SPECIAL FOCUS ISSUE

The Use of Emergency Arbitrators in Investment Treaty Arbitration

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I. THE EMERGENCY ARBITRATOR

The record shows that international investment arbitrations move along very slowly. Based on publicly available statistics, of the 19 investment arbitration awards issued under the ICSID Convention in 2012, the fastest came 29 months after the commencement of arbitration, while the average award took 59 months. A key contributor to this state of affairs is the length of time it typically takes to constitute a tribunal; of the 34 ICSID cases registered in 2012 for which a tribunal was constituted, the average time between registration and constitution was 211 days (nearly seven months), with the slowest taking up to 470 days (nearly 39 months). Investment arbitration is, indeed, ‘not for the impatient’!

This presents a real problem where time is of the essence and there is a risk of irreversible and irreparable damage if the status quo is not swiftly preserved. Insofar as the traditional form of arbitration leaves investors seeking emergency relief prior to the constitution of the tribunal in a ‘jurisdictional void’ with no choice but to turn to

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4 ibid 9.

5 ibid 1.

6 Ali Yesilirmak, Provisional Measures in International Commercial Arbitration (Kluwer 2005) 113–4, stating that ‘If a party were forced to wait for the constitution of the tribunal in order to request an interim protection of rights, in some cases, “the dispute would surely be academic (i.e. the damage done). . . .” That period constitutes a very important phase of arbitration: “what happens in that relatively short period in the early days of a case may have a crucial effect on the entire arbitration.” It is this author’s experience that, in majority of cases, a party either uses or considers using a request for provisional measures as a tool for settlement. . . . Where the party request is successful, then such party will generally be in a commanding position to force the respondent party into settlement under terms favourable to it.’ The range of emergency reliefs that may be required by claimants are diverse, eg, for preservation of confidentiality of the proceedings, preservation of evidence, preservation of the status quo, ordering a State party to discontinue proceedings, or enjoining a state to do something or from doing something. Philippe Pinsolle and Thomas Voisin, ‘Enforcement of interim relief in investor-state arbitration’ in Julien Fouret (ed), Enforcement of Investment Treaty Arbitration Awards (Globe 2015) 33, 35.

7 Kah Cheong Lye, Chuan Tat Yeo and William Miller, ‘Legal Status of the Emergency Arbitrator under the SIAC 2010 Rules: Neither Fish nor Fowl?’ (2011) 23 SAcLJ 93, 3; Erin Collins, ‘Pre-Tribunal Emergency Relief in International Commercial Arbitration’ (2013) 10(1) Loyola University Chicago International Law Review 105, 106 (‘It is important for arbitral institutions to address this void in the remedies offered by international commercial arbitration because companies generally prefer arbitration to transnational litigation but, until recently, had no arbitration option

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national courts for recourse (the forum they had contracted out of when they opted for arbitration, whether due to, for example, concerns of confidentiality, costs, time, bias or other factors), reform was needed.

Reform came in the shape of the emergency arbitrator (EA), an innovation aimed at addressing this lacuna, and whose role is to hold the fort and issue urgent interim relief where necessary, while the tribunal is still being constituted.

This innovation has gained traction in the realm of commercial arbitrations, following its introduction into several institutional rules, for example, International Centre for Dispute Resolution Arbitration Rules (ICDR Rules) (since 2006), Stockholm Chamber of Commerce Arbitration Rules (SCC Rules) (since 2010), Singapore International Arbitration Centre Arbitration Rules (SIAC Rules) (since 2010), International Chamber of Commerce Arbitration Rules (ICC Rules) (since 2012), Hong Kong International Arbitration Centre Arbitration Rules and Guidelines (HKIAC Rules) (since 2013), London Court of International Arbitration Rules (LCIA Rules) (since 2014), China International Economic and Trade Arbitration Commission Arbitration Rules (CIETAC Rules) (since 2015), and has generally been welcomed as a ‘positive’ and ‘necessary step in the growth of international arbitration’. The same cannot, however, be said of the use of EAs in the specific context of investment treaty disputes, which remains nascent.

As it stands, only two sets of institutional rules applicable to investment treaty disputes provide for the use of EAs, viz the 2010 Stockholm Chamber of Commerce (SCC Rules) and the 2016 Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules (SIAC (IA) Rules). As arbitration pursuant to the SCC Rules is available only under about 60 Bilateral Investment Treaties...
(BITs) and the Energy Charter Treaty (ECT)\textsuperscript{16} and as the ICSID and United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules) (under both of which the vast majority of investment treaty arbitrations take place) do not contain an equivalent mechanism,\textsuperscript{17} the appointment of an EA remains inaccessible under the majority of BITs. This may have something to do with resistance by States, who are not beneficiaries of the EA procedure and who may see such procedure as unfairly tilted in favour of the investor, and overly intrusive:

Most users of the SCC system, particularly commercial actors who favour arbitration over domestic litigation, will welcome the amendment to the SCC Rules. This new procedure will offer an avenue for fast and uncomplicated interim protection under an arbitral mechanism that appropriately balances opposing parties’ rights and interests . . .

Another group of users, however, namely States and State entities that have consented to SCC arbitration under investor-State contracts or international investment treaties . . . may perceive this new mechanism for quick and effective interim relief as threatening a temporal and substantive expansion of the SCC’s jurisdiction in investment disputes through a procedure that makes provisional measures available significantly faster than do other arbitral rules in the investment context.\textsuperscript{18}

Given the inaccessibility of emergency arbitration under the vast majority of BITs, and the relative newness of the 2010 SCC Rules, it is unsurprising that there has, to date, only been five known instances where the EA procedure was invoked vis-à-vis investment treaty disputes, twice in 2014 [in TSIKInvest LLC v Moldova\textsuperscript{19} (Moldova-TSIK) and Griffin Group v Poland],\textsuperscript{20} once in 2015 (in JKX Oil and Gas and others v Ukraine),\textsuperscript{21} and twice in 2016 [in Evrobalt LLC v Moldova (Moldova-Evrobalt)\textsuperscript{22} and Kompozit LLC v Moldova (Moldova-Kompozit)].\textsuperscript{23}

As will be seen, however, while the caseload of EA applications filed vis-à-vis investment treaty disputes remains small, the five cases to date each raised novel and important legal issues, which will continue to focus attention on this developing area.


\textsuperscript{17} Eg, ICSID Arbitration Rule 39(6) provides that only the tribunal may recommend provisional measures, unless parties provided ‘in the agreement recording their consent’ for the ‘requesting [of] any judicial or other authority to order provisional measures, prior to or after the institution of the proceedings, for the preservation of their respective rights and interests’. While ICSID Arbitration Rule 39(5) seeks to mitigate the situation by providing that ‘[i]f a party makes a request [for provisional measures] before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution’, it does not satisfactorily deal with the urgency associated with provisional measures which remains contingent upon the tribunal first being constituted (see Piero Bernardini, ‘ICSID versus Non-ICSID Investment Treaty Arbitration’ (15 September 2009) <http://www.arbitration-icca.org/media/4/30213278230103/media01297022370903/bernardini_icsid-vs-non-icsid-investent.pdf> accessed 31 May 2016 para 40.


\textsuperscript{19} TSIKInvest LLC v Moldova (SCC EA No 2014/053) (Moldova-TSIK 2014).

\textsuperscript{20} Griffin Group v Poland (SCC EA No 2014/183) (Griffin Group v Poland).

\textsuperscript{21} JKX Oil & Gas, Poltava Gas, Poltava Petroleum Company v Ukraine (SCC 2015).

\textsuperscript{22} Evrobalt LLC v Moldova (SCC EA No 2016/82) (Moldova-Evrobalt 2016).

\textsuperscript{23} Kompozit LLC v Moldova (SCC EA No 2016.95) (Moldova-Kompozit 2016).
II. SHAPE OF THE CURRENT EA PROVISIONS

In March 2009, the SCC announced its intention to amend the then-version of the SCC Rules to provide for the appointment of an EA with the power to issue an emergency decision prior to the commencement of arbitration or reference of the matter to a tribunal, in view of demands by claimants for swifter interim relief in commercial proceedings. Following a period of public consultation, the EA procedure was officially introduced into the 2010 SCC Rules (effective from 1 January 2010) by way of a new Article 32(4) and Appendix II.

These provisions (which, while designed primarily with private commercial claims in mind, are also accessible by parties in investment arbitrations) established a 'robust' and 'notably streamlined' mechanism that sees the appointment of the EA within 24 hours, the vesting of broad discretionary powers in the EA to conduct the proceedings as he or she deems appropriate and the issuance of an emergency decision within five days from the date upon which the application was referred to the EA.

By contrast, the EA provisions in the SIAC (IA) Rules set less 'aggressive' timelines: the EA shall be appointed within one business day of receipt of the application and payment of the required fee and generally has 14 business days (from the date of his appointment) to reach a decision.

The more 'relaxed' timelines under the SIAC (IA) Rules (as compared to the SCC EA provisions) are likely to be more palatable to those negotiating


25 Article 32(4) of the 2010 SCC Rules: ‘Provisions with respect to interim measures requested before arbitration has been commenced or a case has been referred to an Arbitral Tribunal are set out in Appendix II.’

26 Peterson (n 16).

27 While not nearly as ubiquitous in investment treaties as the ICSID or UNCITRAL rules, arbitration pursuant to the SCC rules is available in at least 60 bilateral investment treaties as well as the multilateral ECT: Peterson (n 16).


29 Peterson (n 16).

30 Article 4(1) of Appendix II to the 2010 SCC Rules: ‘The Board shall seek to appoint an Emergency Arbitrator within 24 hours of receipt of the application for the appointment of an Emergency Arbitrator.’ Article 7 of Appendix II to the 2010 SCC Rules: ‘Article 19 of the Arbitration Rules shall apply to the emergency proceedings, taking into account the urgency inherent in such proceedings.’ Article 19(1) of the SCC Rules provide that: ‘Subject to these Rules and any agreement between the parties, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate.’

31 Article 8(1) of Appendix II to the 2010 SCC Rules: ‘An emergency decision on interim measures shall be made not later than 5 days from the date upon which the application was referred to the Emergency Arbitrator pursuant to Article 6 of this Appendix. The Board may extend this time limit upon a reasoned request from the Emergency Arbitrator, or if otherwise deemed necessary.’ This short timeframe is not uncontroversial, even in the context of general commercial arbitration: ‘[w]ile ex parte proceedings are not allowed, in practice some parties may have difficulty responding within the short time limit, particularly if the responding party is located in a place where delivery of the notice can take time. The emergency proceedings may take place and a decision may be rendered even if the responding party fails to respond or appear at a scheduled hearing. … Because the relief may be sought prior to the commencement of arbitral proceedings, it is possible that the responding party is unaware that a dispute is brewing and the notice may come as a surprise. It may require some time for such a party to react to the notice and to consult and instruct counsel for representation in the proceedings. The five-day time period to render a decision may also be burdensome when a responding party raises serious jurisdictional challenges.’ Patricia Shaughnessy, ‘Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules’ (2010) 27(4) J Intl Arb 337, 341.


33 Article 2 of Schedule 1 to the SIAC IA Rules.

34 Article 8 of Schedule 1 to the SIAC IA Rules.
international investment treaties and agreements on behalf of States, since most States are unlikely to be able to react as swiftly as private commercial respondents (and who may as a result miss the opportunity to be heard during the EA proceedings) at the onset of proceedings:

The respondent [in an investment arbitration] is likely to be less suited to defend its interest in such a swift manner than is the case for most commercial actors. Consider, for example, the fact that many smaller governments do not have proficient English speakers among their legal staff. It may take days before the notice ends up before the relevant official. Many states are furthermore unlikely to have the internal competence to handle such a dispute on its own. Everyone who has ever been involved in a public tender procedure realizes the difficulties involved in procuring external counsel—not to mention able to successfully raise a defence—within days after being notified of the initiation of an emergency arbitration against it. The matter thus raises some fundamental questions of procedural fairness.

Indeed, in the Ukraine and Moldova cases (discussed further below), emergency relief was issued in a matter of days and in the absence of submissions by the respondent States. While it is unclear why Moldova and Ukraine failed to participate in those proceedings (for example, whether they were unable to react to the tight schedule put in place by the EAs or whether a conscious decision was made not to participate), investment treaty arbitration does remain relatively novel to most States who have not previously been involved in such proceedings and who are likely to lack standard responding procedures as well as the relevant in-house expertise (necessitating the procurement of external counsel which may involve lengthy and convoluted tender processes — all of which impede responsiveness and allow private investors to unilaterally dictate the schedule.

The EA provisions in the SIAC (IA) Rules maintain their individuality in further aspects. For example, unlike the SCC EA provisions, a party applying under the SIAC (IA) Rules for emergency relief prior to the constitution of the tribunal may only do so ‘concurrent with or following the filing of a Notice of Arbitration’. Also unlike the SCC EA provisions (which apply unless parties opt out), the SIAC
III. SUBSTANTIVE ISSUES

Procedural issues aside, the use of EAs in investment treaty arbitrations also give rise to novel substantive legal issues, which currently remain unresolved.

A. The Moldova Cases: Cooling-off Periods

The Moldova-­‐TSIK case was the first known case where the SCC EA provisions were invoked in the investment arbitration context. The Claimant (TSIK) was a Russian entity which had acquired a 4.16% shareholding in the Moldovan bank BC Victoriabank SA in 2012. On 5 February 2014, the Administrative Council of the National Bank of Moldova (NBM) issued ‘Decision 19’, which decided inter alia that: (i) TSIK had acted in concert with other investors (collectively, the ‘Decision 19 Investors’) to acquire a substantial share of 10.43% of Victoriabank’s share capital in breach of Moldovan laws on ownerships of banks; (ii) the Decision 19 Investors’ voting rights vis-à-vis their Victoriabank shares were to be suspended; and (iii) the Decision 19 Investors were to dispose of their substantial shareholding in Victoriabank within three months (for example by 5 May 2014).

Aggrieved, TSIK first applied to NBM to seek to annul Decision 19 and, when that failed, sought to challenge Decision 19 in the Moldovan courts.

After TSIK’s court application was dismissed in early March 2014, TSIK sent a notice of dispute to Moldova on 31 March 2014, pursuant to Article 10(1) of the 1998 Russia-­‐Moldova BIT. Article 10(1) provided that:

Any dispute between one Contracting Party and an investor of the other Contracting Party, which arose in relation to an investment, including disputes regarding the amount, conditions or procedure for the payment of compensation under Article 6 of this Treaty, or procedure for the payment of compensation under Article 6 of this Treaty, shall be subject to a written notice accompanied by detailed comments which the investor shall send to the Contracting Party, which is a party to the dispute. Parties to the dispute shall endeavour to resolve such a dispute by amicable means where possible.

As Moldova did not respond to TSIK by 14 April 2014 (as requested in TSIK’s notice of dispute), and with the 5 May 2014 deadline for divestment approaching, TSIK invoked the SCC EA procedure on 23 April 2014 and requested an

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43 Article 26.4 of the SIAC IA Rules provides that ‘[i]f parties expressly agree on the application of the emergency arbitrator provisions set forth in Schedule 1, a party in need of emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1’.


45 TSIKInvest LLC v Republic of Moldova, SCC Emergency Arbitration No EA 2014/053 (Emergency Decision on Interim Measures, 29 April 2014) para 17.

46 ibid paras 18–19.

emergency decision staying Decision 19 pending the resolution of an arbitration which TSIK envisaged commencing against Moldova.48

Before the EA (Professor Dr Kaj Hobêr), TSIK argued that NBM’s actions constituted breaches of various protections under the 1998 Russia-Moldova BIT allegedly attributable to Moldova. In this regard, TSIK contended that ‘the true reason’ for Decision 19 (issued a day before a Victoriabank shareholder meeting convened for voting on changes to the board’s composition) was ‘to prevent [TSIK] and a number of other shareholders who were justifiably unhappy with the mismanagement of [Victoriabank] from exercising their legitimate rights and voting to replace the management of [Victoriabank]’49 and that the order for the Decision 19 Investors to divest their shares by 5 May 2014 was designed to force said investors to sell in circumstances where the share price was ‘approaching...nominal value’.50 TSIK argued that there was an urgent and compelling need for a stay of Decision 19, which would otherwise have the effect of irrevocably expropriating its shares in Victoriabank.51

The EA who was appointed on 24 April 2014 directed Moldova to respond by the next day.52 As mentioned above, Moldova failed to do so, and an emergency decision was released on 29 April 2014 in the absence of any defence. In the published grounds, the EA concluded that TSIK had established a prima facie case on the merits and that ‘urgent and imminent harm is likely to result unless interim relief is ordered’53 (ie the two elements that have been generally accepted as the basis for granting interim relief in arbitral proceedings).54

What was of particular significance is that the EA’s stay order was granted despite TSIK’s failure to wait out the 6-months cooling-off period after its notice of dispute, prior to submitting the matter to the SCC. In other words, TSIK did not strictly comply with Article 10(2) of the 1998 Russia-Moldova BIT, which provided that:

If the dispute is not resolved in such a manner within six months from the date of the written notice referred to in paragraph 1 of this article, it shall be submitted for reconsideration to ... b) the [SCC] ...

Variants of such clauses providing for ‘waiting’ or ‘cooling-off’ periods before referral of the dispute to either litigation or arbitration are common in investment treaties.55 In the Moldova-TSIK case, TSIK argued that it was not necessary for it

49 TSIK v Moldova para 22.
50 ibid para 22.
51 ibid paras 47, 50.
52 ibid paras 9, 60.
53 ibid paras 62–5.
55 ‘Almost 90% of the treaties with ISDS provisions require that the investor respect a cooling-off period before bringing a claim. Often, an investor must respect this waiting period regardless of whether it brings the dispute to domestic courts or before an international arbitral tribunal. ... The length of the cooling-off period varies. Most often, it is set to 6 months, but many treaties set a shorter period of 3, 4 or 5 months’; OECD, ‘Dispute Settlement Provisions in International Investment Agreements: A large sample survey’ (2012) para 38–39 <http://www.google.com.sg/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiy27Xr5uPMAhUJRY8KHTr6DCwFQgaMAA#q=source%3dweb&cd=1&ved=0ahUKEwiy27Xr5uPMAhUJRY8KHTr6DCwFQgaMAA#q=source%3dweb&cd=1>; Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd edn, OUP 2012) 268 (‘[a] common condition in treaties providing for investor-state arbitration is that an amicable
to have waited out the 6-months period in Article 10(2), as: (i) applying such clauses to EA proceedings would be inequitable and procedurally unfair to the claimant; (ii) the most-favoured-nation clause (MFN clause) in Article 3 of the 1998 Russia-Moldova BIT\(^\text{56}\) dis-applied the cooling-off period; and (iii) Moldova had failed to engage in amicable settlement attempts despite TSIK’s efforts in this regard.\(^\text{57}\)

The EA agreed with TSIK’s first argument, that applying the cooling-off period to EA proceedings would be procedurally unfair to [TSIK] and contrary to the purpose of the Emergency Arbitrator procedure . . . not least since [TSIK] seems to be facing a serious risk of suffering irreparable harm before the expiry of the Cooling-Off Period if interim measures are not granted.\(^\text{58}\)

A similar conclusion on the application of cooling-off periods in the context of EA proceedings was reached in Moldova-Evrobalt and Moldova-Kompozit (the fourth known case where the SCC EA provisions were invoked in the investment arbitration context,\(^\text{59}\) and which facts bore marked similarities with that of the Moldova-TSIK case),\(^\text{60}\) where the Russian claimant (Evrobalt) similarly commenced EA proceedings without waiting out the 6-months cooling period in Article 10(2) of the 1998 Russia-Moldova BIT (this time just days after the Notice of Dispute was submitted).\(^\text{61}\) In concluding that the pendency of the cooling-off period did not bar EA proceedings, the EA in Moldova-Evrobalt (Mr Georgios Petrochilos) reasoned that:

> Whether the requirement for an attempt to resolve the dispute amicably be characterized as procedural or as one of admissibility, that requirement cannot be held to where to do so would be manifestly futile. For present purposes, the question is whether it would be futile to insist on the exhaustion of the six-month Cooling-off Period in respect of the dispute that is pending before the Emergency Arbitration. . . . The futility exception is met here.

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\(^{56}\) The Russian text of Article 3 of the 1998 Russia-Moldova BIT (the MFN clause relied upon by TSIK for purposes of argument (b)) was re-produced in paras 43–44 of the EA’s decision as follows: ‘According to Article 3.1 of the Treaty, each of the Countries shall provide within its territory to investments made by investors from the other Country and to activity related to such investments, a fair and equitable treatment, which excludes the application of discriminatory measures, which hinder the management and use of investments. . . . According to Article 3.2 of the Treaty, the regime of fair and equitable treatment referred to in Article 3.1 shall be no less favourable, than a regime, which is afforded to investments and actions related to investments of the Country’s own investors or investors from any other country . . .’

\(^{57}\) TSIK v Moldova para 59.

\(^{58}\) Ibid para 66. Unfortunately, the EA’s published grounds did not set out detailed reasoning on the issue (understandably so, in view of the time pressures involved).


\(^{60}\) In Moldova-Evrobalt, the Russian claimant Evrobalt alleged that its shareholding interest in Agroindbank was at risk of being expropriated in light of NBM’s ‘Decision 43’ (which found that (a) Evrobalt and other investors (collectively, the ‘Decision 43 Investors’) acquired a substantial share in Agroindbank without NBM’s approval, (b) the Decision 43 Investors’ voting rights were suspended; and (c) the Decision 43 Investors were to dispose of their substantial shareholding in Agroindbank within 3 months) was in breach of standards of protections under the 1998 Russia-Moldova BIT (Evrobalt v Moldova paras 11, 15). Similar allegations were made by the Russian claimant (Kompozit LLC) in Moldova-Kompozit in light of NBM’s ‘Decision 43’ (vis-a-vis its shareholding interest in Agroindbank).

\(^{61}\) Evrobalt v Moldova paras 2, 14, 21.
The Respondent has elected to implement Decision 43 within 3 months of its adoption [and] had further confirmed that it does not intend to suspend Decision 43 or Decree 15/2.62

Notwithstanding the above, given that the question of whether a clause consenting to arbitration under rules that provide for the use of EAs trumps another clause providing for a cooling-off period is likely to be a question of treaty interpretation,63 the Moldova cases are unlikely to be the last word on the issue.

Indeed, as TSIK’s first argument in Moldova-TSIK was dispositive of the issue of whether TSIK needed to wait out the six-month cooling off-period before invoking the EA procedure (the EA concluding that cooling-off periods did not apply to EA proceedings), the EA there did not address TSIK’s remaining arguments, including the argument that it could side-step the cooling-off period by virtue of the MFN clause in Article 3—a question that would have engaged the general debate on whether (and the extent to which) MFN clauses can be relied upon to avoid the (pre)conditions and limitations attached to consent to arbitration in a treaty.64

There is also the separate but equally important question of whether an investor can rely on an MFN clause to import EA provisions which are not contained in the basic BIT, for example, can an investor suing under a BIT providing for arbitration under ICSID or UNCITRAL rules only (which do not contain EA provisions) gain access to BITs that provide for the use of EAs, by relying on an MFN clause in the basic BIT?

All these outstanding points will have to be tested and determined in future cases. In the meantime, it appears that despite breaking new ground as the first cases invoking the EA procedure vis-à-vis investment disputes, the Moldova cases ended in an anti-climax. The EA in Moldova-Evrobalt did not eventually grant the emergency measures (finding that the losses Evrobalt stood to suffer were ‘purely economic’, ‘confined in scope’ and capable of being ‘made good by an award of monetary compensation’),65 and while the EA in Moldova-Kompozit did order Moldova to refrain from inter alia taking further steps relating to the cancellation of Kompozit’s Agroindbank shares,66 Moldova reportedly declined to comply with the EA’s order and proceeded to cancel said shares by a decree on 30 June 2016.67

As for the decision to stay Decision 19 in Moldova-TSIK, as Article 9(4) of the SCC EA provisions provides that the emergency decision ‘ceases to be binding’ if inter alia the arbitration is not commenced within 30 days from the date of the emergency decision,68 and as TSIK only filed its formal notice of arbitration on 4

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62 Evrobalt v Moldova paras 22–23. Similarly, the EA in Moldova-Kompozit concluded that the language of ‘as far as possible’ in Article 10 of the Russian-Moldova BIT implied that ‘when the parties are not able to resolve the dispute amicably, then the investor is entitled to submit the dispute to arbitration, pursuant to art 10(2) of the Treaty’. In view of this, and Moldova’s refusal to engage in settlement discussions with the claimant, the claimant was not required to wait out the six-month cooling-period before invoking the EA procedure (Kompozit v Moldova paras 55–56) (emphasis added).

63 Dahlquist (n 54) 266.

64 Dolzer and Schreuer (n 55) 270–74; Dahlquist (n 37).

65 Evrobalt v Moldova para 48.

66 Moldova-Kompozit para 92.


68 Article 9(4): ‘The emergency decision ceases to be binding if: (i) the Emergency Arbitrator or an Arbitral Tribunal so decides; (ii) an Arbitral Tribunal makes a final award; (iii) arbitration is not commenced within 30 days
June 2014, the same likely lapsed in late-May 2014. The enforceability of the EA's order was thus never put to test (compare the Ukraine case, discussed below). In any case, TSIK subsequently failed to pay fees requested by the SCC, resulting in the discontinuance of the arbitration in October 2014.


In the second case, the Luxembourg-based Claimant (Griffin) filed a notice of dispute in October 2013 before commencing arbitration under the BLEU-Poland BIT (following a six-month waiting period prescribed in the BIT), alleging expropriation of its rights to a historic former barracks site adjacent to Lazienki Park in central Warsaw. Sometime after the arbitration filing, Griffin invoked the EA procedure in an effort to enjoin the effects of a Polish court judgment that had impacted upon its property rights to the land at the said historic barracks site.

Unlike in the Moldova cases, the Respondent here (Poland) appeared in the EA proceedings, to challenge the jurisdiction of the EA (Mr Georgios Petrochilos, the same EA appointed in Moldova-Evrobalt), on the basis that: (i) at the time Poland signed the BLEU-Poland BIT, it had envisaged a previous version of the SCC Rules, which did not include any EA procedure; and (ii) even if parties to the BLEU-Poland BIT had envisaged later versions of the SCC Rules to apply, the EA procedure was such an extraordinary qualitative change of the SCC Rules (in that it gave adjudicative functions to somebody other than the tribunal) that Poland could not be regarded as having given advance consent to the procedure.

Poland’s jurisdictional arguments (which were unsuccessful) had echoed arguments which a prescient commentary (by the Honourable Charles N Brower, Ariel Meyerstein and Professor Stephan M Schill, released shortly after the SCC EA provisions came into force in 2010) had envisaged respondent States might argue to ‘attempt to avoid compliance with an emergency arbitrator’s order or award’. The authors of the 2010 commentary had offered the following solution to this temporal issue:

from the date of the emergency decision; or (iv) the case is not referred to an Arbitral Tribunal within 90 days from the date of the emergency decision.’

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69 Dahlquist (n 54) 263.
70 Hepburn (n 44).
72 Griffin Group v Poland (n 19).
75 Knapp (n 71) s 3.
76 Brower and Meyerstein (n 18) 61.
77 ibid 63–4.
[A] State might urge that its consent to SCC Arbitration (and thus to the SCC Rules) in an investment treaty necessarily fixes the Rules to which it has consented to what they were at the time of the treaty’s conclusion, and thus that a subsequent modification of those Rules is equivalent to an amendment of the term ‘SCC Arbitration’ in the treaty. … A counter-argument, however, is that dynamic consent to SCC arbitration is the proper result of interpreting the relevant investment treaty given its context, as well as its object and purpose, namely investment promotion and protection supported by binding and effective dispute resolution. In consequence it could be regarded a sensible conclusion that every party consenting to dispute resolution by institutional arbitration must be conscious at the time of consent that the institutional rules are subject to being updated from time to time in order to keep pace with the evolving needs of arbitration. Consequently, any party agreeing to institutional arbitration must be presumed to be aware that the rules to which it agrees may not be identical to those that will apply when a dispute later arises.

…[T]o the extent one considers that the introduction of the new emergency arbitration rules merely entails changes to the arbitral procedure in SCC arbitrations, one can reasonably conclude that a State’s consent to SCC arbitration in an earlier investment treaty or investor-State contract encompasses agreement with such future changes. This position would stress that the new rules do not substantively enlarge the powers of the SCC… but only make the arbitral process more effective. If, by contrast, one considers that the new procedure materially changes the procedure and affects the substantive rights of the parties, in particular because of the introduction of a new organ – the emergency arbitrator – into the arbitral process, one might conclude that States did not intend to be bound by such a change without their specific consent.78

In the Poland case, the EA reportedly leaned towards the ‘dynamic’ interpretation of Poland’s consent to SCC arbitration, and therefore dismissed the jurisdictional challenge. Among other things, the EA noted that there had already been several qualitative changes to the older versions of the SCC Rules and held that when a treaty is formulated in terms whose content is susceptible of evolving over time, ‘it is fair to presume that the contracting states intended their treaty content to evolve accordingly, unless of course there is evidence of contrary intention’.79 Notwithstanding this, Griffin’s request for emergency relief was ultimately rejected as the EA (whose award is not public) found that the tests for such relief were not met on the facts.80

Again, the Poland case should not be taken to have closed the door on this temporal issue, which also boils down to an interpretation of the specific investment treaty in question.81 Indeed, the issue arose Moldova-Evrobalt, where the EA (also Mr Georgios Petrochilos) similarly leaned towards the ‘dynamic’

78 ibid 68–70 (emphasis added).
79 Knapp (n 71) s 3. A similar view was recently taken by in Moldova-Kompozit, where the EA reasoned that: ‘During the period between the signature and the ratification of the [Russia-Moldova BIT] by the Russian Federation, the new 1999 version of the SCC Arbitration Rules came into effect. Thus, the contracting parties were aware that, during this period the SCC Arbitration Rules mentioned in Article 10 of the [Russia-Moldova BIT] had been amended. Nonetheless, no specific mention or agreement was made regarding the version of the SCC Arbitration Rules that should apply to the disputes between one contracting state and the investors of the other contracting state. If contracting parties wished to be bound by a specific version of the SCC Arbitration Rules, they were free to make an agreement in this regard. Therefore, it is fair to assume that when the contracting parties to the [Russia-Moldova BIT] included a reference to the SCC Arbitration Rules, they anticipated that the SCC Arbitration Rules could be further amended in the future, as this is the case for the major arbitration rules...The SCC Arbitration Rules applicable are those in force at the time of [the filing of the Application], i.e. the 2010 SCC Arbitration Rules’ (Kompozit v Moldova para 38–45).
80 Peterson (n 71).
81 Brower and Meyerstein (n 18) 70.
interpretation of Moldova’s consent to SCC arbitration and is likely to arise again, since the vast majority of investment treaties in which States consented to arbitration had stemmed from a time where the EA procedure simply did not exist. Further, the answer to the issue may itself evolve over time, depending on how EA proceedings are handled going forward (for example, depending on whether EA proceedings continue to be merely ancillary to the future arbitral process or whether they take on a more expansive role so as to affect parties’ substantive rights).

The answer to this question may depend...to some extent, on the way future emergency arbitrator proceedings are handled in investment arbitrations under the auspices of the SCC. On balance, however, as long as emergency arbitrators in investment arbitrations only function as a mechanism to expedite provisional measures in exceptional cases and limit the measures they order, both in time and substance, to what is necessary to safeguard a future arbitral process in an investment dispute, it appears that the introduction of the emergency arbitration procedure merely constitutes a change in procedure rather than an extension of jurisdiction, which consequently is encompassed by a State’s earlier consent to SCC arbitration in an investment treaty or investor-State contract.

C. The Ukraine Case: Enforcement Issues

The third case highlighted potential issues concerning the enforceability of EA decisions in the face of non-compliance by the respondent State. The Claimants, London-listed JKX Oil and Gas plc (JKX) and its wholly-owned Ukrainian and Dutch subsidiaries, sought emergency relief against Ukraine in SCC proceedings commenced in January 2015 under the ECT, the provisions of which Ukraine allegedly breached by doubling gas production taxes in 2014.

As in the Moldova cases, this followed the notification of dispute but preceded the submission of a formal request for arbitration. Also, like Moldova, Ukraine did not participate in the EA proceedings.

In the absence of submissions by Ukraine, the EA (Professor Dr Dr Rudolf Dolzer) issued an emergency decision on 14 January 2015 (six days after his

82 See Moldova-Evrobalt at [30]: ‘It is inherent in a standing offer to arbitrate set out in an investment treaty that the offer may be acted upon by an investor throughout the life of the treaty. The [1998 Russia-Moldova BIT] provides in Article 14(2) that it ‘will be valid during fifteen years’ (ie to 2016) and remain in force thereafter unless and until either Contracting Party gives 12-month advance notice of its intention to terminate it. It is reasonable in this context ... that the reference to SCC arbitration therein should be construed as a dynamic reference to the version of the SCC Rules in effect at the time of the commencement of arbitration. At the time they signed the [BIT] in 1996, and when they came to ratify it thereafter, the Contracting Parties would have known that the SCC Rules had been reissued several times in the past. If they so wished, it would have been straightforward to freeze the applicable version of the SCC Rules by inserting a few words. ... This they did not do.’

83 Dahlquist (n 54).

84 Brower and Meyerstein (n 18) 70.

85 Peterson (n 71).

86 JKX Oil and Gas and others v Ukraine (n 21).


88 ibid.
appointment on 9 January 2015) restraining Ukraine from imposing royalties on the production of gas by JKX’s Ukrainian subsidiary in excess of the rate of 28% (as opposed to the 55% rate that is currently applicable under Ukrainian law).89

The enforceability of the EA’s restraining order against Ukraine was put to the test when Ukraine subsequently refused to comply. The Claimants first turned to the Pechersk District Court in Kiev for enforcement under the New York Convention.90 Ukraine reportedly91 (unsuccessfully) resisted enforcement on the grounds that inter alia: (i) the 3-month waiting period prescribed under Article 26(2) of the ECT had not been complied with prior to the Claimants' recourse to emergency arbitration; (ii) Ukraine was not given due notice of the appointment of the EA and EA process, and could not present its case as required by Article V(1)(b) of the New York Convention; (iii) the SCC rules did not contemplate the use of EA at the time Ukraine ratified the ECT in 1998; and (iv) enforcement of the EA’s order would violate public policy because it inter alia infringed upon Ukraine’s authority to raise royalty taxes and would breach fundamental principles of Ukraine’s tax system.

The Pechersk District Court dismissed all of Ukraine’s objections and granted enforcement of the EA’s order under the New York Convention on 8 June 2015, reportedly92 satisfied that: (i) the ECT’s 90-day window for amicable settlement did not prohibit recourse to emergency arbitration prior to expiration of that period; (ii) Ukraine was notified of the process by the EA and had an opportunity to present a response in the EA proceedings; (iii) the EA’s award was rendered in compliance with the SCC Rules applicable at the time that the EA process was sought; and (iv) the EA’s award was not contrary to public policy as it aimed to prevent a breach of the Claimants’ interests, did not establish any rules other than those in force in Ukraine and concerned the Claimants only.

In subsequent appeal proceedings commenced by Ukraine, the Kiev City Court of Appeal agreed with the Pechersk District Court on issues (i) to (iii), but not (iv), and thus refused enforcement of the EA’s award in Ukraine on public policy grounds in September 2015.93

The Claimants then lodged a cessation appeal, arguing inter alia that the EA’s award did not introduce changes to Ukraine’s general system of taxation but merely ordered Ukraine to apply the pre-July 2014 tax rate to one particular company on a provisional basis. On 24 February 2016, the Ukraine Higher Specialised Court for Civil and Criminal Cases held that the EA had only ordered Ukraine to temporarily refrain from imposing royalties on the Claimants in excess of the 28% rate and that the Kiev City Court of Appeal had failed to fully consider whether the EA’s award had in fact changed Ukraine’s system of taxation. The case was therefore remanded to the Kiev City Court of Appeal for a retrial.94

91 Peterson (n 87); Perepelynska (n 87).
92 Peterson (n 87); Perepelynska (n 87).
93 Perepelynska (n 87).
The Claimants SCC claims have since been consolidated with their claims in separate ICSID\textsuperscript{95} and UNCITRAL proceedings into a single UNCITRAL arbitration,\textsuperscript{96} with the EA’s award since followed up by an interim measures award issued by the UNCITRAL tribunal on 23 July 2015 (granting the same key relief as the EA’s award, ie an order that Ukraine not collect heightened royalties on gas production while the claims remained pending). Nonetheless, the Ukraine case illustrates uncertainties inherent in the enforceability of decisions issued by EAs,\textsuperscript{97} chief amongst which are inter alia the EA’s status and whether the temporary character of the EA’s decision makes it something other than a ‘final’ award capable of enforcement.\textsuperscript{98}

Singapore and Hong Kong\textsuperscript{99} have in this regard reacted swiftly to stamp out uncertainties regarding the status of the EA and the enforceability of emergency decisions.\textsuperscript{100} In 2012, the Singapore legislature amended the definition of ‘arbitral tribunal’ in section 2(1) of the Singapore International Arbitration Act (Cap 143A) to include ‘an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration or an institution or organisation’. Section 2(1) defines ‘award’ as ‘a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any orders or directions made under section 12’. This gave EAs the same legal status and powers as that of an tribunal and ensured that EA orders would benefit from the full enforcement regime set out in the New York Convention.\textsuperscript{101}

Shortly after, in July 2013, Hong Kong passed the Arbitration (Amendment) Bill 2013 which inter alia allowed for the enforcement in Hong Kong of EA decisions under any arbitral rules agreed by the parties (whether made in or outside Hong Kong), subject to conditions.\textsuperscript{102}

While uncertainties persist elsewhere where no such steps are taken to clarify the position, it is likely that efforts to enforce EA decisions made in investment arbitration would in practice be uncommon\textsuperscript{103} as—leaving aside the relatively few number of EA decisions and the question of legal enforceability of such decisions—parties have a powerful incentive to comply with emergency decisions given that non-compliance could have a ‘knock-on-effect during the “main event”’,\textsuperscript{104} for example

\textsuperscript{95} Poltava Gas BV and Poltava Petroleum Company v Ukraine, ICSID Case No ARB/15/9, registered on 11 March and discontinued on 11 August 2015.
\textsuperscript{96} Peterson (n 71).
\textsuperscript{97} Another potential implication for the development of emergency orders in treaty-based arbitrations is a renewed discussion on the enforceability of arbitral interim measures. Whether or not such measures generally, as rendered by a full tribunal, are enforceable under the New York Convention is a familiar discussion in international arbitration law. Most of the discussions centers on whether such a decision should be deemed to be an ‘award’ in the sense of being ‘final’; the same logic arguably applies to a decision by an EA.’ Dahlquist (n 54) 269.
\textsuperscript{98} Pinsolle and Voisin (n 6) 40.
\textsuperscript{100} Lye (n 7) paras 16–7, 25.
\textsuperscript{101} Vasani (n 9) 6; Parkin and Wade (n 9) 51.
\textsuperscript{102} Vasani (n 9) 6; the new Section 22B of the Hong Kong Arbitration Ordinance (Cap 609) provides that ‘(1) Any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order of direction of the Court that has the same effect, but only with the leave of the Court . . . .’
\textsuperscript{103} Brower and Meyerstein (n 18) 74.
\textsuperscript{104} Vasani (n 9) 7.
the tribunal may take such non-compliance into consideration in making costs orders, or draw adverse inferences from a parties’ uncooperative conduct.105

IV. CONCLUSION

Where are we now and how has the EA fared in the context of investment treaty arbitration? It seems too early to tell as, despite the headway made in the first five known cases, uncertainties continue to surround important legal and substantive issues.106 However, insofar as the EA provides investors with a choice between seeking emergency relief in arbitration or before national courts, it is no doubt a welcome addition, which is now further enhanced by the introduction of a second set of rules [the SIAC (IA) Rules] providing for the use of EAs in investment treaty disputes.

Going forward, whether the use of EAs becomes more prevalent in investment treaty disputes will depend on how well-received the EA procedure in the SCC and SIAC (IA) Rules are, how future emergency arbitrations are handled (bearing on States’ attitudes vis-à-vis such procedure), the landing reached on the yet-to-be resolved questions, and also whether ICSID and UNCITRAL would consider introducing similar procedures into their arbitration rules.

105 Pinsolle and Voisin (n 6) 33, 39–40; Brower and Meyerstein (n 18) 74; Vasani (n 9) 7; Stadnyk (n 99).

106 See Shaughnessy (n 32) 358, stating that ‘[a]t least in the short run, the answers to these questions probably depend on whom you ask – the requesting party or the targeted party. In the long run, the answers may require examining the application of procedures in practice.’