and a desire to have such an option available. Notwithstanding, 46% of the respondents still preferred to seek interim relief from domestic courts (with 29% stating a preference for EA and 26% being undecided).[20] These figures might slightly have changed today with the increasing use of and familiarity with EA procedures among the users of arbitration. However, the overall results of the survey demonstrate both a pendulum and a dichotomy between the use of these two, in many cases concurrent, means of obtaining interim relief. For strategic reasons, including time and costs, flexibility and availability, as well as the need for ex parte relief and formal execution, one of these means may be more relevant to pursue in a particular case.[21] Therefore, when analysing the evolution of EA, it may be useful to compare it to certain aspects of interim relief awarded by courts and also be aware of potential parallel developments of harmonization of interim relief in international litigation (section §8.03). Finally, some conclusions will be drawn on the future of EA reflecting upon the strengths and weaknesses of EA as a tool of international arbitration (section §8.04).

Relief%20under%20the%20Swiss%20Rules_Final_20200228.pdf, SCAI, *Emergency Relief under the Swiss Rules (Art 43) – An Overview after 8 Years of Practice* (2020). (All accessed 27 Mar. 2020).

17. The most recent SCC information can be found here https://sccinstitute.com/about-the-scc/news/2020/emergency-arbitration-at-the-scc-a-decade-in-review/?link_id=q2juacYCwgOh (accessed 19 Apr. 2020).
18. *See inter alia* information of the London Court of International Arbitration (LCIA) at https://www.lcia.org/adr-services/lcia-notes-on-emergency-procedures.aspx and statistics of Singapore International Arbitration Center ('SIAC') https://siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics (both accessed 27 Mar. 2020). Further information can be found in the doctrine based on interviews with institutes, *inter alia* Hanessian and Dosman, *supra* note 6, 225–227.
19. The Queen Mary International Arbitration Survey 2015, *Improvements and Innovations in International Arbitration*, 29, available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf (accessed 27 Mar. 2020).
20. *Ibid*., 27.
21. Cavalieros and Kim, *supra* note 5, 293–300.

§8.02 THE REQUISITES FOR GRANTING EMERGENCY INTERIM RELIEF

[A] Background

Most rules of arbitral institutes do not elaborate upon the types of available emergency relief or on the scope of and conditions for granting interim relief.[22] The ICC Rules merely note that EA proceedings concern 'urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal …',[23] whereas the general rules on conservatory and interim measures state that 'the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate'.[24] The SCC Rules explicitly state the same for EA proceeding, holding that the emergency arbitrator has the power to upon request 'grant any interim measures it deems appropriate'.[25] This is also the case under the ICDR, Hong Kong International Arbitration Centre (HKIAC), and Singapore International Arbitration Centre (SIAC) rules, which only refer to the urgent need or necessary relief.[26] In addition, although many modern arbitration acts today confirm that arbitrators are empowered to grant interim relief, traditionally they remain silent on the types of measures and on the requisites or substantive standard for granting interim relief.[27] As an example, section 25(3) of the Swedish Arbitration Act merely sets out that: 'Unless the parties have agreed otherwise, the arbitrators may, at the request of a party, decide that, during the proceedings, the opposing party must undertake a certain interim measure to secure the claim which is to be adjudicated by the arbitrators.'[28]

This lack of substantiation of the scope and conditions for interim relief may of course be a conscious choice of arbitral institutions and legislators not to limit explicitly or overregulate the powers of arbitral tribunals, i.e., to adopt a 'minimalist approach' that enables wide discretion for the arbitral tribunal.[29] Another explanation from a legislator's perspective may be that, because interim arbitral relief is not considered enforceable in that specific jurisdiction, there is less risk in granting flexibility to the arbitral tribunal and, concurrently, little need to specifically regulate its scope and

22. Hanessian and Dosman, *supra* note 6, 227, note that there are exceptions such as the Australian Centre for International Commercial Arbitration (ACICA) rules.
23. ICC Rules Art. 29.
24. ICC Rules Art. 28.
25. Appendix I to the SCC Rules 2017 Art. 1(2) referring to Art. 37(1) of the SCC Rules 2017.
26. Hanessian and Dosman, *supra* note 6, 227.
27. Blackaby and Partasides, *Redfern & Hunter on International Arbitration*, 315 (Kluwer Law International 6th ed. 2015).
28. An interesting question raised in the doctrine is whether this general provision on the arbitral tribunal's power to grant interim measures 'during the proceedings' can also be held to empower an emergency arbitrator that is appointed before the main arbitral proceedings are even instituted. If the answer is negative the basis of that empowerment would merely lie in the parties' arbitration agreement referring to institute rules that provide for EA proceedings. *See* P. Shaughnessy, *Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules*, 27 Journal of International Arbitration 337, 355–357 (2010). *See also* Born, *International Arbitration: Cases and Materials*, 882–883 (Kluwer Law International 2015) who raises the question '… is an "emergency arbitrator" really an arbitrator?'.
29. Shaughnessy *supra* note 6, 108–109.

conditions.[30] However, it may also be the case that legislators, in general, have not found it necessary to regulate interim relief ordered by arbitral tribunals as this has historically not been perceived as a common occurrence. Historically, such relief was generally not at all available, alternatively not available before the arbitral tribunal was actually constituted.[31] A request for interim relief is often prompted by urgency. Interim relief is often sought before – or when – the main proceedings are instituted. Parties have traditionally had no other choice than to turn to the courts for interim relief where they could not await the constitution of the arbitral tribunal.

However, the availability of EA rules that enable interim relief to be awarded *before* the constitution of the arbitral tribunal and even *before* the filing of a request for arbitration, has increased in the past decade and the number of EA proceedings have increased.[32] The lack of rules on interim relief in the arbitral setting may be perceived as a potential void. From a procedural perspective, it is common that there are specific rules (based on statute or developed in case law) for the scope and conditions for interim relief in domestic civil proceedings. To the extent that the institute rules and the *lex arbitri* are silent on the issue, the question also arises as to the legal basis for the parties' submissions on and the arbitral tribunal's analysis of these issues. One approach can potentially be to draw inspiration from the above-mentioned domestic procedural rules. However, that is not considered by many commentators to be a suitable approach for arbitration. Particularly in the context of international arbitration, many commentators argue that domestic procedural rules of the seat should not play a significant role.[33]

At the international arbitration level, both the UNCITRAL Model Law and the UNCITRAL Arbitration Rules in their reformed versions, from 2006 and 2010 respectively, provide a comprehensive set of rules for interim relief. The intention behind the reforms was specifically to provide a full framework for interim relief in arbitration in order to provide legal certainty and guidance.[34] Both sets of rules provide the same conditions for interim relief in Articles 17(A)(1) and 26(3):[35]

> (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
> (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. […].

In addition, both instruments also provide a definition of the scope of the relief in Articles 17(2) and 26(2) according to which an arbitral tribunal can order a party to:

30. Lindskog, *Skiljeförfarande*, 689 (Nordstedts 2012).
31. Born, *supra* note 4, 210, 212 and 217.
32. *See inter alia* Knoll-Tudor, *supra* note 11, 251–253 for a compilation of statistics on EA proceedings.
33. *See inter alia* Shaughnessy, *supra* note 6, 109, and C. Boog, 'The Laws Governing Interim Measures in International Arbitration' in F. Ferrari and S. Kröll (eds), *Conflict of Laws in International Arbitration*, 409, 426–428 (Sellier 2010).
34. Paulsson and Petrochilos, *UNCITRAL Arbitration*, 217–218 (Kluwer Law International 2017).
35. Available at https://uncitral.un.org/en/texts/arbitration (accessed 27 Mar. 2020).

(a) Maintain or restore the status quo pending determination of the dispute;
(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Both deal with interim relief ordered by an arbitral tribunal and do not expressly address the possibility of an emergency arbitrator that may order the same relief. Notably, what we call EA proceedings as defined above are not to be confused with the preliminary orders that arbitral tribunals can grant ex parte in the UNCITRAL Model Law provisions on interim relief.[36]

In some UNCITRAL Model Law jurisdictions, the provisions on interim relief form part of the *lex arbitri*.[37] However, the soft law impact of the UNCITRAL Model Law and UNCITRAL Arbitration Rules is arguably more far-reaching. Both instruments are the result of extensive collaborative work and negotiations under the auspices of the UNCITRAL framework. In addition, they deal with interim relief in a comprehensive manner. Therefore, the provisions on interim relief in both instruments are often taken to represent arbitral practice on interim relief.[38] In addition, commentators refer to them as a codification that represents general principles that are 'universally accepted' on interim relief in arbitration.[39] One commentator specifically observed that they constitute an amalgam drawn from the evolution of interim relief practice in the context of investor-state arbitration.[40] However, they are also understood to originate from commonly accepted standards for interim relief in domestic courts.[41] Further, it has also been noted that the definition of scope of interim relief has been approached with caution as the drafters have aimed to achieve a solution that leaves enough room for co-existing national understandings of interim relief.[42] Hence, it is perceived as customary for both parties and emergency arbitrators to draw inspiration and guidance from them in EA practice.[43] One of the issues that will be analysed further below based on the ICC EA Report is whether this perception is carried through in practice and

36. *See supra* note 7. Notably the UNCITRAL Model Law but not the UNCITRAL Arbitration Rules, provides the arbitral tribunal with the power to grant a preliminary order on interim relief ex parte, UNCITRAL Model Law Art. 17(B). *See* Paulsson and Petrochilos, *supra* note 34, 232–234, for a discussion why the same provision was not included in the UNCITRAL Arbitration. The issue of ex parte interim relief in arbitration is still a fiercely controversial issue, *see* Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*, 297–300 (Kluwer Law International 4th ed. 2019) and H. van Houtte, *Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration*, 20 Arbitration International 85 (2004).
37. Boog, *supra* note 33, 428.
38. Blackaby and Partasides, *supra* note 27, 315.
39. Paulsson and Petrochilos, *supra* note 34, 218.
40. M.J. Goldstein, *A Glance into History for the Emergency Arbitrator*, 40 Fordham International Law Journal 779 (2017).
41. Binder, *supra* note 36, 293–296.
42. *Ibid*., 292.
43. *See inter alia* Knoll-Tudor, *supra* note 11, 263, and K-Y. Kim and B. Satish, 'Legal Criteria for Granting Interim Relief in Emergency Arbitrator Proceedings: Where Are We Now and Where

whether there is indeed a universal standard with respect to the scope of and conditions for interim relief.

[B] The ICC EA Report and Other Practice

[1] General Issues

Statistics show that EA rules of multiple arbitration institutes are being used and that emergency arbitrators are providing recourse to parties. Many arbitration institutes provide statistics on EA applications, and this information is updated regularly. Commentators have also reviewed the statistics; generally, it appears as if EA interim relief has been awarded under many institutional rules in slightly above or below half of the applications.[44] Similar figures also emerge from the information of 2020 on the first ten years of application of the SCC EA Rules. During this period, interim relief was awarded in 45% of the cases.[45] In the ICC EA Reports, the percentage is lower, of the eighty cases reviewed interim relief was awarded in twenty-three cases, i.e., in 29% of the cases. However, based on a closer breakdown of the report, the following emerges. Only seventy-two of the applications progressed to an assessment (in eight cases the application was withdrawn, in three of these cases based on a settlement). However, due to various preliminary issues, including applications being dismissed for lack of jurisdiction or other so-called threshold issues, an emergency arbitrator actually reviewed the merits of the EA application in only fifty-six of the eighty cases reviewed in the report. Of these cases that proceeded to a full review of the merits of the application, the relief applied for was granted wholly or in part in twenty-three cases, i.e., in 41% of the cases.[46]

Further, the ICC EA Report deals with a number of issues that have arisen in practice that it calls 'threshold issues' including applicability, admissibility and jurisdiction. Such issues include whether the ICC EA rules were applicable temporally, whether the ICC EA rules could be applied when the parties had agreed to another pre-arbitral procedure, whether concurrent application for interim relief to a court could affect the jurisdiction of the emergency arbitrator and other jurisdictional arguments of various kinds.[47] In addition, the report raises the interesting issue of the law applicable to the threshold issues.[48] Such issues may be considered to be requisites for EA interim relief as they can impact whether an application will be successful and they often concern preliminary procedural matters based on which an application can be dismissed. Some of the EA reports of other arbitration institutes also demonstrate

Do We Go From Here?' in N. Kaplan and M.J. Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles*, 178 (Kluwer Law International 2018).

44. Hanessian and Dosman, *supra* note 6, 225–226. *See also* Knoll-Tudor, *supra* note 11, 252.
45. SCC, *supra* note 17.
46. ICC EA Report, *supra* note 15.
47. *Ibid*., 10–17.
48. *Ibid*., 16. *See also* Goldstein, *supra* note 40, 780–785, regarding the adjacent issue of the prima facie standard for review of jurisdiction.

that such preliminary issues have arisen.[49] 'Threshold issues' will not be further dealt with in this contribution. The focus in the following will rather be on what the ICC EA Report calls 'substantive standards', i.e., the specific conditions for granting interim relief.

However, the test of urgency, which is a relevant factor in the substantive standards, as will be developed below, can also be considered relevant as a threshold issue. As noted above, the construct of EA rules is such that the relief can only be applied for until the arbitral tribunal is constituted. It is perhaps inherent also in the name itself, 'EA', that there is an urgency in the relief sought. Hence, the ethos underlying the purpose of EA relief is that it cannot await the constitution of an arbitral tribunal.[50] This is explicitly mentioned in the ICC Rules that refer to 'urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal …'.[51] Thus, the ICC EA practice shows that some arbitrators apply this criterion as a separate or distinct from urgency as applicable to the substantive conditions for interim relief. In other cases the emergency arbitrator applied the 'cannot wait' test together with a broader urgency assessment.[52] The report also states that it may not, in the end, lead to a different result, whether 'cannot wait' is assessed separately. However, if an emergency arbitrator chooses to not grant the relief because the 'cannot wait' test is not fulfilled, there may, depending on the circumstances, be more flexibility for the applicant to argue for interim relief from the arbitral tribunal once constituted.[53]

[2] The Conditions Applied

According to the ICC EA Report, the conditions for interim relief applied by the emergency arbitrators included (i) likelihood of success of the merits (*fumus bonus iuris*); (ii) danger of delay including risk of irreparable harm (*periculum in mora*); (iii) urgency (as noted above some independently and some as part of or in connection with danger of delay); and (iv) balance of equities (proportionality). In addition, some emergency arbitrators also referred to or considered the principles of (v) not aggravating the dispute and (vi) not prejudging the merits of the case.[54] Not all of the emergency arbitrators applied all the conditions, but the two first conditions were much more commonly applied than the others.[55] In addition, emergency arbitrators can of course choose to apply the conditions in any order practicable, which naturally entails that if an application is dismissed for lack of fulfilling one condition, the other relevant conditions may not have been assessed. The conditions mentioned in the ICC EA Report, to a significant degree, mirror the practice that has emerged in the SCC EA

49. SCAI, *supra* note 16, 1, and Havedal Ipp, *supra* note 16, 15.
50. *Ibid*., 2.
51. Article 29.
52. ICC EA Report, *supra* note 15, 13–14.
53. *Ibid*., 14.
54. *Ibid*., 24–28. Note that ICC EA Report list the conditions in a different order.
55. *Ibid*. Likelihood of success (31 of 80 cases); danger in delay (40 of 80 cases); balance of equities (16 of 80 cases); no prejudgment of the merits (19 of 80 cases); and risk of aggravation (12 of 80 cases).

cases. In the latest practice note of the SCC, it is noted that a set of factors have crystalized as the commonly acceptable prerequisites (after jurisdiction) including: (i) chance of success on the merits, (ii) urgency, (iii) irreparable harm, and (iv) proportionality.[56] In the latest report of the SCAI, the first three criteria mentioned above for the ICC and the SCC are also noted as the three criteria consistently applied. In the words of the report the criteria are: (i) whether the applicant has a prima facie case on the merits, (ii) whether urgency justifies the requested measures, and (iii) whether there is a risk of irreparable harm or substantial harm.[57]

In addition, commentators reviewing cases of a number of arbitration institutes, including ICDR and SIAC, note that practice shows that emergency arbitrators had considered factors that fall in the three broad categories elaborated in the UNCITRAL Model Law; i.e., (i) the adequacy of the case on the merits (prima facie case, likelihood of success), (ii) the nature of the potential harm (grave, serious, irreparable), and (iii) the balance of harms (proportionality).[58] Thus, very broadly speaking, one can perhaps say that some form of harmonized categories of potential conditions can be derived from practice. However, from the above, it also emerges that there are also potentially slight differences in the approach. For example, in the note of the SCAI, the condition of balancing of equities (proportionality) is not mentioned. In the ICC EA Report it is alleged that this is a common law principle.[59] Whether or not one agrees with that comparative law characterization of the source of the condition, this difference between the institutional reports highlights that furthering a perception of a harmonized categories does not perhaps give the full picture. In addition, there are various ways of formulating the conditions. The slightly different terminology used may merely be different ways of formulating the same condition. But it may also indicate nuances in the understanding of how the conditions should be interpreted. Therefore, one needs to look further into both what basis emergency arbitrators have used for identifying the conditions and how the conditions have been interpreted (sections §8.02[B][3] and §8.02[B][4] below).

Two further factors relevant to the prerequisites in the ICC EA Report should be mentioned before further analysing the conditions, starting with the provision of security. The ICC Rules, as some other institutional EA rules, explicitly provide that emergency arbitrators can subject an interim relief order to posting security.[60] According to the report, there were only two cases in which some form of security was ordered.[61] Thus, one can state that this opportunity has so far rarely been used by emergency arbitrators. The lack of cases in which security has been ordered appears to be supported by information from other arbitration institutes.[62] Second, the type of interim relief has varied, which entails that many different kinds of interim relief have

56. Havedal Ipp, *supra* note 16, 17.
57. SCAI, *supra* note 16, 2.
58. Hanessian and Dosman, *supra* note 6, 228.
59. ICC EA Report, *supra* note 15, 27.
60. ICC Rules, Art. 28, and Appendix V, Art. 6(7). *See also inter alia* SCC Rules, Art. 37(2) and Appendix II, Art. 1(2).
61. ICC EA Report, *supra* note 15, 28.
62. *Ibid.*, 29.

been sought and awarded. These include among anti-suit injunctions (also anti-arbitration injunctions), asset preservation, orders prohibiting action or demanding certain performance, orders concerning corporate body appointments or meetings, and measures concerning bank guarantees.[63]

[3] The Legal Basis for the Conditions

According to the ICC EA Report, emergency arbitrators have overall showed a preference to avoid taking guidance from the applicable domestic law when assessing the conditions for interim relief and have instead chosen an approach propagated by commentators to look at international arbitration standards.[64] Commentators claim that this approach is more aligned to the expectation of the parties in international arbitration and likely to result in broadly uniform and predictable results.[65] According to the ICC EA Report, emergency arbitrators have in forty-nine cases been willing to apply conditions 'developed in connection with the granting of interim measures by arbitral tribunals'.[66] It is difficult to determine which these might be. Possible candidates include: the UNCITRAL conditions in its Model Law and Arbitration Rules, the practice developed and reported for interim relief in investor-state arbitration cases, or the practice developed and reported in the context of the EA under the ICC rules, or other institutional rules during the past decade. One can assume that there may be variations in the sources actually used by emergency arbitrators when seeking to identify an international standard.[67] The report further notes that emergency arbitrators have referred to 'common principles of law' and 'international sources'.[68] Such statements are also generic and unspecific, and they may signal de facto harmonization where multiple international sources mentioned above are consulted and taken as a form of guidance. However, due to the generic nature, it is hard to establish. In the case at hand it would naturally be useful for the parties to have more specific information. The report also notes as a recommendation that an early discussion on the standard or conditions to be applied by the emergency arbitrator with the parties is to be encouraged.[69]

Notwithstanding the general preference to avoid applying domestic law mentioned above, according to the report, emergency arbitrators have in a significant number of the cases also considered the *lex arbitri* or the *lex causae* when assessing an EA application.[70] In one case the emergency arbitrator considered mandatory law of the *lex arbitri*, and in a number of other cases the emergency arbitrators stated that they should be guided by the *lex arbitri*. However, if the *lex arbitri* is silent on the

63. *Ibid*.
64. *Ibid*., 23.
65. *See inter alia* Shaughnessy, *supra* note 6 and Boog, s*upra* note 33.
66. ICC EA Report, *supra* note 15, 23. Similar results emerge for under the SCC EA Rules, *see* Ragnwaldh, Andersson and Salinas, *A Guide to the SCC Arbitration Rules* 181 (Kluwer 2019).
67. Boog, s*upra* note 33, 444.
68. ICC EA Report, *supra* note 15, 23.
69. *Ibid*.
70. *Ibid*.

conditions, the emergency arbitrators have found themselves free to resort to international sources.[71]

The same pattern is confirmed by the SCC Reports. In two cases, the emergency arbitrator explicitly referred to provisions on interim relief in the Swedish Code of Judicial Procedure.[72] In another case, the emergency arbitrator referred to lacking coercive powers under Swedish law as the *lex arbitri* to order compulsion under threat of a fine ('*vite*' in Swedish),[73] and in a further case the emergency arbitrator referred to Swedish principles in holding that interim relief should not amount to advance enforcement of the award and must be a reversible measure.[74] Thus, the reference to domestic law has been made both with respect to the conditions for interim relief as well as the interim relief as such. However, according to the latest SCC Report, in most cases, the emergency arbitrators refer to the broad discretion given under the SCC Rules and the *lex arbitri*, and thus take into account and respect the *lex arbitri*, but due to its silence then proceed to use internationally established standards including the UNCITRAL Model Law and the practice established in prior EA cases in order to set out the conditions for interim relief.[75]

[4] The Interpretation of the Conditions

Based on the ICC EA Report and all the available institutional reports on case practice it is not possible to fully analyse fully how the conditions have been interpreted. Confidentiality has permitted the reports to include only very brief summaries of the cases. The reports do not reveal the full reasoning and assessments of the emergency arbitrators. However, what one can distil from the ICC EA Report is that there is a no uniform application of the conditions. For example, in relation to urgency it is explicitly noted that the interpretation and scope of the condition was far from uniform in the cases reviewed.[76] In addition, with respect to the two other central and most applied conditions, likelihood of success on the merits (*fumus bonus iuris*) and danger of delay including risk of irreparable harm (*periculum in mora*), there are variances in practice.

First, in relation to likelihood of success on the merits, it is noted in the ICC EA Report that many emergency arbitrators require that the applicant must establish a prima facie case. However, this does not in itself clarify what level of probability of success on the merits that emergency arbitrators demand. Emergency arbitrators have sometimes under the SCC Rules understood this criterion to mean a mere showing that the elements of a claim are present, whereas most emergency arbitrators set a higher bar requiring the applicant to show a reasonable possibility of success. Under the ICDR Rules the test is according to the report often framed as a good prospect of success,

71. *Ibid*.
72. Lundstedt, *supra* note 16, 2 and Knapp *supra* note 16, 4.
73. Lundstedt, *supra* note 16, 24.
74. Havedal Ipp, *supra* note 16, 14.
75. *Ibid*., 6, 10, 11, 13, 16 and 17. *See* further Ragnwaldh, Andersson and Salinas, *supra* note 66.
76. ICC EA Report, *supra* note 15, 24.

which is potentially an even slightly higher bar.[77] Commentators have also noted the multitude of ways in which emergency arbitrators can frame the condition as well as set the bar for the level of probability of success, indicating some leeway in the exercise of arbitrators' discretion.[78] The same commentators identify two levels of standard for the condition, the higher standard of 'reasonable possibility of success on the merits' and a lower standard of 'prima facie protectable interest' or 'possible that the applicant will succeed on the merits'.[79] They further argue for applying a lower standard due to the special nature of EA proceedings compared to process for applying for interim relief before an arbitral tribunal, including the very short time frames in EA proceedings and the fact that the parties will often not be able to marshal full evidence before the emergency arbitrator.[80] In addition, they raise the concern noted as a separate principle in the ICC EA Report, namely the risk that the EA proceedings are considered to prejudge or prejudice the applicant's case in the full arbitration.[81]

Another commentator also warns the emergency arbitrators against applying their own domestic understanding of the conditions as framed in, for example, in the UNCITRAL Model Law. He argues that there is no automatic common understanding of the conditions such as likelihood of success and that the emergency arbitrator must give them 'texture' and 'content'.[82] The same conditions may be used in many legal cultures for domestic interim relief but differently appreciated and developed in domestic case law and practice. Thus, in order to avoid the risk of emergency arbitrator giving the condition a domestic interpretation, he posits that an increased understanding of the international historic reference points for the conditions is necessary.[83] The practice developed in investor-state arbitration as well as the *travaux préparatoires* of the UNCITRAL Working Group that prepared the 2006 Reform specifically on interim relief are included in the suggested reference points.[84] Interestingly he notes that with respect to the condition of likelihood of success on the merits there is the biggest difference between the traditional common law standard and the international arbitration standard. He argues that in the international arbitration context, there was a conscious retreat from the common law standard often requiring a substantial likelihood of success on the merits to a lower standard now found in the UNCITRAL Model Law and Arbitration Rules, i.e., a reasonable possibility of success on the merits.[85] He finally agrees with the commentators referring to the special nature of the EA proceeding and the need for the EA proceedings not to prejudge the merits of the case. Thus, he also advocates for a potentially even lower interpretation of standard for the condition likelihood of success in the EA context.[86]

77. *Ibid*., 25.
78. Kim and Satish, s*upra* note 43, 181.
79. *Ibid*., 181–182.
80. *Ibid*., 187–189.
81. *Ibid*., 183 and 189.
82. Goldstein, s*upra* note 40, 780.
83. *Ibid.,* 780.
84. *Ibid.,* 794.
85. *Ibid*., 793–795.
86. *Ibid.,* 796.

With respect to the second condition of danger of delay, including the risk of irreparable harm, the ICC EA Report notes that there is a lack of consensus and even ongoing debate on the level of harm necessary to satisfy the condition. The report further notes that in many domestic jurisdictions the level of harm typically entails showing that it cannot be compensated by a damages award. However, in the international arbitration context a slightly lower standard of harm is also commonly applied, that entails showing serious or grave harm, albeit possible to compensate monetarily.[87] In all of the forty cases reviewed in which the condition was applied it is not clear which level of harm was applied. However, in just over half of the cases, twenty-one, the emergency arbitrator did not apply a literal meaning of irreparable harm but rather referred to serious and substantial harm.[88] In the first SCC EA Report it was noted that emergency arbitrators applied a rather strict test with respect to urgency and irreparable harm.[89] In addition, in the conclusions of the most recent SCC Report it is also noted that where the harm can be compensated by damages most emergency arbitrators under the SCC Rules have found the application unwarranted.[90] Thus, the overall practice under the SCC Rules appears to apply a standard slightly stricter than noted in the majority of the ICC cases.

Commentators have also with respect to the risk of harm condition found that there is a considerable variance in practice, both with respect to the standard and the burden of proof.[91] One commentator even asks whether we should be surprised or distressed that there is no common understanding.[92] However, he also finds that the history of its development in investor-state arbitrations and the drafting history of the UNCITRAL Model Law show that the condition is applied in a more flexible manner than a traditional and restrictive common law application of the condition. Thus, serious and grave harm can be used as the standard rather than demanding that it be literally irreparable.[93] In particular, the commentator also refers to *travaux préparatoires* of the UNCITRAL Working Group on arbitration that the intention behind the wording 'harm not adequately reparable by an award on damages' was to provide more flexibility because 'irreparable harm' could present a too high threshold.[94] Finally, other commentators propose that in addition to using the condition of substantial harm, emergency arbitrators could use ordering security as a tool to offset, for example, lack of evidence of full harm and also to calibrate the relative hardship faced by the parties when interim relief is ordered.[95]

87. ICC EA Report, *supra* note 15, 25.
88. *Ibid.*, 26.
89. Lundstedt, *supra* note 16, 25.
90. Havedal Ipp, *supra* note 16, 18.
91. Kim and Satish, *supra* note 43, 183–186.
92. Goldstein, *supra* note 40, 785.
93. *Ibid.*, 785–793. *See also* Hanessian and Dosman, *supra* note 6, 229.
94. *Ibid.*, 791.
95. Kim and Satish, *supra* note 43, 189–190.

[C] Conclusion

The perception that it is customary for emergency arbitrators to draw inspiration and guidance from international sources and soft law in the form of the UNCITRAL framework is carried through in EA practice. There appears to be a broad acceptance that these sources can be used as guidance in the event that there are no more specific conditions elaborated in the relevant *lex arbitri* or institutional rules. There seems to be a broad and common understanding of which conditions to apply, at least when it comes to the two conditions of likelihood of success on the merits (*fumus bonus iuris*) and danger of delay including risk of irreparable harm (*periculum in mora*). Further, to the extent that there are no mandatory or other obstacles in the *lex arbitri* there also appears to be a common understanding of the broad discretion of emergency arbitrators in relation to the scope of interim relief and the measures that can be ordered. However, there is no universal application and interpretations of the conditions. Practice shows that there is a variance in the application of the most commonly applied requisites regardless of the institutional context of the relevant EA procedure. Regardless of the fact that emergency arbitrators want to adhere to an international standard it is perhaps not always clear what that standard is, and emergency arbitrators may invariably be affected by their own legal cultures.

Thus, there is a reason for both parties and emergency arbitrators to be aware of these divergences and nuances in the application of the requisites. As noted in the ICC EA Report, it would be useful for the parties that emergency arbitrators are transparent in how they will apply the conditions at an early stage of the process. In addition, if a deeper uniformity is to be achieved in the interpretation of the main requisites for EA interim relief, it is imperative that the arbitration institutes continue to publish reports on the practice and that a dialogue on the requisites is continued in the doctrine and other relevant fora in the arbitration community.

§8.03 A COMPARATIVE LENS

[A] Introduction

As confirmed above there appears to be a broad consensus that emergency arbitrators should and de facto do look to international sources for guidance on the interpretation of the requisites for interim relief to the extent that the *lex arbitri* is silent. Hence, there appears to be a broad common understanding that domestic procedural law regarding interim relief rendered in courts should not be a primary source of guidance.[96] Indeed, even domestic courts that have had to review EA interim relief have recognized that the broad discretion of the emergency arbitrator and that the emergency arbitrator may apply standards different from domestic courts.[97] The purpose of this chapter is not to challenge or criticize that premise. However, we cannot entirely exclude underlying

96. Boog, *supra* note 33, 426–430.
97. Hanessian and Dosman, *supra* note 6, 229–230.

legal cultural perceptions that may inform emergency arbitrators' understanding of the prerequisites and how to interpret them, even unconsciously. In order to avoid that emergency arbitrators do so, it is important to have a clear awareness of both the domestic perspective and the broader international standard. A commentator referred to above was able to conduct such an analysis from a common law perspective.[98] Thus, it is arguably useful to also present other domestic perspectives in order to further such a comparative exercise also outside the common law domain. In addition, in order to develop EA proceedings as a tool of international arbitration, development and discourse in other international contexts of interim relief can perhaps be used as a comparative inspiration or benchmark. In this section the Swedish domestic perspective on interim relief is briefly outlined. In addition, recent European cross-border developments with respect to interim relief are briefly presented.

[B] A Domestic Example

According to Chapter 15 of the Swedish Code of Judicial Procedure,[99] an application for an interim relief can be granted if the applicant shows probable cause that it has a claim against another party that is or can form the basis of judicial proceedings or be determined by another similar procedure (condition of probable cause), and if it is reasonable to suspect that the opposing party, by carrying on a certain activity, by performing or refraining from performing a certain act, or by other conduct, will hinder or render more difficult the exercise or realization of the applicant's right or substantially reduce the value of that right (condition of risk of sabotage).[100] Risk of sabotage means that the applicant must show that the risk is objectively determinable, impending and that the opposing party's action is imminent or ongoing.[101] Although the condition refers to a risk of future sabotage, a measure that has been taken earlier by the opposing party will most likely affect the assessment.[102] Another condition in section 15(6) of the Code of Judicial Procedure is that the applicant must deposit security up-front with the court for the loss that the opposing party may suffer. This requirement should be applied in view of section 3(22) of the Enforcement Code, which states that the applicant has a strict liability for all the damages that the opposing party suffers due to the enforcement, including economic loss.[103] Hence, the size of the security deposit is of importance when the court assesses whether to grant an application for an interim relief or not.

98. Goldstein, *supra* note 40.
99. An unofficial translation to English is available here https://www.government.se/49e41c/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf (accessed 19 Apr. 2020).
100. Section 15(1–3) of the Swedish Code of Judicial Procedure (1942:740).
101. Westberg, *supra* note 1, Book 3, 39 and 89. *See also* Ekelöf et al, *Rättegång tredje häftet*, 26-31 (Nordsteds juridik, 8th ed., 2018).
102. *Ibid.*, 256.
103. *Ibid.*, Book 4, 219–221 and 226–247.

Even though it is not explicitly stated in Chapter 15 of the Code of Judicial Procedure, another requisite that needs to be considered is the proportionality principle. This entails that there must be a balance between the aimed result of the interim measure and the negative effects that come with it, and a court can reject an application if interim relief would lead to disproportionate damage in comparison to the reasons for awarding it.[104] The Swedish Supreme Court has held that the proportionality principle can overlap the assessment of the other requirements.[105] The proportionality principle is of special importance when a security deposit does not fully protect the opposing party for its potential loss.[106]

Chapter 15 section 5 of the Code of Judicial Procedure provides that no application may be granted unless the opposing party has been given the opportunity to respond. However, if the applicant can show that such a delay places its claim at risk (condition of imminent danger), the court may immediately, without the hearing of the opposing party (ex parte), impose a measure to remain effective until otherwise ordered. The Swedish Supreme Court has stated that imminent danger can be regarded as a requirement of a qualified risk of sabotage, where the degree of urgency applies especially. There must be a significant reason for the court to grant relief without hearing the opposing party, for example, if it is to be feared that notice of the application will trigger the opposing party to immediately take a sabotage measure.[107] If interim relief has been granted without the hearing of the opposing party, the court must, when the opposing party has been served and submitted its comments, immediately reconsider if the interim measure should stand or be reversed.[108]

[C] European Developments

There have been several recent and interesting developments at an international level in Europe concerning interim relief. Since 2017, the European Account Preservation Oder Regulation[109] (the 'Regulation') has been applicable and offers successful applicants in local domestic courts in the European Union (EU) the possibility to attach bank accounts in other EU Member States, i.e., it constitutes the first uniform and directly enforceable cross-border interim measure in the EU.[110] Under the Regulation an applicant creditor can obtain a European Account Preservation Order (EAPO) which prevents the subsequent enforcement of the creditor's claim from being jeopardized through the transfer or withdrawal of funds up to the amount specified in the EAPO which are held by the debtor or on his behalf in a bank account maintained in a

104. *Ibid.*, Book 4, 191–334, and Swedish Supreme Court case NJA 1993 page 182. *See also* Ekelöf, *supra* note 101, 31-32.
105. Swedish Supreme Court case NJA 2018 page 189.
106. Westberg, *supra* note 1, Book 4, 270.
107. Swedish Supreme Court case NJA 2005 section 29.
108. Ekelöf, *supra* note 101, 23-24. *See also* Swedish Chancellor of Justice case JK 1983:23.
109. Regulation (EU) No. 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L 189/59.
110. The Regulation is applicable in all EU Member States except the UK and Denmark.

Member State.[111] The possibility to apply for an EAPO is available to the creditor as an alternative to interim relief under domestic law.[112] In order to obtain an EAPO the applicant must show: (i) an urgent need for a protective measure because there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult, and (ii) that it is likely to succeed on the substance of its claim.[113] In the recitals to the Regulation is it noted that the conditions for issuing an EAPO should strike an appropriate balance between the interest of the creditor in obtaining interim relief and the interest of the debtor in preventing abuse of the interim relief.[114] In addition, where ex parte interim relief is applied for specific safeguards are stipulated in order to prevent abuse and protect the debtor's rights. The safeguards include the possibility of requiring the creditor to provide security and a rule on the creditor's liability for any damage caused to the debtor by the EAPO.[115]

A major study on domestic procedures in the EU complied for the EU Commission also included provisional relief within its scope. The results of the study demonstrate among other that most Member States apply the two conditions for interim relief, urgent threat of impairment (*periculum in mora*) and the existence of a claim (*fumus bonus iuris*).[116] In addition, some EU Member States also have other conditions including the balancing of the parties' risks (proportionality). With respect to interpretation of the conditions the interesting result of the study concerns the applicant's duty to substantiate prima facie its claim on the merits. Here, the study showed a clear variance in the standard applied. In some EU Member States a prima facie plausible existence of the right whose protection is sought is deemed sufficient, while other Member States adhere to a higher standard including 'a good arguable case'.[117]

The research project of the European Law Institute (ELI) and UNIDROIT on European Rules of Civil Procedure that commenced in 2014 is due to be published soon.[118] The project is a soft law project to create model civil procedural rules for Europe and has already raised debate on the potential further harmonization of civil procedure in the EU and interest among the EU institutions.[119] The rules include a section on provisional and protective measures that have drawn inspiration from the

111. Regulation, *supra* note 109, Art. 1.
112. *Ibid.*, Arts 1 and 16.
113. *Ibid.*, Art. 7.
114. *Ibid.*, Recital 14.
115. *Ibid.*, Recitals 17–19, Arts 12 and 13.
116. Storskrubb and Cuniberti, *supra* note 2. The Report is also available at https://op.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en (accessed 19 Apr. 2020) *see* Chapter 3 Provisional Measures, 232–233.
117. *Ibid*.
118. *See* project information at https://www.europeanlawinstitute.eu/projects-publications/current-projects-feasibility-studies-and-other-activities/current-projects/civil-procedure/ and https://www.unidroit.org/work-in-progress/transnational-civil-procedure (both accessed 17 May 2020) for available public reports regarding the process of the project. *See also* J. Soarbji, 'The ELI-UNIDROIT Project: An Introduction and an English Perspective' in A. Nylund and M. Strandberg (eds), *Civil Procedure and Harmonisation of Law*, 36–46 (Intersentia 2019).
119. *See* E. Storskrubb, 'EU Civil Justice at the Harmonisation Crossroads', in A. Nylund and M. Strandberg (eds), *Civil Procedure and Harmonisation of Law*, 28–32 (Intersentia 2019).

ALI UNIDROIT Principles of Transnational Civil Procedure[120] of 2006 and from a multitude of comparative sources in a European context. The section on provisional and protective measures includes a general part with provisions that apply to all types of measures and a special part with separate rules for different types of interim relief. This chapter is not the place to present the rules. However, they will include specific conditions for different types of interim relief as well as an overall principle of proportionality. As an example of the specific conditions, an applicant for asset preservation must show: (i) a good chance of succeeding on the substantive merits, and (ii) that it is likely that, without such an order, enforcement of a final judgment against the respondent will be impossible or exceedingly difficult.[121]

[D] Comparative Reflexions

There are a number of reflexions that arise from the brief and non-exhaustive presentations above on the approach under Swedish law and European law developments with respect to interim relief in comparison to what we have learnt about the arbitration practice in an EA context. Only a few will be touched upon here. First, what appears to be a difference is how the condition *periculum in mora*, danger in delay, is framed and applied in practice. As we have seen, the UNCITRAL framework of the Model Law and the Arbitration Rules frame this as, 'harm not adequately reparable by an award of damages' and many emergency arbitrators in both ICC and SCC EA practice have interpreted this condition in a strict or literal manner. However, commentators referred to above have argued that this is in most cases an impossible standard to meet in a commercial case, and that this was not the intention behind the condition as elaborated in the UNCITRAL framework. Rather it has been argued that serious and grave harm is a more appropriate standard rather than demanding that harm be literally irreparable.

In both the Swedish and the EU provisions mentioned above, the condition is worded in an arguably alternative manner and the focus of the application, the condition is also perhaps slightly different. In the Swedish context the condition is called risk of sabotage and the focus is on conduct that will hinder or render more difficult the exercise or realization of the applicant's right or substantially reduce the value of that right. Under the Regulation the condition is framed as 'a real risk that enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult'. Although the underlying purpose of the condition is the same, due to the way it is framed the focus appears different. It is easy to consider that the manner in which the applicant provides proof that the condition is fulfilled may be very different depending on that focus. The purpose here is not to argue that the

120. https://www.unidroit.org/instruments/transnational-civil-procedure (accessed 7 May 2020).
121. The author has participated in the project and been involved in two of its Working Groups and has access to the unpublished draft of the project, at the time of writing publication forthcoming in 2020.

international arbitration provisions or EA practice should entirely change its focus. However, the different way of framing the same condition may be instructive to further the understanding of the aim underlying the condition and be useful in the continued dialogue on EA practice.

The second reflection is that the possibility to require the applicant to provide security is so rarely used in the EA practice. According to the ICC EA Report security has been required only in two cases. However, commentators referred to above, suggest that emergency arbitrators could use ordering security more often as a tool to offset, for example, lack of evidence of full harm and to calibrate also the relative hardship faced by the parties when interim relief is ordered. In contrast, to post security is central requisite for an applicant for interim relief in Swedish courts, and also considered a central safeguard under the Regulation. A further observation is that the balance of equities (proportionality) condition has been applied in relatively few cases according to the ICC EA Report, albeit that can be considered to be reflected in the UNCITRAL rules that require that the 'harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted'. The reason for it not having been applied so often may be that it is in many cases applied as a final condition when all the other conditions have been met. However, it may be remembered that the Swedish Supreme Court has held that the proportionality principle can overlap the assessment of the other requirements as noted above. Similarly, in the ELI and UNIDROIT project the principle of proportionality is placed in the general part of the rules on provisional measures, as a general principle to be applied in all cases. The purpose here is not to argue that the EA practice has been lacking in this respect. However, it may be useful and instructive to highlight the potential of both the possibility of ordering security as a safeguard and the use of the balance of equities condition for emergency arbitrators to enable them to calibrate their actions in granting or dismissing EA applications.

§8.04 FUTURE PERSPECTIVE FOR A MATURING AND EVOLVING PROCEDURE

The reports on EA practice by the arbitration institutes, such as the very insightful ICC EA Report that has been the inspiration and starting point for the chapter, demonstrate that it is a maturing and evolving procedure. There are certainly issues that still remain debated and may hamper its usefulness in certain cases such as lacking enforceability and ex parte procedures.[122] However, the reports also show that EA proceedings are being used and are providing needed redress for many parties in international arbitration. This chapter has attempted to examine more closely what EA practice tells us about the requisites for interim relief. In particular, to examine whether emergency arbitrators use international standards as guidance and whether a universal standard has emerged with respect to the scope of and conditions for interim relief. The results of the analysis above are that there is a broad consensus for using international

122. *See supra* note 6–7 and 36.

standard as guidance, but there is no universal application in the interpretation of that guidance. The variance in the EA practice shows that there is a need for further comparative understanding and dialogue on the requisites. This chapter is a contribution thereto.