

Provisional measures in international commercial arbitration.

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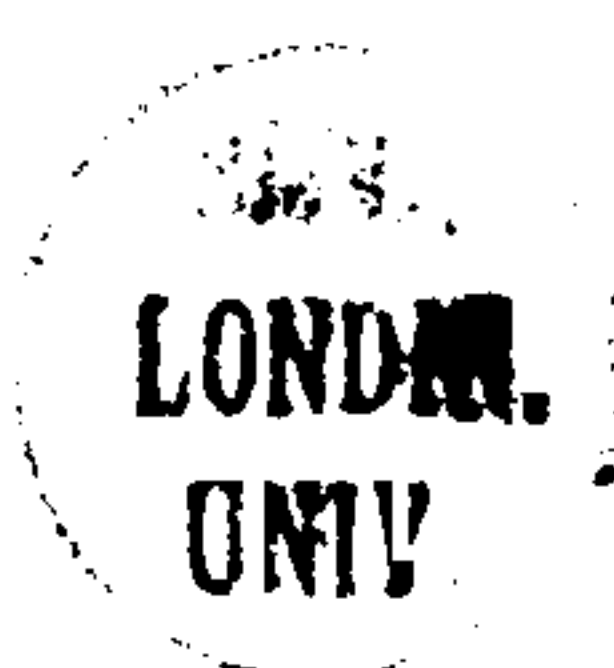
UNIVERSITY OF LONDON

**PROVISIONAL MEASURES
IN
INTERNATIONAL COMMERCIAL ARBITRATION**

**A DISSERTATION SUBMITTED TO
QUEEN MARY COLLEGE
UNIVERSITY OF LONDON
FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY**

**BY
ALI YESILIRMAK
LLM, LLB**

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ABSTRACT

Interim protection of rights (through provisional, including protective, measures) is as important as the final protection of those rights.

This thesis examines several problems and uncertainties surrounding provisional measures in international commercial arbitration. Those problems and uncertainties influence the effectiveness of arbitration; thus, they constitute a threat to the future of arbitration. The thesis aims to identify, analyse, and offer solutions to those problems and uncertainties.

The thesis initially examines the roots and evolution of the concepts of arbitral powers to grant provisional measures and court assistance to arbitration. This examination highlights the roots of the problems and uncertainties and demonstrates how the approach towards provisional measures shifted, in due course of time, from judicial authorities' exclusive power to arbitrators' power to grant those measures and how the courts' role regarding interim protection has evolved into assistance.

It further deals with the forum to seek provisional measures mainly to demonstrate that today an arbitrator or another party-determined authority is and should be the natural judge regarding interim protection of rights and that the courts' assistance should be restricted to ensure the effectiveness of arbitration.

It, in addition, investigates complementary mechanisms to arbitration for providing interim protection in order to show that such mechanisms enhance the effectiveness of arbitration for a period prior to the appointment of an arbitrator.

The thesis also endeavours to establish the standards of procedure and principles in regard of arbitral provisional measures, for instance, form, requirements and types of arbitral provisional measures. The establishment of these standards and principles makes arbitration a more consistent and predictable dispute resolution mechanism. It thus boosts the effectiveness of arbitration.

It finally discusses the enforcement of arbitral provisional measures to show that some of these measures are effective without any coercion and that some others, however, necessitate the use of coercive powers, which are lent by judicial authorities.

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TABLE OF ABBREVIATIONS

Institutions and Organisations

AAA	American Arbitration Association
AFMA	American Film Marketing Association
AIA	Italian Arbitration Association
AR	Arbitration Rules
ASA	Swiss Arbitration Association
CIA	Chartered Institute of Arbitrators
CAMCA	Commercial Arbitration and Mediation Centre for the Americas
CANE	the Court of Arbitration of Northern Europe
CEPANI	Belgian Centre for Arbitration and Mediation
CCI	Chamber of Commerce and Industry of the Russian Federation
CCIG	Chamber of Commerce and Industry of Geneva
CIETAC	China International Economic and Trade Arbitration Commission
CMEA	Council for Mutual Economic Assistance (Eastern Europe) (COMECON)
CPR	Center for Public Resources
DIS	Deutsche Institution für Schiedsgerichtbarkeit
EAA	English Arbitration Act
ECA	European Court of Arbitration
ECAFE	United Nations Economic Commission for Asia and the Far East
EDF	European Development Fund
ERR	Emergency Relief Rules
EU	European Union
FAA	French Arbitration Association
FOSFA	Federation of Oils, Seeds and Fats Associations
GAFTA	Grain and Feed Trade Association
GCC	Geneva Chamber of Commerce
HKIAC	Hong Kong International Arbitration Centre
IACAC	Inter-American Commercial Arbitration Commission
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Center for Dispute Resolution
ICSID	International Centre for the Settlement of Investment Disputes
JCAA	Japan Commercial Arbitration Association
LCIA	London Court of International Arbitration

LMAA	London Maritime Arbitration Association
LME	London Metal Exchange
MERCOSUR	Common Market of the Southern Cone
MIGA	Multilateral Investment Guarantee Agency
NAI	Netherlands Arbitration Institute
OREMP	Optional Rules for Emergency Measures of Protection
PARP	Pre-Arbitral Referee Procedure
PARR	Pre-Arbitral Referee Rules
PCA	Permanent Court of Arbitration (The Hague)
SAP	Summary Arbitration Proceedings
SCC	Stockholm Chamber of Commerce Arbitration Institute
SIAC	Singapore International Arbitration Centre
UNCC	United Nations Compensation Commission
UNCITRAL	United Nations Commission for International Trade Law
UNECE	United Nations Economic Commission for Europe
UNECAFE	United Nations Economic Commission for Asia and the Far East
UNIDROIT	International Institute for the Unification of Private Law
WIPO	World Intellectual Property Organisation
ZCC	Zurich Chamber of Commerce

General Abbreviations

AA	Arbitration Act
AC	Law Reports, House of Lords (Appeal Cases)
AO	Arbitration Ordinance
AR	Arbitration Rules
Arb J	Arbitration Journal
ADR	Alternative Dispute Resolution
ADRLJ	Arbitration and Dispute Resolution Law Journal
All ER	All England Law Reports
ALR	Australian Law Reports
Am J Comp L	American Journal of Comparative Law
Am J Int'l L	American Journal of International Law
Am Rev Int'l Arb	American Review of International Arbitration
Arb Int	Arbitration International
ASA Bulletin	Swiss Arbitration Association Bulletin
BATİDER	Banka ve Ticaret Hukuku Araştırma Enstitüsü Dergisi
Boston U Int'l LJ	Boston University International Law Journal
BLR	Building Law Reports
BYBIL	British Yearbook of International Law
CA	Court of Appeal of England and Wales

Case W Res J Int'l L	Case Western Reserve Journal of International Law
CCP	Code of Civil Procedure
ChD	Chancery Division
CLR	Common Wealth Law Reports
Clunet	Journal de droit international
Co	Company
Colum J Transnat'l L	Columbia Journal of Transnational Law
Comm	Commercial
Con LR	Construction Law Reports
Copenhagen Rules	International Law Association Arbitration Rules 1950
Corp	Corporation
CPR	Civil Procedure Rules
Croat Arbit Yearb	Croatian Arbitration Yearbook
DAC	Departmental Advisory Committee
Doc	Document
Dis Res J	Dispute Resolution Journal
EAA 1889	English Arbitration Act 1889
EAA 1934	English Arbitration Act 1934
English AA 1996	English Arbitration Act 1996
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Communities
ECR	Report of Cases before the Court of Justice of the European Communities
EDNY	Eastern District of New York
EFTA	European Free Trade Area
EHRR	European Human Rights Reports
EJCL	Electronic Journal of Comparative Law
ER	English Reports
EU	European Union
European Convention	European Convention on International Commercial Arbitration 1961
European Ct HR	European Court of Human Rights
F 2d	The Federal Reporter Second Series
F 3d	The Federal Reporter Third Series
Fordham Int'l LJ	Fordham International Law Journal
F Supp	Federal Supplement
Geneva Convention	the Geneva Convention on the Execution of Foreign Arbitral Awards 1927
Geneva Protocol	the Geneva Protocol on Arbitration Clauses 1923
Geo Wash J Int'l L & Eco	George Washington University Journal of International Law and Economics
Harv Int'l LJ	Harvard International Law Journal

Hastings Int'l & Comp L Rev	Hastings International and Comparative Law Review
HKHC	Hong Kong High Court
HKLJ	Hong Kong Law Journal
HL	House of Lords
IBA Rules	IBA Rules on the Taking of Evidence in International Commercial Arbitration 1999
ICC Int'l Ct Arb Bull	International Chamber of Commerce International Court of Arbitration Bulletin
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID Centre	International Centre for the Settlement of Investment Disputes
ICSID Convention	Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965
ICSID Rev-FILJ	ICSID Review – Foreign Investment Law Journal
IECL	International Encyclopedia of Comparative Law
Ind J Global Legal Stud	Indiana Journal of Global Legal Studies
Int ALR	International Arbitration law Review
Inter-American Convention	Inter-American Convention on Arbitration of 1975
Int'l Bus Law	International Business Lawyer
Int'l Fin L Rev	International Financial Law Review
Int'l Law	International Lawyer
ILA Rep	International Law Association Report
ILM	International legal Materials
ILR	International Law Reports
Iran	the Islamic Republic of Iran
Iran-US CTR	Iran-United States Claims Tribunal Reports
JBL	Journal of Business Law
J Int'l Arb	Journal of International Arbitration
J Law Soc Scotland	Journal of Law Society of Scotland
Juris-Classeur Pro Civ	Juris-Classeur Procédure Civile
J Mar L & Com	Journal of Maritime Law and Commerce
J World Inv	Journal of World Investment
KB	King's Bench
Law & Policy in Int'l Bus	Law & Policy in International Business
Lloyd's Rep	Lloyd's law Reports
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LNTS	League of Nations Treaty Series
Louisiana L Rev	Louisiana Law Review
Mealey's IAR	Mealey's International Arbitration Reports

Minn L Rev	Minnesota Law Review
MLR	Model Law Review
MR	Master of Rolls
N. D. Cal.	United States District Court for the Northern District of California
NE	North Eastern Reporter
New LJ	New Law Journal
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
NSWLR	New South Wales Law Reports
NW J Int'l L & Bus	Northwestern Journal of International Law and Business
NYAD	New York Appellate Division
NYLJ	New York Law Journal
NY L Sch 'l Int'l & Comp L	New York Law School Journal of International and Comparative Law
NYULQ Rev	New York University Law Quarterly Review
OJ	Official Journal of the European Communities
PC	Privy Council
PCIJ	Permanent Court of International Justice
Proposed Plan	Proposed Plan For Conciliation and Arbitration Between Traders of Different Countries
QBD	Queen's Bench Division
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RCADI	Recueil des Cours de l'Académie de Droit International de la Haye / Collected Courses of the Hague Academy of International Law
RDAl/IBLJ	Revue de droit des affaires internationales / International Business Law Journal
Register of Texts	Register of Texts of Conventions and Other Instruments concerning International Trade Law
Rev Arb	Revue de l'arbitrage
S Ct	Supreme Court of the United States
SDNY	South District of New York
SLR	Singapore Law Reports
SPIL	Swiss Private International Law
Register of Texts	Register of Texts of Conventions and Other Instruments concerning International Trade Law
TAM	Recueil des décisions des tribunaux arbitraux mixtes

Texas Int'l LJ	Texas International Law Journal
Tulane L Rev	Tulane Law Review
U Cin L Rev	University of Cincinnati Law Review
UCLA Law Rev	UCLA Law Review
U Ill L Rev	University of Illinois Law Review
U Miami Inter-Am L Rev	University of Miami Inter-American Law Review
U Miami Y B Int'l L	University of Miami Yearbook of International Law
U Rich LR	University of Richmond Law Review
UN	United Nations
UNCITRAL Notes	UNCITRAL Notes Organizing Arbitral Proceedings
UNTS	United Nations Treaty Series
US	United States of America
USFL Rev	University of San Francisco Law Review
Vanderbilt L Rev	Vanderbilt Law Review
WAMR	World Arbitration and Mediation Report
WL	Westlaw
WLR	The Weekly Law Reports
WTAM	World Trade and Arbitration Materials
Yale LJ	Yale Law Journal
YCA	Yearbook of Commercial Arbitration

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INTRODUCTION

In a perfect world, contracting parties perform all their obligations throughout their contract's life. Indeed, contracting parties comply with the terms of international commercial contracts in thousands of transactions every day. In a few cases, however, disputes arise. Some of the disputes are settled amicably.

In many disputes, depending on the type of contract, arbitration is generally preferred over litigation as a dispute settlement mechanism; some other disputes end in litigation before national courts. The contracting parties are aware of the need to protect their rights. They choose to arbitrate convinced that arbitration is better suited for resolution of their future or existing disputes than litigation or alternative (out of court) dispute resolution ("ADR") mechanisms.¹

Arbitration, like litigation, takes time.² For instance, a typical International Chamber of Commerce ("ICC") arbitration usually takes over one and a

¹ For advantages of arbitration over litigation, see, e.g., Martin Domke, *Commercial Arbitration* (New Jersey: Prentice-Hall 1965); Pieter Sanders, *Quo Vadis Arbitration? – Sixty Years of Arbitration Practice* (The Hague: Kluwer 1999), 2-9 ("Quo Vadis"). On ADR, see, e.g., Henry Brown / Arthur Marriott, *ADR Principles and Practice*, 2nd ed. (London: Sweet & Maxwell 1999); and ICC (ed.), *ADR International Applications*, ICC Publication No. 640E, (Paris: ICC Publishing 2001).

² This is due partially to "procedural safeguards and opportunities for all parties to be heard." Gary B. Born, *International Commercial Arbitration Commentary and Materials*, 2nd ed. (The Hague: Transnational Publishers / Kluwer 2001) ("International Arbitration"). It is noteworthy that in the 'good old days,' arbitration was conducted in a short period of time.

half years.³ Consequently, protection of parties' rights often includes interim protection. Indeed, parties' expectations from a dispute resolution mechanism for interim and final protection of their rights are very high. Such protection has to be effective. The question is whether or not arbitration meets all these expectations.

Undoubtedly, international commercial arbitration⁴ is very effective in providing final protection of rights. Both arbitration agreements and awards concerning international commercial contracts are recognised today in nearly most states in the world thanks mainly to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁵ Indeed, arbitration has evolved over time and has become the main mechanism for resolving international business disputes.⁶

³ W. Laurence Craig / William W. Park / Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd ed. (New York: Oceana 2000), para.108 ("ICC Arbitration 2000").

⁴ Unless otherwise stated, a reference to "arbitration" is hereinafter a reference to "international commercial arbitration."

⁵ Done at New York, 10 June 1958, 330 UNTS 38, No. 4739 (the "New York Convention"). Other conventions relevant for the recognition and enforcement of foreign arbitration agreements and awards in the international plane mainly are the Geneva Protocol on Arbitration Clauses, done at Geneva, 24 September 1923, 27 LNTS 258 (1924) No. 678 (the "Geneva Protocol"); and the Geneva Convention on the Execution of Foreign Arbitral Awards, done at Geneva, 26 September 1927, 52 LNTS 302 (1929), No. 2096 (the "Geneva Convention"); the Inter-American Convention on Arbitration, done at Panama City, 30 January 1975, reprinted in 14 ILM 336 (1975) ("Inter-American Convention").

⁶ See, e.g., Alan Redfern / Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3rd ed. (London: Sweet & Maxwell 1999), 1; and Eric Robine, "L'évolution de l'arbitrage commercial international ces dernières années (1990-1995) (The Evolution of International Commercial Arbitration Over These Past Years (1990-1995))", (1996) RDAI/IBLJ 145. One of the illustrations of its wide usage is the growing number of arbitration cases, on which see generally *infra* Chapter IV.

As to interim protection of rights in arbitration, meeting expectations of business persons poses a challenge. Such challenge is related to problems and uncertainties surrounding provisional measures in arbitration; these difficulties mainly concern the jurisdiction of arbitrators or another party-determined authority to grant provisional measures, and the role of courts⁷ in respect of interim protection of rights. Further, the problems extend to standards of procedure and principles as regards arbitral provisional measures and their enforceability. In order to meet the expectations of business persons, in other words, the users of arbitration services, these uncertainties and problems should be resolved. In fact, UNCITRAL is currently undertaking, upon suggestions made by various experts in a special commemorative New York Convention Day held on 10 June 1998, a study in order to propose solutions to, among other issues, the problems and uncertainties regarding provisional measures in arbitration.⁸ The study aims “for improvement of arbitration laws, rules, practices”.⁹ UNCITRAL’s study will be examined and referred to, as and where appropriate, throughout this thesis.¹⁰

Aims of the Thesis

This thesis aims to demonstrate that arbitration should, in principle, be the forum to grant provisional measures and that the role of courts is limited to

⁷ Judicial provisional measures are available either from “state courts” or other “judicial authorities” in various states. These two terms are used interchangeably throughout this thesis.

⁸ See, e.g., UN Doc A/53/17.

⁹ See UN Doc A/CN.9/WG.II/WP.108, para. 5.

¹⁰ This study currently deals with three main issues of interim protection of rights in arbitration: arbitral provisional measures, judicial provisional measures and enforcement of arbitral provisional measures. See, e.g., A/CN.9/524, paras. 1-14. On the initial two issues, UNCITRAL’s work has not been sufficiently advanced to comment on it. *Id.* However, on the issue of enforcement of arbitral provisional measures, there has been enough progress for comment, which is done in *infra* Chapter V, Part 3.3.

assistance to arbitration. However, there are several questions and uncertainties related to such measures. These questions and uncertainties weaken the effectiveness of arbitration. Thus they constitute a threat to its future. This thesis further aims to identify, analyse, clarify, and offer solutions to those problems and uncertainties. Solutions will be offered for enhancing effectiveness of arbitration in regard of interim protection of rights. Arbitration needs to be effective to reach its *raison d'être*, meeting the needs of the business world and, thus, to survive.¹¹

Methodology

In order to achieve its objectives, the thesis examines the historical evolution of provisional measures in arbitration. It further analyses and compares theory, law, and practice. All major arbitration conventions, many laws and rules, the practice of the main arbitration institutions, and of courts of various states as well as the views of several commentators are critically assessed.

Definition

Although “[t]he interim protection of rights is no doubt one of those general principles of law common to all legal systems”,¹² there is no widely

¹¹ See Introduction, *infra* notes 72-76 and accompanying text.

¹² Lawrence Collins, “Provisional and Protective Measures in International Litigation”, 1992(III) RdC 9, 23, reprinted in: L. Collins, *Essays in International Litigation and on the Conflict of Laws* (Oxford: Clarendon Press 1994), 1-188. See also, e.g., Jerome B. Elkind, *Interim Protection: A Functional Analysis* (The Hague: The Martinus Nijhoff 1981), Chapters II and III. On interim protection under private international law, see, e.g., Collins, *id.*; Catherine Kessedjian, “Preliminary Document No. 10 - Note on Provisional and Protective Measures in Private International Law and Comparative Law” (Hague Conference on Private International Law Enforcement of Judgments, October 1998), available at <<http://www.hcch.net/e/workprog/jdgm.html>, <ftp://hcch.net/doc/jdgmpr10.doc>> last visited at 28 October 2003; George A. Bermann, “Provisional Relief in Transnational Litigation”, 35 Colum J Tran L 553 (1997). On interim measures in public international law, see, e.g., Elkind, *id.*; Karin Oellers-Frahm, “Interim Measures of Protection” in: *Encyclopedia of Public International Law* (1981), v.1, 69-72; Shigeru Oda, “Provisional Measures” in: Vaughan Lowe / Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of*

accepted definition of the concept of interim measures.¹³ In fact, no uniformity in respect of the concept of interim protection of rights exists in public and private international law.¹⁴ Nor is a concrete definition of that concept or its scope found in international commercial arbitration.¹⁵ A provisional measure is, broadly speaking, a remedy or a relief that is aimed at safeguarding the rights of parties to a dispute pending its final

Justice - Essays in honour of Sir Robert Jennings (Cambridge: Grotius 1996), 541-556; and J. G. Merrills, "Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice", 44 ICLQ 90-146 (1995). For general justification of interim protection of rights, see, e.g., A.A.S. Zuckerman, "Interlocutory Remedies in Quest for Procedural Fairness", 56 MLR 325-341 (1993).

¹³ See, e.g. Kessedjian, para. 2, note 3; and Bermann, 556. It is stated, in this regard, that

the notion of "conservatory measure" is one of the most obscure that there can be. Etymologically, it is understood as a measure which tends to safeguard a right. But when one seeks to go more thoroughly into this concept, the certainties slip away because, in reality, the "conservatory measure" covers very disparate hypotheses.

Stephen R. Bond, "The Nature of Conservatory and Provisional Measures" in: ICC (ed.), *Conservatory and Provisional Measures in International Arbitration*, ICC Publication No. 519 (ICC Publishing 1993), 8 ("Conservatory Measures"). Further, it is noteworthy that most, if not all, arbitration rules do not provide for a definition of provisional measures. See UN Doc A/CN.9/460, para. 116. The arbitration rules could have given such definition but they refrain from doing so. That is probably because they intend to leave to arbitrators and courts the freedom to decide how the term "provisional measure" (or, in some cases, interim and conservatory measures, etc.) should be defined.

¹⁴ See "Second Interim Report – Provisional and Protective Measure in International Litigation of the International Law Association's [(“ILA”)] Committee on International Civil and Commercial Litigation", 67 ILA Rep 185, 202, para. 3 (1996), reprinted in 62 RabelsZ 128-130 (1998) ("Second Interim Report"). The Committee also indicated a certain principles in respect of provisional and protective measures in international litigation (the "ILA Principles"). *Id.*, 192-204. On these Principles, see also Peter Nygh, "Provisional and Protective Measures in International Litigation – The Helsinki Principles", 62 RabelsZ 115-122 (1998). Indeed,

[d]ifferent legal systems have characterized interim measures of protection in different ways and using different classification. In addition, the scope and variety of interim measures available differ from country to country.

UN Doc A/CN.9/WG.II/WP.111, para. 7. Kessedjian indicates that "legal systems diverge to a greater or lesser extent" in the area of law regarding provisional measures. Kessedjian, para. 2. Indeed, the diversity in respect of the types of remedies in a legal system, in some cases, is extreme. For example, thirty types of protective measures are reported to be available in France. *Id.*, note 4.

¹⁵ UN Doc A/CN.9/WG.II/WP.108, para. 65.

resolution.¹⁶ The underlying principle in respect of provisional measures is that no party right should be damaged or affected due to the duration of adjudication.¹⁷ The objective of such measures is generally to facilitate the “effectiveness of judicial [or arbitral] protection”¹⁸ by providing interim relief, which complements the final relief.

Characteristics

It may be difficult to list all of the characteristics of provisional measures since they contain, *inter alia*, “very disparate hypotheses.”¹⁹ The difficulty also lies in the fact that the types of provisional measures vary, at least to a certain extent, from one country to another.²⁰ There are, however, certain essential characteristics of provisional measures in arbitration.

The first characteristic is that applications for a provisional measure “presuppose the existence of a dispute” final protection of which has

¹⁶ According to the European Court of Justice (the “ECJ”), provisional measures are “intended to preserve a factual or legal situation so as to safeguard rights” Mario Reichert and Others v. Dresdner Bank, Case C-261/90, [1992] ECR I-2149, para. 34. See, e.g., Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp., 935 F2d 1019, 1022-23 (9th Cir 1991) (holding that “[t]emporary equitable relief in arbitration may be essential to preserve assets or enforce performance which, if not preserved or enforced, may render a final award meaningless.”); and “Final Report on Intellectual Property Disputes and Arbitration” (A Report of the ICC Commission on International Arbitration Chaired by Julian D. M. Lew) published in 9(1) ICC Int’l Ct Arb Bull 37 (1998) (“Final Report on Intellectual Property Disputes”).

¹⁷ Mario Reichert and Others v. Dresdner Bank, Case C-261/90, [1992] ECR I-2149, para. 34. German Polish Mixed Arbitral Tribunal of 1924 stated, in this respect, that “[b]y means of interim protection the courts seek to make up for the law’s delays in such a way that as possible the outcome of the proceedings is the same as if they could have been completed in one day.” *Id.* For the French original, see *Ellermann v. Etat polonais* (1924) 5 TAM 457, 459. In other words, provisional measures aim to neutralise any actual or potential imbalance between the contracting parties at the beginning of arbitration in accordance with the terms of the contract and the applicable law. See Bernardo M. Cremades, “Is Exclusion of Concurrent Courts’ Jurisdiction over Conservatory Measures to be Introduced through a Revision of the Convention?”, 6(3) J Int’l Arb 105, 106 (1989) (“Exclusion”).

¹⁸ Advocate General Tesauro’s Opinion, Case C-213/89, R. v. Secretary of State for Transport, *ex parte*: Factortame Ltd. (No. 2) (1990) ECR 2433, 2450, para. 18.

¹⁹ See Bond in: ICC (ed.), *Conservatory Measures*, 8.

already or will be sought from the same or a different forum.²¹ In other words, there has to be a dispute that is to be litigated or arbitrated. This is tenable in that interim protection should only be available where final protection is or will be sought.

The second characteristic is that a remedy should be temporary / provisional in nature. This is self-evident.²² A temporary protection is only needed “for a specified limited time”²³ at most until the final protection is granted.²⁴ In other words, a provisional relief should preserve a right pending the final relief. A caveat, however, has to be borne in mind. Provisional relief, at the end of adjudication of the merits of the case, “should be taken into account and [as the case may be] merged in the arbitral tribunal’s final adjudication of the dispute.”²⁵

²⁰ See Introduction, *infra* note 45 and accompanying text.

²¹ See, e.g., Bond in: ICC (ed.), *Conservatory Measures*, 18. To this end, it should be noted that when a measure is ordered by a court prior to formation of a tribunal, the subsequent initiation of arbitration proceedings should normally be expected.

²² The measure is subject the tribunal’s final adjudication. See Section 39(3) of the English Arbitration Act (“EAA”) 1996. See also ICC Interlocutory Award 10596 of 2000 (unpublished) (holding that a decision on a provisional measure “makes no final findings of fact or law. In other words, no findings made herein prejudice the merits of the dispute.”).

²³ See Principle 12 of the ILA Principles. Indeed, an ICC tribunal granted its interim injunction for a specified period of time (ICC Interim Conservatory Award 10021 of 1999) (unpublished) and upon the termination of such period extended it further (ICC Partial Award 10021 of 2000) (unpublished). In this regard, see also Bernardo M. Cremades, “The Need for Conservatory and Preliminary Measures”, 27(5) *Int’l Bus Law* 226, 228 (1999) (“The Need”); Craig / Park / Paulsson, *ICC Arbitration* 2000, 460.

²⁴ See, e.g., Section 26(2) of the Hungarian Act LXXI on Arbitration 1994.

²⁵ UN Doc A/CN.9/WG.II/WP.108, paras. 66 and 100. That is to say that a provisional measure shall in no way prejudice the final award of an arbitral tribunal on the substance of the case under adjudication. See, e.g., Article 37(3) of the Netherlands Arbitration Institution (“NAI”) Arbitration Rules.

The third characteristic is that interim relief should not exceed the final relief or the legal protection sought as the interim relief aims to complement and, in this sense, is ancillary to the final relief.²⁶

The fourth characteristic is derivative of the second. Interim relief should normally be granted where it is risky to await the final relief.²⁷ This is the requirement of urgency.²⁸ Where the parameter is safeguarding a party right pending final protection, urgency generally seems to be a requirement for grant of interim relief.

The fifth characteristic also is another derivative of the second: the interim nature of the protection dictates that an interim measure could be reviewed, modified, or terminated prior to final determination of a dispute “if the circumstances of the case or the progress of arbitral [or judicial] proceedings require”.²⁹

²⁶ See, e.g., Bond in: ICC (ed.), *Conservatory Measures*, 9. In another words, a provisional measure shall not constitute “prejudice to the rights of the [arbitrating] parties or to the final determination of the dispute [in question].” Article 35 of the American Arbitration Association (“AAA”) Commercial Arbitration Rules 1944. See *infra* Chapter I, Part 1.2.2.1.

²⁷ See, e.g., Bond, 18. Bond rightly indicates that urgency may not always constitute one of the characteristics of provisional measures as such determination depends upon the competent law, if there is any. *Id.* One example of where urgency is not a requirement for the grant of a provisional measure is interim payment. See *infra* Chapter IV, Part 7.5.

²⁸ See, *infra* Chapter IV, Part 3.1.3.

²⁹ UN Doc A/CN.9/468, para. 64. See also UN Doc A/CN.9/WG.II/WP.108, para. 66; and Principle 13 of the ILA Principles. On the issue of review, modification or termination of an interim measure, see *infra* Chapter IV, Part 6. ICC Interlocutory Award 10596 of 2000 (unpublished) (holding that “[t]he provisional nature of the present dispute further means that all issues addressed in this decision may be reargued by the parties in the later course of the arbitration and revisited by the Arbitral Tribunal in the final award.”).

The sixth characteristic is that “there would be no need for interim protection if the final decision on the merits could, in and of itself, satisfy all the interests of the parties at stake in a dispute.”³⁰

The seventh characteristic is that, under certain circumstances, a provisional measure may generally be decided without notice, *ex parte*.³¹ However, because of due process considerations, an *inter partes* decision on the measure should be given following the previous *ex parte* decision.³²

The eighth characteristic is that unlike judicial interim measures, arbitral provisional measures are not themselves self-executing. This is because of the fact that an arbitral tribunal does not have *imperium*, coercive powers to enforce its own decision.³³ Accordingly, legally binding force is not one of the characteristics of arbitral provisional measures.

The final characteristic is that an arbitral interim measure does not itself bind third parties to arbitration. However, it may affect interests of third parties “holding, for example, money or other assets of the party

³⁰ See, e.g., Bond, 18.

³¹ See, e.g., UN Doc A/CN.9/468, para. 70; and D. Alan Redfern, “Arbitration and the Courts: Interim Measures of Protection - Is the Tide About to Turn?”, 30 Texas Int’l LJ 71, 79 (1995) (“Arbitration and the Courts”).

³² It seems that this is what is envisaged by the Principle 7 of the ILA Principles. On this issue, see *infra* Chapter IV, Part 8.

³³ Private parties like arbitrators are not empowered with *imperium*. That is because they are private individuals not judges or enforcement officers of a state. Nor do they hold any other post in the judiciary of or appointed by a state. Empowering a private party is thought to cause anarchy. It is, in this regard, interesting to note that an arbitrator (*iudex*) a private person appointed by parties to a dispute under early Roman law did not also have *imperium* to enforce its decision. The *imperium* was left with the Praetor. See W. W. Buckland / A. D. McNair, *Roman Law and Common Law*, (ed. by F. H. Lawson), 2nd ed. (Cambridge: Cambridge University Press 1965), 400. The administration of justice by *iudex* at that time seemed to work. It should, however, be noted that *iudex* later appointed by the state.

concerned since they may be obliged to take some action in respect of that property by virtue of the order directed to the party.”³⁴

Terminology

In international commercial arbitration, provisional measures³⁵ are known and referred to as, for instance, provisional and protective measures, interim measures, interim measures of protection, interim or conservatory measures, preliminary measures,³⁶ preliminary injunctive measures, urgent measures,³⁷ precautionary measures, and holding measures³⁸. These terms are often used interchangeably.³⁹ The references to the terms “provisional”, “interim”, “interlocutory”, “preliminary”, and “urgent” measures are, on one hand, references to the nature of these measures.⁴⁰ On the other hand, the references to the terms “protective” and “conservatory” measures are references to the purpose of these measures.⁴¹ This

³⁴ UN Doc A/CN.9/468, paras. 64 and 70. In addition, an arbitral tribunal could request from a party to arbitration to cause a third party who, for instance, works for such arbitrating party to comply with an arbitral provisional measure. For more information on this issue, see *infra* Chapter II, Part 4.1. Further, an arbitrator may merely request from a third party to cooperate in implementing of a measure albeit the failure to comply with such request has no consequences. Mauro Rubino-Sammartano, *International Arbitration Law and Practice*, 2nd ed. (The Hague / London / Boston: Kluwer 2001), 631.

³⁵ The term “measure” is, in some cases, replaced by the terms “remedy” or “relief”. The terms will hereinafter be used interchangeably throughout this thesis.

³⁶ See, e.g., Section 21 of the Arbitration Rules of the Court of Arbitration of the Slovak Chamber of Commerce and Industry.

³⁷ See, e.g., Article 14 of the International Arbitration Rules 1996 of the Chamber of National and International Arbitration in Milan.

³⁸ This term refers to measures that inherently necessitate the use of coercive powers once they are granted, e.g. attachments. Rubino-Sammartano, 631.

³⁹ On some of these terms, see UN Doc A/CN.9/WG.II/WP.108, para. 63.

⁴⁰ See, e.g., Emmanuel Gaillard / John Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague / Boston / London: Kluwer 1999), para. 1303.

⁴¹ See, e.g., *id.* It should be noted that, under such law as the Italian law, there is a distinction between conservatory and provisional measures. In accordance with Article 818 of the Italian Code of Civil Procedure (“CCP”), an arbitral tribunal could not order a conservatory measure but could order “interlocutory payment or any other ‘provisional’ measure.” Bond, 10. It has also been argued that some provisional

purpose is, for international commercial arbitration, preservation of arbitrating parties' rights.⁴²

It should be noted that, the terms "provisional measures" and "protective measures" are not precisely defined in arbitration.⁴³ They are loosely used to mean the same thing most of the time. These terms are probably derived from the references made in various legal systems to those measures. In a move to include every possible measure in the armoury of a decision-maker, or arbitrator, on an interim relief request, the term "conservatory" or "protective" is used along with the term "interim" or "provisional".⁴⁴

Types of Provisional Measures

The types of provisional measures vary nearly in every national jurisdiction and under both public and private international law; although it is possible to trace functionally similar or identical types of measures (albeit under different names) in each of those jurisdictions.⁴⁵ Perhaps because of this

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- measures, e.g., disposing of property, ordering production of documents, ordering payment of security for costs, etc. are not of a conservatory nature.
- ⁴² Perhaps, this is the reason why Article 26 of the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules makes reference to "interim measures of protection".
- ⁴³ Nor is the term "interim and conservatory" measures defined. For instance, no definition of these terms is found in a prominent dictionary on arbitration. See K. Seide (ed.), *A Dictionary of Arbitration and Its Terms* (New York: Oceana / Dobbs Ferry 1970).
- ⁴⁴ Under certain circumstances, an arbitral tribunal may render a decision on a request for a provisional measure in accordance with a particular national law. See *infra* Chapter IV, Part 3. In these circumstances, the applicable national law's definition of interim relief and the distinction, if any, between interim and conservatory measures becomes relevant. Otherwise, "[i]n arbitral practice, little importance is given to semantical distinctions." Blessing, para. 834.
- ⁴⁵ See Collins, 24. On provisional measures available in various jurisdictions, see, generally, Kessedjian, para. 9 etc.; Axel Bösch (ed.), *Provisional Remedies in International Commercial Arbitration - A Practitioner Handbook* (Berlin: De Gruyter 1994). To illustrate this, the following measures could be listed as examples: preliminary injunction, appointment of experts for preservation of evidence,

variety, it is difficult to clearly determine the types of measures that are available for the use of arbitral tribunals. In fact, institutional arbitration rules and the UNCITRAL Arbitration Rules for *ad hoc* arbitration generally refer to the types of interim measures broadly, sometimes indicating certain examples.⁴⁶ Nonetheless, considering their function (or objective), provisional measures in arbitration can generally be dealt with under three broad categories:⁴⁷ measures related to the preservation of evidence, measures related to the conduct of arbitration and “relations between the parties during arbitral proceedings”,⁴⁸ and measures aimed to “facilitate later enforcement” of an award.⁴⁹ An atypical provisional measure, interim payment, may be added to those categories.

Measures Related to Preservation of Evidence

A need to preserve evidence might arise prior to its presentation or collection at an advanced stage of arbitral proceedings. Evidence might fade away in a routine or exceptional course of events or due to intentional

sequestration, freezing orders, pre-award attachment, security for claim, and security for costs. It is interesting to note, in regard of the type of a measure, that the United States (“U.S.”) Supreme Court, in *Grupo Mexicano*, denied permitting a preliminary injunction prior to entry of a money judgment. *Grupo Mexicano de Desarrollo, S.A., et al. v. Alliance Bond Fund, Inc., et al.*, 527 US 308, 119 S Ct 1961. It should be further noted that such measures as orders for clarification of statements, measures for taking evidence, the appointment of an expert, fixing the date of a hearing, or summoning a party or a witness to appear before the arbitral tribunal should not be considered as provisional measures. See, e.g., Zhivko Stalev, “Interim Measures of Protection in the Context of Arbitration” in: Albert Jan van den Berg (ed.), *International Arbitration in a Changing World*, ICCA Congress Series No. 6 (The Hague: Kluwer 1993), 103, 104 (“Arbitration in a Changing World”).

⁴⁶ See UN Doc A/CN.9/WG.II/WP.108, para. 65.

⁴⁷ Apparently, neither the categories nor the examples provided under them are exhaustive. On some other ways of categorising provisional measures, see, e.g., UN Doc A/CN.9/WG.II/WP.108, para. 63; Bond in: ICC (ed.), *Conservatory Measures*, 9-10, and Redfern, *Arbitration and the Courts*, 78. On the examples of types of measures that may be granted in practice, see *infra* Chapter IV, Part 7.

⁴⁸ See Bond in: ICC (ed.), *Conservatory Measures*, 9. Provisional measures aim to prevent aggravation of a dispute or delay and disruption of arbitration proceedings are likely to fall into this category.

⁴⁹ See UN Doc A/CN.9/WG.II/WP.108, para. 63.

conduct of a party. Alternatively, a key witness' statement or an expert report about rotting goods might be required in order to establish the case that is to or will be adjudicated.

The power to preserve evidence should not be confused with the power regularly available to arbitral tribunals in respect of production or collection of evidence. Arbitral tribunals are generally empowered to make certain orders for the collection of evidence.⁵⁰ Such orders on production of documents are different from provisional measures regarding preserving evidence in that the production of documents aim more to collect evidence than to preserve it. Apparently, the orders for production of documents could aim to preserve evidence as well as to collect it. In fact, in some cases it may be more appropriate to make an application for a production order than an order to preserve evidence on an interim basis.

Measures Related to Conduct of Arbitration and Relations between the Parties during Arbitral Proceedings

This is the broadest category of provisional measures, which are more common in practice. In general terms, these measures involve ordering parties to do or refrain from doing something. These are simply injunctions that aim to protect a legal right.⁵¹ Some examples of measures falling into this category include:

- orders to continue performing a contract during the arbitral proceedings (e.g., an order to a contractor to continue construction works despite its claim that it is entitled to suspend the works);
- orders to refrain from taking an action until the award is made;
- orders to safeguard goods (e.g., to take specific safety measures, to sell perishable goods or to appoint an administrator of assets);
- orders to take the appropriate action to avoid the loss of a right

⁵⁰ See, generally, Craig / Park / Paulsson, ICC Arbitration 2000, 449. On the collection of evidence, see *infra* Chapter IV, note 202.

⁵¹ In close examination, any provisional measure that an arbitrator can order involves some positive or negative action (inaction).

(e.g., to pay the fees needed to extend the validity of an intellectual property right); orders relating to clean up of a polluted site.⁵²

Measures Aimed to Facilitate Later Enforcement of Award

There may be a need to avoid dissipation of assets from which the final judgment / award could be satisfied. This type of measure is apparently aimed at not leaving the winning party empty-handed with a *Pyrrhic* victory, where all assets of the losing party were flown away. Examples for this category include:

orders not to move assets or the subject-matter of the dispute out of a jurisdiction; orders for depositing in a joint account the amount in dispute or for depositing movable property in dispute with a third person; orders to a party or parties to provide security (e.g. a guarantee) for costs of arbitration or orders to provide security for all or part of the amount claimed from the party.⁵³

Interim Payment

Interim payment is “an outright payment to the plaintiff which may be subsequently revised on final judgment [or award]”⁵⁴. It is an atypical provisional measure in that the moving party is often granted, in full or in part, the remedy it is seeking. Interim payment is available in the laws of many states, but is foreign to the laws of as many states too.⁵⁵ Interim

⁵² UN Doc A/CN.9/WG.II/WP.108, para. 63. This list is not exhaustive. To this end, “orders to the parties and other participants in arbitral proceedings to protect the privacy of the proceedings (e.g., to keep files in a certain place under lock or not to disclose the time and place of hearings)” also, in the view of this author, fall into this category. For example, see *id.*

⁵³ *Id.*

⁵⁴ Second Interim Report, 67 ILA Rep 200, para. 37 (1996). Provisional payment enables a party to survive or contributes to such survival by preserving the party’s cash flow. See also Julian D M Lew / Loukas Mistelis / Stefan Kröll, *Comparative International Commercial Arbitration*, (The Hague / London / New York: Kluwer 2003), para. 23-55.

⁵⁵ For instance, the ILA Principles exclude interim payment from their scope. Principle 22 of the ILA Principles. In addition, some legal systems, e.g. Switzerland do not recognise provisional payment as interim measure. See Wirth, 35. Further, it is noteworthy that a provisional payment is excluded from the domain of court remedies where the underlying case is referred to arbitration. See, e.g., *Société Eurodif et autre*

payment could in principle be granted on *an interim basis* by arbitral tribunals.⁵⁶

Importance of Interim Protection of Rights

Provisional measures play a very important role in international arbitration. Indeed, the view that provisional measures are not important in international commercial arbitration was abandoned a long time ago.⁵⁷ The availability of provisional measures was often deemed detrimental to “the progress and the outcome of proceedings on the merits of a case.”⁵⁸ To this end, interim protection of rights in international commercial arbitration today is as significant as the final protection of those rights.⁵⁹ This is because once it is granted either by a court or an arbitral tribunal, a provisional measure, “in its own terms, may have final and significant

v. République Islamique d'Iran (14 March 1981), Rev Arb 69 (1985) (Court of Cassation).

⁵⁶ See *infra* Chapter IV, Part 7.5.

⁵⁷ In fact, the importance of interim protection of rights was recognised in the 1920s as, during the preparation of the first ICC arbitration rules, particular attention was given to such protection. See Roberto Pozzi, “Conciliation and Arbitration between Merchants of Different Countries”, ICC Brochure No. 13, 20 (1920). But see Pieter Sanders, “Procedures and Practices under the UNCITRAL Rules”, 27 Am J Comp L 453-454 (1979) (“Procedures”) (indicating that in the mid the 1970s, “[t]he question of interim measures only occasionally present[ed] itself in an arbitration.”); Georgio Gaja, *International Commercial Arbitration – The New York Convention* (New York 1984), Binder I, Introduction, D.B.I. Indeed, within the 1960s, in accordance with Broches’ experience “arbitral tribunals were extremely loath to order provisional or interim measures and one should have some confidence in the self-restraint which tribunals would impose upon themselves.” *Convention on the Settlement of Investment disputes Between States and Nationals of Other States – Documents Concerning the Origin and the Formulation of the Convention* (Washington, D.C. 1968), v. II, Part I, 515 (“History”). The contrast between the above approaches is tenable as following the period of permissiveness in the 1920s, the power of arbitrators to grant provisional measures faced with resistance from judiciary and legislatures in the 1950s. Such resistance was begun to relax in the 1980s. See generally *infra* Chapter I.

⁵⁸ Kessedjian, para. 5. See also Collins, 27.

⁵⁹ Born, *International Arbitration*, 920 (indicating that provisional measures are often more important in international arbitration than domestic arbitration.). It is even argued that provisional remedies “are often more important than final judgment [or

consequences that cannot be reversed even if the measure is later modified or turns out to be unnecessary in the light of the final award.”⁶⁰ Indeed, “a final award may be of little value to the successful party if, in the meantime, action or inaction on the part of a recalcitrant party has rendered the outcome of the proceedings largely useless”⁶¹

The importance of and the need for interim protection of rights in arbitration have grown immensely over the last twenty years.⁶² The growth owes much to globalisation⁶³ and increased confidence in arbitration.⁶⁴ The

award]”. See, e.g., Trevor C. Hartley, “Interim Measures under the Brussels Jurisdiction and Judgments Convention”, 24 E L Rev 674 (1999).

⁶⁰ UN Doc. A/CN.9/WG.II/WP.108, para. 66.

⁶¹ UN Doc A/CN.9/460, para. 117. See also, Cremades, *The Need*, 226-227.

⁶² This growth is, for instance, confirmed with the increasing number of decisions on provisional measures, particularly over the last ten years. A survey conducted by the AAA indicates that the number of requests for interim measures in international commercial arbitration is nearly double the number of such requests under domestic arbitration. See Richard W. Naimark / Stephanie E. Keer, “Analysis of UNCITRAL Questionnaires on Interim Relief”, 16(3) Mealey’s IAR 23, 26 (2001). See generally *infra* Chapter IV.

⁶³ The number of international commercial transactions has recently increased due mainly to globalisation. See Coleen C. Higgins, “Interim Measures in Transnational Maritime Arbitration”, 65 Tulane L Rev 1519, 1520 (1991); and ICC Interim Conservatory Award 10021 of 1999 (unpublished). For the importance of interim measures as regards construction contracts disputes, see, e.g., Peiro G. Parodi, “Interim Measures in Respect to Arbitration in the Construction Business” in: Albert J. van den Berg (ed.), *I. Preventing Delay and Disruption of Arbitration – II. Effective Proceedings in Construction Cases*, ICCA Congress Series No. 5 (Deventer: Kluwer 1991), 485-86 (“Preventing Delay”); as regards maritime disputes see, e.g., Higgins, 1519-1549; and as regards intellectual property disputes, see, e.g., Final Report on Intellectual Property Disputes published in 9(1) ICC Int’l Ct Arb Bull 37-73 (1998). As a result of globalisation, the number of disputes with international character has increased immensely. For instance, the number of cases registered with the ICC increased from 250 (in 1980) (see “News From the Court and Its Secretariat”, 6(1) ICC Int’l Ct Arb Bull 3 (1995)) to 593 (in 2002) (see <www.iccwbo.org/court/english/right_topics/stat_2002.asp> last visited at 28 October 2003) within nearly twenty years. Further, each year, nearly 5000 international arbitrations and mediations are held in or from London. Judith Gill / Lord Hacking / Arthur Marriott / Geoff Prevett / Peter Rees (eds.), *Delivering Results – Dispute Resolution in London* (London 2000), 5. Also, each year, approximately 2300 new arbitration cases register with the thirteen major arbitration institutions (e.g., AAA, CIETAC, ICC, ICSID, LCIA, and SIAC). This is in accordance with unpublished research entitled “Statistics on

growth is further related to the longer duration of arbitration proceedings due to globalisation, the complexity, bureaucratisation,⁶⁵ or institutionalisation of arbitration.⁶⁶

In addition, legal assistance is today available to arbitrating parties from able lawyers familiar with the tools and strategies of international adjudication (more specifically, of international commercial arbitration). Indeed, perhaps due to such availability, provisional measures “are sometimes misused as offensive weapons intended to exert undue pressure on the other party or a means to delay or obstruct the proceedings.”⁶⁷ Misuses or abuses of provisional measures must be

Arbitration Centers’ Activities” and done, in 2000, by Sylvie Picard Renuat and Esther van Rossen of the ICC International Court of Arbitration. In sum, globalisation has a positive effect on arbitration. Indeed, it is rightly argued that “[a]rbitration has become more and more international following the globalisation of the economy. Arbitration may be the juridical response to this globalisation.” Sanders, *Quo Vadis*, 24. See also Bernardo Cremades, “Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration”, 14(2) *Arb Int’l* 157, 172 (1998) (“Cultures”).

⁶⁴ This is partly observed in the fact that an increasing number of states, precisely 134, adopted the New York Convention. In this regard, see <www.uncitral.org/en-index.htm> last visited at 28 October 2003. See, e.g., Sanders, *Quo Vadis*, 9.

⁶⁵ See, e.g., Catherine Kessedjian, “Court Decisions on Enforcement of Arbitration Agreements and Awards”, 18(1) *J Int’l Arb* 1, 11 (2001) (stating that “arbitration has become increasingly ‘procedure-oriented’.”) (“Court Decisions”); Higgins, 1525 (indicating that “[r]ising concern over the abuse of procedural devices for purposes of delay is spawned by the increasing trend of arbitral proceedings to acquire characteristics of contested court litigation.”); and Fali S. Nariman, “The Spirit of Arbitration”, 16 *Arb Int’l* 261, 263 (2000) (noting that, in arbitration, “‘ceremonies’ are multiplying, formalities are on the increase and much time spent in adapting the arts of litigation.”).

⁶⁶ See Redfern/Hunter, para. 1-04; and Born, *International Arbitration*, 919. For instance, the average length of an ICC arbitration is between one and two years. See Craig / Park / Paulsson, *ICC Arbitration 2000*, 14.

⁶⁷ See, e.g., Klaus P. Berger, *International Economic Arbitration* (Deventer/Boston: Kluwer 1993), 336 (“International Economic Arbitration”); Axel Bösch, “The Problem of Provisional Remedies in International Commercial Arbitration” in: Bösch (ed.), 4-5; “Final Report on Interim and Partial Awards” (A Report of the ICC Commission on International Arbitration chaired by Martin Hunter), published in 1(2) *ICC Ct Bull* 26, para. 30 (1990) (“Final Report on Awards”) (indicating that arbitration becomes to have “increasingly adversarial character ... with a consequently greater emphasis on disputing such matters as” interim protection of rights.). See also Alan H. Kaufman,

controlled for maintaining the effectiveness of arbitration and the flexibility needed in international trade.⁶⁸ The control is thus necessary for the “benefit of trade”⁶⁹ and its promotion.

Further, the growth in the importance of arbitral provisional measures is related to “the ease and speed with which assets can be transferred in the modern world to avoid a court judgement or an arbitral award”⁷⁰ Indeed, where no assets to enforce a final award are in existence, the final protection envisaged to safeguard a right is simply a *Pyrrhic* victory.⁷¹

In sum, the existence and availability of effective interim protection of rights in arbitration is vital for the further success of this institution. Luring business persons to arbitration or keeping their satisfaction high with the arbitral process could in practice prove to be very difficult only with arbitration’s other advantages⁷² where the availability of effective arbitral interim protection is in question.⁷³ The degree of difficulty increases when one is reminded that a comparatively effective interim protection of rights is generally available from judicial authorities in international litigation.⁷⁴

“Major Strategic Issues in International Litigation”, in: *International Business Litigation & Arbitration 2000* (New York: Practising Law Institute 2000), 1-20. The undue pressure may have “psychological effects”. See, in this regard, Cremades, *The Need*, 227. Further, some provisional measures actually force a party to settle the case. *Id.* For instance, the issuance of a measure e.g., freezing assets of a party may pressure it to settle the dispute on unfavourable terms where such measure could destabilise its financial condition.

⁶⁸ Cremades, *Exclusion*, 106.

⁶⁹ Cremades, *The Need*, 227.

⁷⁰ UN Doc. A/CN.9/WG.II/WP.111, para. 7.

⁷¹ See, e.g., Albert Jan van den Berg, *The New York Arbitration Convention – Towards a Uniform Judicial Interpretation* (The Hague / Deventer: TMC Asser Institute / Kluwer 1981), 143 (“New York”).

⁷² On the advantages and disadvantages of arbitration, see sources cited in Introduction, *supra* note 1.

⁷³ See, e.g., Note - “Arbitration-Availability of Provisional Remedies in Arbitration Proceedings”, 17 NYULQ Rev 638 (1940).

⁷⁴ See generally *infra* Chapter V, notes 1 and 13.

(Litigation remains the main competitor of arbitration as a dispute resolution mechanism.) Problems and uncertainties regarding interim protection of rights in arbitration affect the quality of justice provided for parties in arbitration and its effectiveness. Consequently, such problems and uncertainties pose a threat to the future of arbitration. To this end, Bond states

[w]hile it is inevitable that litigation and arbitration each has certain advantages and disadvantages vis-à-vis the other, should parties consider that the quality of justice rendered or the obtaining of satisfaction on an arbitral award is substantially diminished by the selection of arbitration over litigation, it would obviously bode ill for the future of arbitration.⁷⁵

What would be a further threat to the future of arbitration is if arbitrating parties were, in each case, referred to judicial authorities to obtain provisional measures. Such referral would generally undermine the parties' basic choice to resolve a dispute by way of arbitration rather than by recourse to the courts.⁷⁶

In order to reach its aim, this thesis will examine:

- the evolution of provisional measures in arbitration;
- the forum to obtain such measures;
- complementary mechanisms;
- arbitral provisional measures; and
- enforcement of arbitral provisional measures.

⁷⁵ Bond, 10.

⁷⁶ See *infra* Chapter II, Part 1.1. Apparently, the interaction between the jurisdiction of judicial authorities and that of arbitrators is unavoidable for the effectiveness of arbitration and better distribution of justice. For the reasons with respect to such interaction, see *infra* Chapter II, Part 4.1.

Evolution of Provisional Measures in Arbitration

Recognising the commercial need for interim protection of rights, some of the early arbitration rules were permissive as regards arbitral competence to grant provisional measures. In the first quarter of the 20th century, national laws were generally silent on such competence. Both legislatures and courts often mistrusted arbitration and arbitrators. Further, courts were jealous of arbitration. Only a handful of laws dealt with the role of courts with respect to provisional measures. These laws generally envisaged court assistance to arbitration in rudimentary form. Within this period, provisional measures were, in general, exclusively available from courts regardless of where the final protection was sought. The second, third, and even a part of the fourth quarter of the last century witnessed dramatic changes. Some national laws and court decisions provided for the exclusive jurisdiction of courts for interim protection of rights even though the final protection of such rights was, by agreement, sought from arbitrators. The negative attitude of legislatures and courts affected the drafters of arbitration rules and thus these rules generally refrained from empowering arbitrators to issue provisional measures. The rules were generally permissive of court involvement in arbitration for interim protection of rights. Regardless of such involvement, the substance of the case in dispute remained within the arbitral domain. Such approach paved the way for wide recognition of arbitral competence to issue provisional measures in the last decade of the 20th century. Within the same period, the courts' role was generally restricted to assistance for enhancing the effectiveness of arbitration.

The evolution of the concept of court assistance to arbitration and the power of an arbitrator to grant provisional measures as well as historical,

political, and commercial causes that affected such evolution will be examined. Such examination will enlighten the roots of some of the problems and uncertainties about provisional measures in arbitration.⁷⁷ The examination will also enhance understanding of some of the trends concerning those measures and assist in shaping such trends for the 21st century.

Forum to Obtain Provisional Measures

Nowadays, an arbitral tribunal is and should be the “natural forum” for providing both final and interim protection of arbitrating parties’ rights, despite the fact that this view is not fully accepted.⁷⁸ The principle of party autonomy in arbitration dictates such conclusion. Indeed, for instance, if the tribunal is entrusted to finally determine the parties’ rights, it is natural that the tribunal should be entrusted to deal with the interim protection of these rights.⁷⁹ However, there are still three salient problems and certain other shortcomings with the tribunal’s power.⁸⁰ A tribunal has no power over third parties. Arbitration is a contractual mechanism binding upon the contracting parties. Interim protection of rights against third parties has to be sought from judicial authorities.

In addition, the tribunal cannot use coercive powers to force a party to comply with its decision. An arbitral tribunal is not an organ of a sovereign. Sovereigns do not entrust their functions to private individuals. Accordingly, provisional measures that require use of coercive powers could only be obtained from state courts.

⁷⁷ See infra Chapter I.

⁷⁸ See infra Chapter II, Part 1.

⁷⁹ For further reasons in favour of the power of an arbitrator to grant provisional measures, see infra Chapter II, Part 1.1.

⁸⁰ See infra Chapter II, Part 4.1.

Further, an arbitral tribunal could only be available to provide interim protection of arbitrating parties' rights when it is formed. At the stage prior to constitution of the arbitral tribunal or, in some case, prior to the transmittal of the file to the tribunal (collectively referred to as the "pre-constitutional stage"), interim protection may be available from either another party-determined authority, e.g. emergency arbitrator,⁸¹ or a court.

The above problems along with the shortcomings require court involvement in the arbitral process. How such involvement *is* and *should* be regulated is determined by arbitration rules and state laws.⁸² Court involvement in arbitration is necessary for the support of arbitration's effectiveness. In determining the necessary degree of involvement, the needs of international commerce should be taken into account. The effectiveness of arbitration requires a limited level of court support where the exercise of power to grant provisional measures by an arbitral tribunal is *impossible* or *ineffective*. In such cases, the courts' role is to complement and assist the arbitration process. Thus it is necessary to clarify the manner of coordination of the power between arbitrators or party-appointed authorities and courts.

Complementary Mechanisms

No provisional measures are available from an arbitral tribunal at the pre-constitutional stage, which is a very important phase of arbitration. This phase unfortunately extends over a certain period of time due to bureaucratisation or internationalisation of arbitration. The majority of disputes are resolved within that period. In the absence of arbitral

⁸¹ See *infra* Chapter III.

⁸² See *infra* Chapter II, Part 4.

provisional measures, courts are generally the parties' only option for interim protection of their rights. However, such option is, *inter alia*, contrary to the parties' intention to resolve their disputes before a neutral / party-determined authority. Referring a party to a court means channelling such party to a forum (a court) it just opted out of by the agreement to arbitrate. In addition, petitioning a court for interim protection may infringe upon the confidential nature of arbitration intended by the parties. Furthermore, such request may be considered a waiver of the right to arbitrate. Finally, judicial provisional measures may, in some cases, not be effectively available, or available at all.

In order to overcome the above salient problems, complementary mechanisms were proposed⁸³ and are also supported by the principle of party autonomy. These mechanisms envisage entrusting a neutral person with the issue of provisional measures. This neutral person may be a head or an organ of an arbitration institution. Alternatively, contracting parties may opt for emergency measure procedures, under which a neutral person called an emergency arbitrator, pre-arbitral referee, or an arbitrator decides a request for an interim protection of rights. It is necessary to examine how such mechanisms operate and whether or not they would be effective in providing provisional measures. Such examination will demonstrate that the complementary mechanisms may be useful and effective at the pre-constitutional stage.

Arbitral Provisional Measures

Once the power of an arbitral tribunal is established then it is necessary to determine the standards of procedure and principles for the granting of

⁸³ See *infra* Chapter III.

provisional measures.⁸⁴ The determination of standards and principles is vital. The determination assists consistency and predictability of the arbitration process. Thus the determination of standards or procedures and principles affects the efficiency of that process.

Arbitration rules and laws are generally silent on these standards and principles. However, arbitrators are often equipped with broad powers and exercise wide discretion. The standards and principles should be flexible so that they can suit the circumstances of each individual case. In determination of such standards and principles, *inter alia*, the temporary nature of provisional measures should be taken into consideration. Such standards and principles should be pragmatic in order to suit the practical needs of international commerce and arbitration.

For the determination of standards and principles, arbitrators, occasionally, refer to or take inspiration from the law of the place of arbitration or any other relevant law. Further, parties rarely make specific reference to national laws in practice. In using their discretion for such determination, arbitrators may be guided by arbitral case law and a comparative analysis of various arbitration rules. To this end, it is useful to examine, in light of that case law and such analysis, the standards of procedure and principles for the grant of provisional measures. Seventy-two sets of arbitration rules and arbitral practice mainly under the arbitration rules of the AAA, ICC, ICSID, and UNCITRAL are examined in the thesis.

⁸⁴ See *infra* Chapter IV.

Enforcement of Arbitral Provisional Measures

Arbitral provisional measures are, unlike judicial measures, not self-executing. They have, however, certain weight.⁸⁵ Arbitrating parties may voluntarily abide by the decisions of their tribunals. Otherwise, certain sanctions may be available against a recalcitrant party. Adverse inferences may be drawn where a party refuses to comply with a provisional measure concerning preservation of evidence. Alternatively, the recalcitrant party may be held liable for costs and damages concerning two categories of provisional measures; namely, (i) measures related to the conduct of arbitration and the relations between the parties during arbitral proceedings, and (ii) measures aimed to facilitate later enforcement of the award.

Drawing adverse inferences may be very effective. However, holding a party liable for costs and damages in regard of provisional measures may not always be effective. Particularly against the dissipation of assets, the potential liability is not considered effective protection. The effectiveness of arbitral provisional measures is directly related to the effectiveness of arbitration. The success of arbitration lies in its appeal to its main users. By taking the importance of the enforceability issue into account, several legislatures introduced judicial assistance to arbitration for enforcement of arbitral provisional measures. However, these efforts are not sufficient. This is because there is disharmony in regard of the provision of judicial assistance. Further, only a few laws provide for judicial assistance to foreign arbitration. No arbitration convention expressly contains a provision on the enforcement of arbitral provisional measures. The weight

⁸⁵ See *infra* Chapter V, Part 1.



of arbitral provisional measures and how their effectiveness would be enhanced through enforcement will be examined below.

CHAPTER I

EVOLUTION OF PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION

Interim protection of rights is not a new phenomenon. Some of the interdicts of the Roman law aimed at protecting property on a provisional basis.¹ Later, in the middle ages, for instance in England, the possessory assizes, which were inspired from possessory interdicts² were used to “mitigate the long delay which occurred between the issuance of a writ of right and the trial - a delay which was due to the solemnity of the writ of right.”³

In international content, the regulation of interim protection of rights seems to date back to the beginning of the 20th century.⁴ The drafters

¹ Buckland / McNair, 420-423.

² Id., 421.

³ Elkind, 27.

⁴ Interim protection in international plane was contained in series of treaties dated the early 1900s. See Elkind, 38-43. Perhaps, the most influential provisions in respect of interim protection were placed in the Treaties for the Advancement of Peace or Bryan Treaties of 1914. The Bryan treaties were signed between the United States (“U.S.”) and China, France, and Sweden. For the U.S.-China (Advancement of Peace) Treaty, see Charles I. Bevans, *Treaties and Other International Agreements of the United States of America 1776-1949*, v.6 (Washington: Department of State 1968-1976), 711-713; for the U.S.-France (Advancement of Peace) Treaty see id., v.7, 883-885; and for the U.S.-Sweden (Advancement of Peace) Treaty see, id., v.11, 741-743. Article IV(2) of each treaty provided:

In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Commission [to be constituted in accordance with the terms of each treaty] shall as soon as possible indicate what measures to preserve the rights of each party ought, in its opinion, to be taken provisionally and pending the delivery of its report.

The treaties affected the drafting of Article 41 of the Statute of the Permanent Court of International Justice. See Elkind, 41, 43-46. That Article was the basis of Article 41 of the Statute of the International Court of Justice. In this period, the function of interim protection differed under various legal systems. See, generally, Elkind, 23-31. The function was generally prevention of deprivation or disturbance of

of international commercial arbitration rules in those days were probably affected by such regulation. Indeed, it was in 1915 when the concept of interim protection of rights was introduced into international commercial arbitration for mainly the satisfaction of commercial and business needs.

The growth of arbitration as a dispute resolution mechanism, in general, and, the idea of interim protection of rights, in particular, was naturally related to evolution of international trade and business. In the evolution of the international commercial arbitration practice, there are two periods within which there were significant developments: the first and the last quarters of the 20th century. These developments were no haphazard. It was the rapid expansion of international trade and business that triggered in the first place the flourishing of international commercial arbitration in the beginning of the 20th century.⁵ Increasing trade relations between Latin American states and the U.S. resulted in creation of a mechanism for settling disputes arising from such relations in 1915. This mechanism was composed of a set of arbitration rules. Recognising the importance of interim protection of rights, these rules were, for the first time, empowered a party-appointed authority to grant interim measures for the protection of property in dispute.

National legislatures and courts soon after accepted that court assistance in respect of interim protection was sometimes necessary for success and effectiveness of international commercial arbitration and effective distribution of justice. The necessity for courts' involvement in arbitration in regard of interim protection of rights was

possession, prevention of violence and protection of *status quo ante* pending trial.
Id.

⁵ On the evolution of international business, particularly business environment, in the 1880s and afterwards see Geoffrey Jones, *The Evolution of International Business - An Introduction* (London/New York: Routledge 1996), 29-41.

also recognised by arbitration rules. However, national legislatures for a long period of time refrained from empowering arbitrators to grant provisional measures. State courts too took prohibitive approach to the arbitral power.

The approach of legislatures and courts was a reaction to empowering arbitrators under certain arbitration rules to grant provisional measures. The refusal of recognition of arbitral power in respect of provisional measures and the prohibitive approach of the courts had a negative effect on the express regulation of the arbitral powers for interim protection of rights. This effect gradually increased over the second, third, and a part of the fourth quarters of the 20th Century. Throughout these years, several attempts for improving regional and international commercial arbitration practice were made with some success. During these years, the business environment was changed due mainly to two World Wars. The trends restricting free movement of goods and business were generally adopted, particularly, after the Second World War.⁶

International legislatures in those days dealt with two main problems for the success of international arbitration: recognition and enforcement of arbitration agreements (for present and future disputes) and of awards. The Geneva Protocol of 1923 and the Geneva Convention of 1927 dealt with the recognition and enforcement issue.⁷ In 1958, the New York Convention perfected the system created then.

International trade and business boomed again in the 1980s. In fact, the importance of international business in the world economy was

⁶ See, e.g., generally, Jones, 46-52.

⁷ See also the Treaty concerning the Union of South American States in respect of Procedural Law, signed at Montevideo, 11 January 1889, II Register of Texts 5 (1973).

revived and grown in the 1980s to the level of the 1920s.⁸ Restrictions on free movement of trade and business were steadily released and the fall of the European Eastern Block (or of the Berlin Wall)⁹ boosted trade and business not only between east and west but also in international (global) plane. These developments raised importance of mechanisms for resolution of disputes, particularly international commercial arbitration. The attention to arbitration contributed positively already existing attempts to resolve problems of international arbitration practice. The concept of interim protection of rights was identified as one of those problems of international arbitration in 1956¹⁰ and was dealt with under the European Convention on International Commercial Arbitration¹¹ (the “European Convention”), the United Nations Economic Commission for Europe (the “UNECE”) Arbitration Rules, and the Rules for International Commercial Arbitration of the

⁸ Jones, 59 (stating that “[b]etween 1880 and the 1920s international business reached a significance in the world economy which it was not to approach again until the 1980s.”). See also Sanders, *Quo Vadis*, 83. In support of this view, it could be added that the 1980s is the most active period in the history of ICC arbitration in which the ICC International Court doubled the requests it received until 1980 from the ICC Arbitration Rules first inception in 1923 within the period between 1980 and 1990. “A Survey of Ten Years of ICC Arbitration (1980-1990)”, 1(1) ICC Ct Arb Bull 7 (1990). In this regard, it is interesting to note what Ronald Reagan stated in 1986:

Today, world trade has increased to a level requiring a more expansive and effective system for dispute resolution. In promoting and developing such a system, international arbitrators can help to lessen conflict, promote harmony, and bring world peace closer to fulfilment. (Emphasis added.)

Welcoming Letter to the VIIIth International Arbitration Congress of the International Council for Commercial Arbitration, in: Pieter Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series No.3 (Deventer: Kluwer 1987), 1 (“Comparative Arbitration”).

⁹ This event marked the era of globalisation. On globalisation see, e.g., Jarrod Weiner, *Globalization and the Harmonization of Law* (London/New York: Pinter 1999); Loukas Mistelis, “Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations”, 34(3) *Int’l Law* 1055 (2000); Gordon Walker / Mark Fox, “Globalization: An Analytical Framework”, 3 *Ind J Global Legal Stud* 375 (1996); and Martin Shapiro, “The Globalization of Law”, 1 *Ind J Global Legal Stud* 37 (1993).

¹⁰ UN Doc Trade/WP1/12, paras. 41-42.

¹¹ Done at Geneva, 21 April 1961, 484 UNTS 364, No. 7041 (1961-1964). 26 countries signed and ratified the European Convention. For the list of those countries see <www.unece.org/trade/tips/comarbit/listpart.htm> last visited at 28 October 2003.

United Nations Economic Commission for Asia and the Far East¹² (the “UNECAFE”).¹³ These Arbitration Rules recognised the need to empower arbitrators to grant provisional measures. They also recognised the need for courts’ assistance to arbitration for the grant of provisional measures. In the beginning of the 1980s, the number of national laws permitting arbitrators to grant provisional measures increased rapidly. This was related to the recognition of the commercial need by national legislatures through overcoming the historical prejudice towards arbitration.¹⁴ The need for judicial assistance to arbitration too gained wide acceptance in international and national legislations as well as court decisions within the last part of the 20th century.

¹² Now the U.N. Economic and Social Commission for Asia and the Pacific.

¹³ The 1972 Nestor Report did not, however, identify the concept as one of the problems perhaps because the issue was dealt with under the above arbitration rules. For the Report of Ion Nestor on International Commercial Arbitration in 1972, see UN Doc A/CN.9/64.

¹⁴ In overcoming such prejudice, the UNCITRAL Arbitration Rules and the Model Law, both of which reflect the evolution of the issue of provisional measures in arbitration played a vital role. Both the UNCITRAL Arbitration Rules and the Model Law have improved, internationalised, and harmonised international commercial arbitration. On the UNCITRAL Arbitration Rules, Berger, *International*, 63 (indicating that the UNCITRAL Arbitration Rules “have inspired many provisions contained in contemporary institutional arbitration rules.”); Sanders, *Quo Vadis*, 13 (stating that “today it can be noted that the UNCITRAL Arbitration Rules, to some extent, have had a harmonising effect.”). On the Model Law, see, e.g., Redfern / Hunter, 508; and Sanders, *Quo Vadis*, 83 (arguing that the wide adoption of the Model Law “throughout the world contributed greatly to the harmonisation of arbitration laws.”). Several experts from various parts of the World worked on the preparation of the Model Law and laws of 43 jurisdictions are based on it. Legislation based on the Model Law are enacted in Australia, Azerbaijan, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Germany, Greece, Guatemala, Hong Kong Special Administrative Region of China, Hungary, India, Iran (Islamic Republic of), Ireland, Jordan, Kenya, Lithuania, Macau Special Administrative Region of China, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Russian Federation, Singapore, Sri Lanka, Tunisia, Turkey, Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; within the United States of America: California, Connecticut, Illinois, Oregon and Texas; Zambia, and Zimbabwe. See generally UN Doc A/CN.9/WG.II/WP.108/Add.1 available at <www.uncitral.org> last visited at 28 October 2003.

This Chapter studies the evolution of provisional measures in arbitration and its historical, commercial, and political causes. The study of the evolution and its causes will enlighten the roots of some of the problems and uncertainties on those measures. The roots, evolution and its causes enhance our understanding of today's trends and assist shaping of trends for the 21st century in respect of those measures. In this regard, two issues will mainly be studied. These issues are power of arbitrators to grant provisional measures and court assistance (concurrent jurisdiction of arbitrators and of courts) for interim protection of rights. This Chapter examines the approach of (i) arbitration rules and (ii) international and national legislatures as well as courts to those issues.

1 Arbitration Rules

It was in the early years of the last century when a sophisticated set of rules¹⁵ dealing with international commercial arbitration recognised the need, to empower a party-appointed authority to grant interim protection of rights. Indeed, in 1915, at the First Pan-American Financial Congress, a plan (a dispute resolution mechanism) for settlement of disputes by arbitration in trade between business persons in the United States of America and the Argentine Republic was prepared (the "1915 Plan").¹⁶

¹⁵ The sophistication of which is perhaps a reflection of the fact that commercial disputes in those days often settled by arbitration. See generally Arthur Nussbaum (ed.), *International Year Book on Civil and Commercial Arbitration*, (New York: Oxford University Press 1928), v.I, 398.

¹⁶ The Plan came into force in 1916. The Plan was reprinted in AAA (ed.), *Year Book on Commercial Arbitration in the United States* (New York: Oxford University Press 1927), 823. The Plan perhaps influenced by the Bryan Treaties as the U.S. was a party to them. On the Plan, see also Horacio Grigera Naón, "Latin American Arbitration Culture and the ICC Arbitration System", in: Stefan N. Frommel / Barry A. K. Rider (eds.), *Conflicting Legal Cultures in Commercial Arbitration – Old Issues and New Trends* (Kluwer: London 1999), 117.

The rules contained in the 1915 Plan were dealing with trade between two trade institutions: the U.S. Chamber of Commerce and the *Bolsa de Comercio* of Buenos Aires. In accordance with the 1915 Plan, an arbitration committee each established within the above chambers of commerce was empowered to deal with disposal of perishable or seasonal goods. This power was given as recognition of a commercial need to protect, on an interim basis, the rights of the arbitrating parties. Since arbitration emerged in the beginning of the last century as a dispute resolution mechanism for resolving disputes between business persons belonged to various trade institutions, it was logical to empower the administrative organ of a trade institution, which was indisputably neutral, and readily available and whose integrity was free from doubt for the grant of interim protection of rights. Also such institution had moral powers over its (businessmen) members, which powers eased the compliance with the institution's decision on the interim protection.

The mechanism contained in the 1915 Plan was developed into two divergent systems for effectiveness of interim protection of rights. For nearly 40 years, an organ (a special committee) or a head of an arbitration institution was empowered to grant certain interim measures. This power, though it vanished in the 1950s for a period of time due to political and historical reasons, still survives.¹⁷ Since the 1920s, along with that power or, solely, in general, arbitral tribunals have been empowered to grant interim measures under various arbitration rules.¹⁸ Commencing from the 1930s, a number of arbitration rules made references to the concurrent jurisdiction of arbitrators and of courts.

¹⁷ See *infra* Chapter III, Part I.

¹⁸ Apparently, any such power entrusted to a party-appointed authority could/can only be used where applicable national laws were/are permissive. See generally Chapter I, *infra* Part 1.2.

This Part deals with evolution of power of an organ or the head of trade institution. It also studies arbitrators' competence to grant interim measures and the issue of concurrent jurisdiction under various arbitration rules.

1.1 Power of Organ or Head of A Trade Institution

Until the formation of an arbitral tribunal or even after its formation, there may be a need to urgently seek interim protection of rights. This need is commercial. It was commercially vital for business persons that their rights or the subject matter of a dispute were protected regardless of the fact that such protection was provided on an interim basis. The need for interim protection may require an established body or organ. The 1915 Plan recognised and remedied the need by referring interim measure applications to a permanent body. The 1915 Plan was taken as a basis by the U.S. Chamber of Commerce's "Plan for Commercial Arbitration" prepared in 1922 (the "1922 Plan") for promoting domestic arbitration within the U.S. Both Plans probably affected the ICC Rules of Arbitration 1931, which empowered the president of the ICC Court, along with arbitrators, to take conservatory measures. However, the concept of empowering an organ of a trade institution, e.g. a committee or its president faced with troubles and abandoned in 1955 to be revived in the 1990s. This Part examines the 1915 and 1922 Plans and the ICC Arbitration Rules.

1.1.1 1915 Plan

In accordance with the 1915 Plan,

the *Bolsa de Comercio* of Buenos Aires and the United States Chamber of Commerce each established a *Committee* on arbitration and an official list of arbitrators, with bi-national participation in both, and they agree to urge the insertion of a standard arbitration clause in contracts between merchants of the Argentine Republic and the United States of America. Rules

for the conduct of arbitration[sic]s are provided in connection with the agreement.¹⁹ (Emphasis added.)

It was no coincidence that such a sophisticated plan was agreed by two countries situated in the American Continent. Nor was it coincidence that, upon approval of the Inter-American High Commission, similar plans were negotiated between the United States Chamber of Commerce and various commercial organisations in Brazil, Ecuador, Panama, Paraguay, Uruguay, Venezuela, and Columbia.²⁰ These developments owed to the fact that, in those days, trading environment in the Americas was favourable whereas Europe was at the brink of the First World War thus trade relations within or from Europe were hampered.

Article XII of the 1915 Plan provided:²¹

If a controversy which is submitted to arbitration involves merchandise, the committee on arbitration which will have supervision of the case may, after communication with the parties, sell the merchandise or take such action as may, in their judgment, be advisable to avoid increased loss. The proceeds of such sales shall be deposited in bank to await the award of arbitrators.

This Article responded the call for the commercial need to protect the merchandise²² in dispute on an interim basis. There are two issues to note on the Plan. The Plan entrusted the committee on arbitration, as a standing body available to provide interim protection of rights whenever

¹⁹ AAA (ed.), 823-824.

²⁰ Id., 824. It is interesting to note that a similar plan was signed between Chamber of Commerce at Buenos Aires (Argentina) and the *Associação Commercial* of Rio de Janeiro (Brazil). See Nussbaum (ed.), 291, note 8.

²¹ AAA (ed.), 835. This Article was entitled "Disposal of Perishable or Seasonal Goods." The procedure for the sale of goods explained in Articles 5 and 8-11 of the Rules for Dealing With Merchandise (an annex to the Plan). For the text of this annex see id., 840.

²² The drafters of the Plan considered, particularly, the protection of the merchandise in dispute because, in those days, sale of goods contracts constituted a bulk of

necessary, with the power to grant provisional measures.²³ Further, Article XII of the 1915 Plan constituted the basis for interim protection of rights under international commercial arbitration.

1.1.2 1922 Plan

Apparently, the 1915 Plan inspired the 1922 Plan for promotion of arbitration by use of businessmen of various domestic chambers of commerce in the U.S.²⁴ Apparently, the inspiration was motivated with the recognition of the same commercial need to protect the merchandise in dispute. Article 14 of the Arbitration Rules of that Plan provides:

If the circumstances of a case disclose that while the controversy is pending there may be aggravation of damages, as in a case involving rejection of perishable merchandise, the committee [on arbitration of the relevant association] shall forthwith propose to the parties that they assent, saving all of their rights, to such a disposal of the merchandise, or such a course with other subject matter, as will prevent further deterioration or aggravation of damages in any other form. In all such cases, the committee shall place the facts before the arbitrators.²⁵

This Article differed from Article XII of the 1915 Plan in one important aspect. The latter gave power to direct sale, if necessary, the goods in question whereas the former gave power to make a mere proposal for sale. This author is unable to find any express stipulation as to why direct power to sell the disputed subject matter amended to make a proposal in that regard. Article 14 under the 1922 Plan was probably

international transactions and also because the above institutions aimed to assist sale of goods transactions e.g., cotton.

²³ The drafters did not entrust that power to arbitrators. That is probably because they observed the difficulties that we still have today; namely, it takes some time to appoint arbitrators, even in those days when arbitration was not judicialised and internationalised or, in other words, comparatively simple and flexible and that until arbitrators' appointment no interim protection could be available.

²⁴ AAA (ed.), 822, 824. It seems that a similar mechanism was in operation under the Arbitration Rules of, then, the London Court of Arbitration. See Article 17 of the Rules of the London Court of Arbitration reprinted in: Nussbaum (ed.), 270, 273.

²⁵ AAA (ed.), 829. This Article was entitled "Prevention of Aggravated Damages."

based on the promise that arbitrating parties would voluntarily follow any such proposal as they wilfully submitted their dispute for resolution to the committee.

1.1.3 ICC Arbitration Rules 1931

The 1915 and 1922 Plans were mirrored and followed by the ICC Arbitration Rules 1931. Article 11 of the Rules empowered the president (along with arbitrators) of the ICC Court of Arbitration with certain emergency powers. That Article was flexible for creating most effective means of interim protection. Article 11 left the power with arbitrators but recognised the shortcomings of such competence and also empowered the president²⁶ of the then ICC Court of Arbitration for providing such protection.²⁷

²⁶ On the reason for empowering the president with such power, Robert stated:
Experience has shown that urgent cases may arise which necessitate, outside the monthly meetings of the Executive Committee, a decision concerning conservatory measures to be taken in the interest of one or other of the parties.
... [I]t was decided to insert a new Article [11 which empowered both the president and the tribunal to grant provisional measures]

See Marx Robert, "The Court of Arbitration of the International Chamber of Commerce – Revision of the Rules", 11 *World Trade* 301, 302 (August 1931). This statement suggests that, prior to the amendment, the Executive Committee had a power in respect of conservatory measures. However, this author could not find any information to support that proposition. The statement might be related to the regulation of conservatory measures under the 1915 Plan upon which Article 11 most probably was based. Article XII of the 1915 Plan empowered the Committee to grant certain conservatory measures. See Chapter I, *supra* Part 1.1.1. However, the ICC Rules, after various discussions, refrained from empowering the Executive Committee because the Executive Committee of the ICC was not really a standing body as it convened once in a month. The awkwardness of the above statement is probably because only a part of those discussions was referred to in the Max Robert's commentary.

²⁷ There were two important characteristics of the president's power: First, the president of the Court of Arbitration was given the power in urgent cases to appoint an expert, who was armed with power to adopt certain conservatory measures including sale of the goods in dispute. The pre-condition for the use of that power was the existence of an ICC arbitration clause. Second, the president's power might only be used in urgent cases and upon a request from a party (never *ex officio*). See Robert, 302. For the text of Article 11 and further characteristics under such power, see Chapter I, *infra* Part 1.2.1.

Certain amendments made to Article 11 in 1939 but the president's power retained only to be removed in 1955.²⁸ Indeed, in this year, the power of arbitrators to grant a provisional measure was too removed from the ICC Arbitration Rules. The removal might be attributable to potential and actual problems caused by the existence or practice of that power due to the negative attitude of legislatures and courts towards arbitration.²⁹ This is conceivable as the president's (or the arbitrator's) power to grant conservatory measures made the institution itself open to a challenge. A potential challenge meant potential liability. In addition, arbitration was facing with hostility at the post war era (decolonisation period).³⁰ Further, the use of the power by the President or arbitrators for interim protection of rights could be considered sensitive, as such power perceived to belong to sovereign within the context of arbitration in those days. Indeed, national legislatures did not generally recognise the power in those days.³¹ The concept of arbitral provisional measures from a standing body was reintroduced to international commercial arbitration world in the 1990s.³²

1.2 Recognition of Arbitrators' Power and of Concurrent Jurisdiction

The 1915 Plan was also inspired the drafters of the first ICC Rules of Arbitration. In 1920, the Council of the ICC decided to undertake a study of international commercial arbitration.³³ A special commission and, subsequently, a sub-committee were set up for this purpose.

²⁸ Frédéric Eisemann, "The Court of Arbitration: Outline of Its Changes from Inception to the Present Day", in: ICC (ed.), *60 Years on - A Look at the Future*, ICC Publication No. 412 (Paris: ICC Publishing 1984), 391, 395 ("A Look at the Future").

²⁹ Id.

³⁰ See Chapter I, *infra* note 52 and accompanying text.

³¹ See Chapter I, *infra* Parts 2.1 and 2.2.

³² See *infra* Chapter III, Part 1.

³³ "Introduction", *ICC Brochure No. 13*, 3 (1920).

Having studied various rules,³⁴ the sub-committee proposed a set of conciliation and arbitration rules, which were originally prepared by Owen D. Young.³⁵ Article 10 of the proposed arbitration rules dealt with provisional measures.³⁶ This Article was inspired from the 1915 Plan.³⁷ After lengthy discussions, the arbitration rules³⁸ were adopted with minor amendments in 1922.³⁹ These rules became the ICC Arbitration Rules 1923.

Since 1923, the regulation under the ICC Arbitration Rules in their several revisions almost always contained a provision on provisional measures. To this end, it seems that, until the 1940s, the ICC Arbitration Rules was pioneering in international plane. Since then, several arbitration rules, following the ICC example, provided for interim protection of rights.

This Part examines the approach of the ICC Arbitration Rules from their initial inception and of various other international (institutional and *ad hoc*) arbitration rules to the issue of provisional measures.

³⁴ These rules were the Arbitration Rules of the International Cotton Federation (1911), the Arbitration Rules of the Publisher's Congress (1912), the results of the inquiry conducted by the Berlin Chamber of Commerce, the rules proposed by the New York Chamber of Commerce, and the Arbitration Rules attached to the 1915 Plan. See Pozzi, 6, 14.

³⁵ "Proposed Plan For Conciliation and Arbitration Between Traders of Different Countries", *ICC Brochure No. 13*, 23 (1920) (the "Proposed Plan"). Owen D. Young was the chairman of the committee on commercial arbitration of the Chamber of Commerce of the U.S.

³⁶ This Article provides:

In all cases the arbitrators, at the request of either or both of the interested parties, shall have the right to make a provisional decision providing for such measures of preservation as may be necessary, in so far as concerns the goods in dispute.

Proposed Plan, 28

³⁷ On Article XII of the 1915 Plan, see Chapter I, *supra* Part 1.1.1. It was no surprise that the 1915 Plan was affected the drafting of the rules as Young who prepared the draft was the chairman of the committee on commercial arbitration of the Chamber of Commerce of the U.S.

³⁸ These rules and the opinions of its author published in the ICC Digest No. 3. See George L. Ridgeway, *Merchants of Piece – The History of the International Chamber of Commerce* (Boston/Toronto 1959), 324.

1.2.1 ICC Arbitration Rules 1923, 1927, 1931, and 1939

With the exception of the 1927 Rules, the 1923, 1931, and 1939 ICC Arbitration Rules dealt with the issue of interim protection of rights. This is an apparent reflection of the importance given to the issue under the rules. Article XXXIX, Section C of the Arbitration Rules 1923 provided:

In all cases, the arbitrators, at the request of either of the interested parties, shall have the right to render a provisional decision, providing for such measures of preservation as may be indispensable and, when strictly necessary, disposing of the merchandise or objects in dispute; it being, however, understood and agreed that any such decision of the arbitrators shall not carry with it any personal responsibility on the part of such arbitrators.⁴⁰

Perhaps, due to a trouble caused by the exercise of the tribunal's power or by the enforcement against a recalcitrant party of a provisional decision, a provision on interim protection of rights was removed from the ICC Arbitration Rules in 1927. However, a rule on interim protection was re-appeared in the 1931 amendments to the Rules. Article 11 of the ICC Arbitration Rules 1931, which was lengthier than Article XXXIX of the previous Rules provided:

When the parties are bound by the arbitration clause of the International Chamber of Commerce, in urgent cases at the request of the parties or of one of them, the President of the Court of Arbitration at any time before the arbitrator has entered upon his duties, and the arbitrator himself after he has entered upon his duties, shall have power to appoint an expert⁴¹ and if necessary

³⁹ Id.

⁴⁰ Rules of the Court of Arbitration of the International Chamber of Commerce, *Court of Arbitration Acceptance of Warrant* 41 (19 January 1923). It is noteworthy that the Drafting Committee of the Rules further requested that "the [ICC] Headquarters [should] take into account the practice of arbitration, where necessary, the rights of owners of trade marks of the goods in dispute, when the arbitrators according to Article XXXIX might dispose of these goods." See "Explanatory Commentary of the Rules of Conciliation (Good Offices) and Arbitration", Appendix to *ICC Brochure No. 21*, 4 (1923).

⁴¹ It is not clear why power as regards interim protection was entrusted to an expert. The drafters of the Rules probably thought that the handling of provisional measure applications was necessitated a special experience. In respect of a possible

several experts to make statements of facts, adopt all conservatory measures and if necessary to sell, after having stated the facts, the goods in dispute for the account of their lawful owner and in the form prescribed by local laws.

The expert appointed shall present to the Court of Arbitration or to the arbitrator a detailed report on the accomplishment of his mission.⁴²

In 1939, Article 11 was amended so as to:

(1) modify the title as follows: "Provisional or Conservatory Measures".

(2) in the first paragraph, substitute for the words "conservatory measures" the words "provisional or conservatory measures".

(3) at the end of the article add: "and shall if necessary pay over the proceeds of sale to the International Chamber of Commerce (whose Secretary General shall have power to give a good receipt for the same) to be held for disposal in accordance with the Arbitration Award".⁴³

A third paragraph was also added that Article:

"Before or in the course of the proceedings anyone or more of the parties can, if they deem this preferable, apply to any competent judicial authority for provisional or conservatory measures, without this thereby violating the arbitration clause by which they are bound. Notice of such an application shall be given forthwith to the Court of Arbitration".⁴⁴

negative effect of granting interim measures through an expert, the revision committee stated:

This article [11] meets certain fears expressed in this connection; it had been felt that it would be difficult to set a limit to the measures to be taken by the expert as and when necessary and that such measures might prejudice the subsequent arbitration procedure. ... Further, the mission of the expert has been confined and limited as closely as possible, so that it ought now to be impossible for any action to be taken by the expert to have any undue influence on the subsequent arbitration or on the jurisdiction of the arbitrator.

Robert, 302.

⁴² "Resolution No. 14 – Commercial Arbitration - Amendments to the Rules of Conciliation and Arbitration of the International Chamber of Commerce", *ICC Brochure No. 77*, 28 (1931). Article 11 was entitled as "conservatory measures."

⁴³ "Resolution 14 – Amendments to the Rules of Conciliation and Arbitration of the International Chamber of Commerce", *ICC Brochure No. 100*, 13 (1939).

⁴⁴ *Id.* According to Bagge, the amendment aims at confirming a right that already exists but about which there has been some uncertainty, viz., that parties bound by an arbitration clause can, without foregoing the benefit of the clause, apply to the courts for conservatory

Within twenty-five years from the 1915 Plan, two main issues were established, there was a commercial need for interim protection of rights⁴⁵ and such protection could be sought from arbitrators. Also, the express acceptance of the court's role represented a remarkable step and influenced most of today's arbitration rules and laws. The acceptance recognised certain shortcomings of arbitral jurisdiction (e.g. arbitrators' lack of coercive powers) and more importantly constituted reflection of the negative approach of legislatures and courts to such jurisdiction.⁴⁶

1.2.2 Further Developments in the 1940s and Onwards

Institutional arbitration rules were generally silent in regard of interim measures of protection in the midst of the twentieth century.⁴⁷ For example, in 1958, only twenty of 127 arbitration rules (including rules of all major arbitral institutions) surveyed dealt with interim measures of protection.⁴⁸ Thirteen of those rules expressly empowered arbitral tribunals to take interim measures whereas seven of the rules referred

measures such as attachment or distraint the application of which is reserved to the national judicial authorities.

Algot Bagge, "Amendments to the ICC's Rules of Conciliation and Arbitration", *World Trade* 47 (August 1939).

⁴⁵ These measures were initially referred to as "measures of preservation" or "conservatory measures." The aim was to protect the merchandise or object in dispute. That was because their initial concern was the sale of goods transactions. Indeed, the examples to such measures, e.g., sale of goods confirm that analysis. However, the 1939 amendments made a reference to "provisional and conservatory measures." The aim was to enlarge the scope of the provision on interim protection of rights (regardless of how a measure is referred to under the applicable local law) in order to suit the provision for any type of transaction (in addition to sale of goods transactions). See Bagge, 47.

⁴⁶ On such approach, see Chapter I, *infra* Part 2.1.

⁴⁷ But see, for instance, Article 24 of the (then) Arbitration Rules 1948 of the London Court of Arbitration. This Article provided:

The arbitrator, arbitrators or umpire shall have power to make such order as he or they may think fit for the interim protection, warehousing, sale or disposal of the subject matter of arbitration. When the subject matter of the arbitration is sold in accordance with this Rule the price received shall be paid forthwith into a separate banking account in the name of the London Chamber of Commerce pending the result of the arbitration.

parties to courts for such measures.⁴⁹ What can be inferred from this statement is that the power of arbitrators to grant provisional measures was not widely recognised in the 1940s. Such little recognition is tenable. Once such powers were adopted under arbitration rules in a period between 1919 and 1940, the reaction of that adoption of national legislatures and courts was generally excessively reluctant due to the mistrust towards arbitrators and arbitration.⁵⁰ The reason for such mistrust was historical. In addition, interim measures were thought to be within exclusive jurisdiction of courts.⁵¹ The reason for the exclusivity was both historical and political. Further, perhaps most importantly, business environment was changed following the Second World War. The trends restricting free movement of goods and business were adopted.⁵²

Due to the above mistrust and exclusivity, the competence of an arbitral tribunal to grant provisional measures had a set back commencing, in international plane, with the ILA Arbitration Rules 1950 (the “Copenhagen Rules”). These Rules refrained from dealing with arbitral powers. This approach affected many arbitration rules and its effect lasted until the 1990s. The 1960s witnessed revival of that power in

⁴⁸ UN Doc Trade/WP.1/15/Rev.1, 57.

⁴⁹ Id.

⁵⁰ See Chapter I, *infra* Part 2.2.

⁵¹ See Chapter I, *infra* Parts 2.1 and 2.2, and *infra* Chapter II, Part 3. It is noteworthy that, in respect of security for costs, the attitude of the rules was different. The majority of those (102 in precise) 127 arbitration rules contained a “provision either for security for the costs of arbitration, or for the payment prior to the hearing of the fees, or part of the fees, payable to the arbitral institution.” See Peter Benjamin, *New Arbitration Rules for Use in International Trade* in: Pieter Sanders (ed.), *International Commercial Arbitration* (Paris: Dalloz 1958), v.I, 323, 377 (“International Commercial Arbitration I”). In some cases, the security could be granted for both costs and arbitral fees. Some of the rules, in addition, provided for security for claim provided either by the claimant or both of the parties. Id., 377-378.

⁵² See, generally, Jones, 46-52; and Loukas Mistelis, “Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law” in: Ian Flechter / Loukas Mistelis / Marise Cremona (eds.), *Foundations and*

international level due to the recognition of the power's importance. The UNECE Arbitration Rules 1966, and the UNECAFE Arbitration Rules 1966 initiated the revival.

The mistrust and exclusivity naturally affected approach of arbitration rules to the power of judicial authorities to grant provisional measures and the effect of such power on the arbitration agreement. The rules generally indicated that a request to a court for those measures is neither a waiver nor an infringement of that agreement. The concurrent jurisdiction of arbitrators and of courts for the grant of arbitral provisional measures was expressly adopted again under the UNECE Arbitration Rules.⁵³ The ICC Arbitration Rules 1975 with its 1988 amendments followed this approach.

This Part deals with how the approach to interim measures evolved from the midst towards the final quarter of the last century. For this purpose, the following rules are examined: the AAA Commercial Arbitration Rules from 1944 to 1997, the ILA Rules on Commercial Arbitration 1950, the ICC Arbitration Rules from 1955 to 1988, the UNECE Arbitration Rules 1966, and the UNECAFE Arbitration Rules 1966.

1.2.2.1 AAA Commercial Arbitration Rules (1944 to 1997)

The AAA's first commercial arbitration rules were adopted in 1926.⁵⁴ The 1944 rules contained a provision dealing with arbitral provisional measures and not with court assistance. This provision lasted until the

Perspectives of International Trade Law (London: Sweet & Maxwell 2001), para. 1-002 ("Harmonisation").

⁵³ The adoption of the concurrent jurisdiction arose from the reading the Rules along with the European Convention. On this Convention, see Chapter I, *infra* Part.2.2.

⁵⁴ These rules were generally applicable to both national and international cases.

1997 with slight revisions in due course of time.⁵⁵ Article 35 of the 1944 rules stated in its original version:

The Arbitrator, with the consent of the parties, may issue such interim orders as may be deemed necessary to safeguard the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.⁵⁶

1.2.2.2 Copenhagen Rules

The Copenhagen Rules reflected the negative attitude of national legislatures towards arbitral power to grant provisional measures.⁵⁷

These Rules constituted an initiation of a shift under arbitration rules towards accepting exclusive power of courts in handling provisional measures.⁵⁸ Indeed, in accordance with Rule 1(2), the parties

reserve the right to apply to the courts in the manner prescribed by local law, for protective or urgent measures such as inquiries, or investigations by or before experts, which do not pre-judge the issue [in dispute].

Rule 1(1) dealt with the interrelation between the merits of the case and a provisional measure request. It provided that parties to arbitration undertook not to apply to a court for the determination of dispute (substance) in question. In other words, the request was separated

⁵⁵ The 1997 version of the rules and the 1991 version of the International Arbitration Rules along with their recent amendments closely follow Article 26 of the UNCITRAL Arbitration Rules.

⁵⁶ Article 35. In 1945, the term “interim” dropped from the text. Reflecting the attitude of those days, Article 35 aimed to preserve property in question. That is because international arbitration, in those days, concerned with sale of goods agreements. This is conceivable as most of the transactions and disputes were, in fact, related to sale of goods. For instance, between 1972 and 1974, total number of international cases administered by the AAA was 104 and 43 percent of those cases was related to sales contracts. Howard M. Holtzmann, *A Guide to International Arbitration Under the Rules of the American Arbitration Association* (New York, 1975), 8 (unpublished). Indeed, Article 26 of the UNCITRAL Arbitration Rules, which was adopted in 1976, too makes specific reference to sale of goods agreements. The scope of provisions on provisional measures was widened in Article 17 of the Model Law in 1985. In confirmation with this development, the title of the AAA rules amended from “conservation of property” to “interim measures” in 1988.

⁵⁷ See Chapter I, *infra* Parts 2.1 and 2.2.

from and should not affect the scope of arbitral domain in respect of the merits.

1.2.2.3 ICC Arbitration Rules (1955 to 1988)

There was a dramatic change on the handling the power of an arbitral tribunal to grant provisional measures in the 1950s under the ICC Arbitration Rules. The ICC Arbitration Rules 1955 pursued the shift towards recognition of courts' exclusive jurisdiction for the grant of provisional measures as set forth under the Copenhagen Rules. Indeed, until 1998, the Rules refrained from expressly granting arbitrators the power to issue provisional measures.⁵⁹

The ICC Arbitration Rules 1955, unlike their predecessors, did not expressly confer upon an arbitral tribunal the power to grant provisional measures.⁶⁰ The Rules dealt with the effect of the court intervention for providing interim protection on the agreement to arbitrate. Article 13(5) of the Rules provided:

The parties may, in case of urgency, whether prior to or during the proceedings before the arbitrator, apply to any competent judicial authority for interim measures of protection, without thereby contravening the arbitration clause binding them. Any such application, and any measures taken by the judicial authority shall be brought without delay to the notice of the Court of Arbitration or, when necessary, of the arbitrator.

It is noteworthy that a request to a court was optional under the ICC Arbitration Rules 1939 whereas the ICC Arbitration Rules 1955 aimed

⁵⁸ This shift did not affect the approach to the arbitral powers under the AAA Arbitration Rules but had direct influence on the ICC Arbitration Rules. See Chapter I, *infra* Part 1.2.2.3.

⁵⁹ The ICC Arbitration Rules 1998 give such powers to arbitrators. On the detailed examination of these Rules, see *infra* Chapter IV.

⁶⁰ Indeed, as compared to the ICC Arbitration Rules 1939, the express power of the tribunal to grant provisional measures was completely dropped off because "[t]he conservatory measures and similar actions . . . gave rise to more problems." Eisemann, 395.

to introduce an important limitation: a request to a court is permitted where there is urgency.

Article 13(5) of the ICC Arbitration Rules 1955 was, whilst mainly containing the basic theme, slightly amended in Article 8(5) of the ICC Arbitration Rules 1975.⁶¹ In the 1988 amendments to this last Rules, Article 8(5) was restated as:

Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator.

Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat of the Court of Arbitration. The Secretariat shall inform the arbitrator thereof.

Article 8(5) brought two important changes. It made a very important reservation as to the need of courts' assistance. It initially differentiated between two stages of arbitration proceedings. Although the Rules made no reservation for the stage prior to transmittal of a file to arbitrators, they indicated that, after the transmittal of the file, a right to apply to a judicial authority should be exercised "in exceptional circumstances." This restriction served to limit a request for provisional measures to a court in case where the tribunal was appointed.⁶² However, Article 8(5) was fallen short of express recognition of arbitral power to issue those measures.⁶³

⁶¹ The text of these Rules reprinted in I YCA 157-166 (1976).

⁶² This restriction seems to be a reflection of the view of complete autonomy of arbitration from court intervention.

⁶³ This Article recognises the relevant powers reserved to the arbitrator. The intention was "neither to mandate nor [to] exclude" the issuance of interim measures by arbitrators. Schwartz, *Provisional Measures*, 46. In arbitral practice, arbitrators were generally found themselves empowered to grant those measures basing generally on the language of Article 8(5). See, e.g., Ali Yesilirmak, "Interim and Conservatory Measures in ICC Arbitral Practice", 11(1) ICC Int'l Ct Arb Bull 31,

1.2.2.4 UNECE Arbitration Rules 1966

The tide towards arbitral powers to grant provisional measures turned again with the introduction of the UNECE Arbitration Rules. These Rules again re-recognised the commercial need for interim protection and perhaps influenced from the ICSID Convention, which expressly empowered an arbitrator to “recommend” a provisional measure.⁶⁴ The Rules adopted to complement the European Convention, which aimed to promote East-West trade. The Rules did not expressly deal with the court assistance to arbitration.⁶⁵ Article 27 of the Rules provided:⁶⁶

Subject to any legal provision to the contrary, the arbitrators are authorized by the parties to take any measure of conservation of the goods forming the subject matter in dispute, such as the ordering of their deposit with a third party, the opening of a banker's credit or the sale of perishable goods.

1.2.2.5 UNECAFE Arbitration Rules 1966

These Rules were adopted for mainly promoting arbitration in the ECAFE region.⁶⁷ The Rules failed to address the judicial powers to grant provisional measures but indicated, in recognition of the

32, note 13 and 14 (2000) (“Interim”). The change of attitude towards permission of arbitral powers to grant provisional measures was undoubtedly affected by the UNECE and UNECAFE Arbitration Rules. See Chapter I, *infra* Parts 1.2.2.4 and 1.2.2.5, respectively.

⁶⁴ See Chapter I, *infra* Part 2.2.

⁶⁵ That is because the Rules were adopted for mainly complementing the European Convention, which contain a provision on the court assistance (Article VI(4)).

⁶⁶ The Rules gave further power to an arbitrator to grant security for costs. Article 28 of the Rules stated that “[t]he arbitrators shall be entitled to require security for the costs of the arbitration proceedings.” The arbitrators' power is restricted to costs of arbitration but not to claim in dispute as that was the trend at the time of the Rules' adoption. Benjamin in: Sanders, *International Commercial Arbitration*, 345. As to which costs and their initial apportionment, Cohn states that only the costs of arbitration excluding costs of a party are counted and that they should equally be distributed as an initial measure between the parties should the tribunal decide to require security for costs. E. J. Cohn, “The Rules of Arbitration of the United Nations Economic Commission for Europe”, 16 *ICLQ* 946, 966-967 (1967).

⁶⁷ See, generally, Pieter Sanders, “ECAFE Rules for International Commercial Arbitration”, in: Pieter Sanders (ed.) *International Arbitration Liber Amicorum for Martin Domke* (The Hague: Martinus Nijhoff 1967), 252.

importance of arbitral powers to grant these measures, in Article VI(6) of the Rules.⁶⁸

The arbitrator/s shall be entitled to take any interim measure of protection which he/they deems/deem necessary in respect of the subject matter of the dispute.

2 International and National Legislations and Court Decisions

For a period between late 19th and early 20th century, arbitration awards were generally only morally binding; there were no legal sanctions under most national laws⁶⁹ against non-compliance of arbitrators' decisions. When business persons commenced to recognise arbitration as a favourable dispute resolution mechanism alongside litigation, resistance from judiciary including lawyers was emerged. Courts, for example, at a time, did not accept the idea of their jurisdiction being ousted by private agreements in England.⁷⁰

Nussbaum explained the negative attitude towards arbitration:

To a certain degree this unfavourable attitude may be ascribed to a subconscious jealousy of arbitration, which may be competing with the courts; but the actual basis of the opposition to arbitration should be sought elsewhere. It will be admitted that the increase of arbitration [practice] might endanger state jurisdiction and the high ideals of impartial justice, if legislative and juridical measures for the remedy of abuses were not provided.⁷¹

⁶⁸ Article VI(7) provided that "[t]he arbitrator/s shall be entitled to fees and shall be entitled to require security for the costs of the arbitration proceeding and his/their fees."

⁶⁹ A notable exception is the English Act for Amending and Consolidating the Enactments Relating to Arbitration 1889 (the "EAA 1889"). See Section 12.

⁷⁰ See, e.g., *Thompson v. Charnock* (1799) 8 Term Reports 139-140; and *Scott v. Avery* [1843-1860] All ER 5. But see Derek Roebuck, "The Myth of Judicial Jealousy", 10(4) *Arb Int'l* 395-406 (1994) (arguing that there was no evidence of judicial antipathy towards arbitration before the 18th Century.).

⁷¹ Arthur Nussbaum, "Introduction", in: Nussbaum (ed.), xi ("Introduction"). See also Arthur Nussbaum, "Problems of International Arbitration" in: Nussbaum (ed.), 1, 5 ("Problems"); Wesley A. Sturges, "Commercial Arbitration in the United States of America" in: Nussbaum (ed.), 165, 169-171. The negative attitude partly owed to the chaos erupted in France due to the law under which all disputes were subject to arbitration in 1790. On this chaos, see mainly Jean-Louis Devolvé, "The Fundamental Right to Arbitration", in: Hunter / Marriot / Veeder (eds.), 141, 142.

A further reason for national legislatures and courts' negative attitude towards arbitration was related to an inherent problem of arbitration; namely, arbitrators' lack of power to coerce compliance with their decision.⁷²

Following the enactment of some legislative remedies against possible abuses of ousting courts' jurisdiction through arbitration agreement,⁷³ it was again in England where the negative attitude towards arbitration initially relaxed in the 19th century. Several American States followed this trend soon afterwards.⁷⁴

Once courts recognised and enforced arbitration agreements and awards,⁷⁵ there were further issues to overcome for improving the quality of arbitral justice. Dealing with such issues was also important for the success of international arbitration and, thus of international commerce. In the 1920s, a very important concept, which complemented the recognition and enforcement of arbitration agreements, was emerged. The concept was court assistance to arbitration.⁷⁶ The court assistance was initially available to arbitration in respect of appointment and removal of an arbitrator and compelling witnesses to attend.⁷⁷ The concept accepted by English and American legislatures was also extended in time to grant of provisional remedies in support of arbitration in those countries. This approach was, however, not generally followed; laws of many countries were silent on the concept. Similarly, many laws were silent on arbitral competence to grant provisional measures. A small number of laws dealt with such

⁷² On the issue of arbitrators' lack of coercive powers, see *infra* Chapter II. part 4.1 and *infra* Chapter V, Parts 2 and 3.

⁷³ See the AA 1889, section 4.

⁷⁴ Nussbaum, Introduction, xi. See also Sturges, 169-171.

⁷⁵ See, e.g., R. Sutton, "Arbitration in English Law" in: Nussbaum (ed.), 52-60.

⁷⁶ This concept was characterised as a positive effect of an arbitration agreement. Nussbaum, Problems, 6.

⁷⁷ *Id.*

competence. Those laws were generally restrictive. The silence and the negative attitude had both historical and/or political causes.

Since the 1920s, the process of acceptance and recognition of the concepts of court assistance to arbitration in regard of provisional remedies and of arbitral competence to grant those remedies (particularly the latter concept) was, under international and national legislations, very slow. For a long period of time, a certain degree of mistrust towards arbitration was existed. In addition, courts considered arbitrators as their rivals or competitors.⁷⁸ The worldwide acceptance of the court assistance to arbitration and of the arbitral tribunals' power to grant interim measures of protection begun in the 1980s.

The evolution of the concept of court assistance and of arbitral competence to grant interim measures under international and national legislations and court decisions will be studied by examining three periods: the 1920-30s, 1950-60s, and 1980s.

2.1 1920-30s: Breaking of Judicial Mistrust Towards Arbitration - Emergence of the Concepts of Court Assistance (Decrease in Rivalry Towards Arbitration) and of Arbitral Power to Grant Provisional Measures

Neither the Geneva Protocol nor the Geneva Convention did contain any provision on provisional measures.⁷⁹ It seems that only a handful of national laws dealt with court assistance to arbitration and arbitrators' power to issue provisional measures. The concept of court assistance to arbitration in regard of provisional remedies emerged in the U.S.

⁷⁸ Indeed, it was the case in France until 1981 when the new French arbitration law adopted. See, e.g., Pluyette, 72, 74.

⁷⁹ Apparently, interim measures were not considered one of the main issues of arbitration in those days.

The statutes of Illinois (1921),⁸⁰ Nevada (1925),⁸¹ North Carolina (1939),⁸² Utah (1927),⁸³ Wyoming (1931),⁸⁴ and the U.S. AA 1921⁸⁵ permitted the grant of certain provisional remedies by a court where substance of a dispute fell into arbitral domain. Out of those laws, Section 12 of the Nevada Act is remarkable:

At any time before final determination of arbitration the court may upon application of a party to the submission make such order or decree or take such proceedings as it may deem necessary for the preservation of the property or for preserving satisfaction of the award.

A similar but more extensive provision was contained in the EAA 1934.⁸⁶ Under the Act, where a dispute was to be arbitrated, a court had power to make orders on security for costs, preservation, interim custody or sale of any goods which were the subject-matter of arbitration, security for amount in dispute, detention, preservation or inspection of any property or thing which was the subject of arbitration, and interim injunctions or appointment of a receiver.⁸⁷

However, most national arbitration laws did not deal with the issue of courts' assistance in regard of provisional measures to arbitration. That was because the availability of court assistance to arbitration as to provisional measures was implicitly assumed.⁸⁸

⁸⁰ Revised Statutes of the Illinois, chapter 10, sections 1-17.

⁸¹ Statutes of Nevada (1925), chapter 7.

⁸² North Carolina Code Annotated (Michie, 1939), section 898(1).

⁸³ Utah Laws, chapter 62, section 12.

⁸⁴ Wyoming Revised Statutes Annotated (1931), section 7-112.

⁸⁵ United States Statutes at Large, v. 43. (68th Cong. 1923-25), Chapter 213, section 8.

⁸⁶ Section 8, which was re-enacted in Section 12(6) of the EAA 1950. Section 44 of the EAA 1996 contains, in most respects, a similar provision. The EAA 1934 was enacted verbatim in Northern Ireland (AA 1937, c. 8, Schedule II), and New Zealand (AA 1938, Schedule I).

⁸⁷ See Article 8 of the EAA 1934, and the First Schedule to the Act.

⁸⁸ Bagge, 47.

In respect of power of a tribunal to grant interim measures of protection, laws were generally silent too in the 1920s.⁸⁹ Laws of, for instance, only three countries (out of eleven⁹⁰) dealt with the issue. The Dutch law dictated compliance of all provisional orders of an arbitral tribunal⁹¹ whereas, under the German law, arbitrators were not authorised “to issue temporary attachments or injunctions”.⁹² Like the German law, the Greek law stated that arbitral tribunal was not authorised to issue a provisional decision.⁹³ The silence and the negative attitude were related to historical prejudice against arbitration. They were also related to political reasons because no sovereign in those days would even consider leaving the issue of interim measures to a private person, an arbitrator. It was generally thought that those measures would require the use of coercive powers, which were exclusively reserved to the sovereign.

2.2 1950-60s: Even Less Rivalry but Residue of Mistrust

In 1956, when the problems of arbitration were discussed, the court intervention and assistance to arbitration was highlighted. It was thought that such intervention and assistance were necessary.⁹⁴ This was despite the fact that jurisdiction of courts was completely ousted by an arbitration agreement in regard of the substance of a case in question.⁹⁵ The necessity arose in cases where arbitrators lacked jurisdiction in dealing with certain essential issues. One of the examples given was collection of evidence including compelling witnesses to take oath or appear. It was observed that assistance to

⁸⁹ See generally Nussbaum (ed.), 193-235.

⁹⁰ The International Yearbook dealt with the arbitration laws of Germany, England, France, Greece, Italy, the Netherlands, Austria, Palestine, Poland, Russia, and the U.S. Id., 193-235.

⁹¹ See id., 212.

⁹² Id., 44.

⁹³ Id., 50.

⁹⁴ UN Doc Trade/WP1/12, para. 40.

⁹⁵ Id.

arbitrators was essential and allowed by “nearly all legal systems”.⁹⁶ This was based on the promise that “when the arbitrators need the help of the courts they should be allowed to ask them to perform the acts which they themselves cannot perform.”⁹⁷ The same concept and its basis applied to interim and conservatory measures.⁹⁸ The theoretical grounds of the concept of court assistance to arbitration were explained:

In all these cases [where court involves in arbitration] *the question is no longer one of competition but of co-operation between the two types of jurisdiction.* There can therefore be no objection in principle to this sort of intervention by the courts in arbitration proceedings. It should be remembered, however, that intervention by the courts may mean extra delay and expense. To safeguard the reputation for rapidity and cheapness which is one of the most important inducements to parties to decide to resort to international commercial arbitration, *requests for the intervention of the courts might usefully be limited in the preliminary stages and in the adoption of provisional and conservatory measures.* The extent to which that could be done would depend on the extent of the powers granted to arbitrators in this respect by the various national legal systems.⁹⁹ (Emphasis added.)

Courts’ assistance to arbitration was also recognised by the UNIDROIT Draft Law on Arbitration in Respect of International Relations of Private Law 1957.¹⁰⁰ Article 5(2) of the Draft Law provides that “[t]he fact of claiming in a court of justice interim measures of protection shall not prevent an arbitration agreement from being relied on.” This Article stated that a request to a court is not a waiver of agreement to arbitrate; accordingly, the substance of a case remains within arbitral domain.¹⁰¹

⁹⁶ Id. See also UN Doc Trade/WP.1 Add.1, para. 11. It was indicated that interim measures or measures of conservation could be obtained from a court under all European legal systems even though the substantive issues fell into jurisdiction of an arbitral tribunal. UN Doc Trade/WP.1/29, para. 53.

⁹⁷ UN Doc Trade/WP1/12, para. 40.

⁹⁸ Id., para. 41.

⁹⁹ Id., para. 42.

¹⁰⁰ Reprinted in (1957) *UNIDROIT Yearbook* 135.

¹⁰¹ The Draft Law, in this respect, followed the approach initially set forth in the ICC Arbitration Rules 1939. See Chapter I, *supra* Part 1.2.1.

The New York Convention does not expressly deal with interim measures.¹⁰² However, the European Convention¹⁰³ took a similar view to the UNIDROIT Draft Law. The Convention itself did not expressly deal with the arbitral competence to grant provisional measures but there is no prohibition in this respect.¹⁰⁴ Article VI(4) of the Convention provides:

A request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the case to the court.

Further, it is considered that the Convention permits court assistance to arbitration taking place in a country foreign to the place where the assistance is sought.¹⁰⁵

¹⁰² But see *infra* Chapter II, Part 4.2.

¹⁰³ This Convention was adopted to satisfy a need to overcome certain problems in East-West trade in Europe for using arbitration as a dispute settlement mechanism. Para. 4 of the Preamble of the Convention. On the convention, see generally Pierre Jean Pointet, *The Geneva Convention on International Commercial Arbitration* in: Pieter Sanders (ed.) *International Commercial Arbitration - A World Handbook* (La Haye: Martinus Nijhoff 1965), v.III, 263 ("International Commercial Arbitration III"); P. I. Benjamin, "The European Convention on International Commercial Arbitration", 37 BYIL 478 (1961); and Dominique T. Hascher, "European Convention on International Commercial Arbitration of 1961", XVII YCA 711 (1992) ("European Convention"). The Convention convened under the auspices of the Economic Committee for Europe of the United Nations. See para. 2 of the Preamble to the Convention. Although the Convention named European and signed and ratified by mainly European Countries, the accession to the Convention is open to any country, which is a member of the United Nations. See, mainly, Hascher, 711. In fact, the UNECE Rules adopted to complement the Convention, which provides for that power. See Chapter I, *supra* Part 1.2.2.4.

¹⁰⁴ Hascher, European Convention, 735. Recent amendment work on the Convention initially highlighted the importance of the above Article and suggested for enlargement of it. See UN Doc Trade/WP.5/2000/8/Add.1, para. 31. However, the work later focused on various other issues for improving effectiveness of the Convention. See UN Doc Trade/WP.5/2000/Informal/1.

¹⁰⁵ It was observed that, at the time of drafting the Convention, in "practically" all European countries, arbitrations treated in the same way regardless of being held in a country in question or elsewhere. See UN Doc Trade/WP.1/29, 17-19.

Historically, the ICSID Convention followed the European Convention. Article 47 of the ICSID Convention provides that, unless otherwise agreed, arbitrators can recommend¹⁰⁶ any measure aim to preserve parties' rights.¹⁰⁷ The Convention does not contain any express provision on the issue of court assistance but excludes any remedy other than ICSID arbitration itself in accordance with Article 26 of the Convention. It is, however, considered that Article 26 is, due to self-contained system created by the ICSID Convention and Arbitration Rules, excluded any court assistance.¹⁰⁸

The European Convention Providing a Uniform Law on Arbitration 1966 closely followed the European Convention in regard of interim protection of rights.¹⁰⁹ Article 4(2) of the Convention states that “[a]n application to the judicial authority for preservation or interim measures shall not be incompatible with an arbitration agreement and shall not imply a renunciation of the agreement.”

Within the 1950-60s, national arbitration laws were often silent on the court assistance and arbitral powers to grant provisional measures.¹¹⁰

¹⁰⁶ It is recalled that the form of a measure was indicated as “proposal” under the 1922 Plan, although the preparatory materials on the ICSID Convention made no reference to the Plan.

¹⁰⁷ See also Rule 47 of the Arbitration Rules. On arbitral provisional measures in ICSID arbitration, see generally *infra* Chapter IV.

¹⁰⁸ On this issue, see *infra* Chapter II, Part 2.

¹⁰⁹ European TS, No. 56 (1966).

¹¹⁰ Indeed, the 1960s also witnessed a doctrinal argument that, mainly, arbitration should be detached from restraints and controls of laws of place of arbitration. See, generally, Berger, *International*, 40-89; Redfern / Hunter, paras. 2-16-2-19; Jan Paulsson, “Arbitration Unbound: Award detached from the Law of Its Country of Origin”, 30 ICLQ 358 (1981); and Jan Paulsson, “Delocalization of International Commercial Arbitration”, 32 ICLQ 53 (1983). Under this doctrine, courts played the role of control at the stage of enforcement. The doctrine, although contributed freeing from national restraints over international commercial arbitration, seems to be ended up with failure of recognition. See, e.g., Redfern / Hunter, para. 2-17. It should, however, be noted that even some of the proponents of that doctrine accepted court assistance to arbitration during arbitral proceedings. See Goldman, 275-282. The approach of both the ICC and the LCIA Arbitration Rules seemed to support, at least partially, the detachment doctrine for a period of time. Article 8 of

The court assistance to arbitration was generally assumed for the grant of provisional measures. The Swiss Intercantonal Arbitration Convention 1969 (the "Concordat") is an example on how provisional measures are regulated within that period. Article 26 of the Concordat initially sets the rule: "judicial authorities alone have jurisdiction to make provisional orders." It then uniquely states that "the parties may voluntarily submit to provisional orders proposed by the arbitral tribunal". Although the approach of Article 26 towards interim protection of rights was very liberal for the late 1960s when it was enacted, it fell short of giving full powers to arbitral tribunals to issue interim measures of protection. However, they could "propose," "offer," or "recommend" provisional measures. The Concordat's approach to provisional measures contains a residue of mistrust towards arbitration. This approach reflects the perspective of many national laws. It also reflects the legislatures' reaction to power given to arbitrators for the grant of provisional measures during the process of enactment of many arbitration laws and the era of decolonisation and nationalisation¹¹¹ of legal systems.

2.3 1980s: The Tide Began to Turn - Trust to Integrity of Arbitrators and Arbitration

This period marked the change of approach towards arbitration. It was observed, for example that until the enactment of the new French arbitration law in 1981, arbitration was considered a rival competitor to

the ICC Arbitration Rules 1975 provided that courts' assistance would be sought under exceptional circumstances. See Chapter I, *supra* Part 1.2.2.3. Similarly, the LCIA Arbitration Rules 1985 kept power to grant certain interim remedies solely within the arbitral jurisdiction. Articles 13. The text of the Rules reprinted in X YCA 157, 162 (1985). Article 13 seems to aim at "eliminating a potential means for obstructing progress in arbitration." See J. Martin H. Hunter / Jan Paulsson, "A Commentary on the 1985 Rules of the London Court of International Arbitration", X YCA 167, 170 (1985). However, the approach of both Rules to provisional measures was changed due to the recognition of the need for court assistance for efficiency of arbitration. See *infra* Chapter II, Part 4.4.

¹¹¹ Mistelis, Harmonisation, para. 1-002.

courts in France.¹¹² However, growing importance and practice of international commercial arbitration and the effect of trustworthiness or integrity that arbitration and arbitrators gained over 65 years of arbitration practice caused the change of perception of arbitration as a rival dispute resolution mechanism to judiciary. In fact, this is the period when arbitrators' powers to grant provisional measures commenced to have wide recognition. McDonnell examined in a comparative study the availability of provisional measures within the 1980s.¹¹³ According to his study, twelve out of twenty-six jurisdictions surveyed provided for concurrent jurisdiction to judicial authorities and arbitral tribunals. Thirteen of those contained exclusive powers to courts.¹¹⁴ One jurisdiction's approach could be interpreted as providing for exclusive jurisdiction to arbitrators.¹¹⁵

The allocation of the power under concurrent jurisdiction approach was, according to McDonnell, generally related to types of measures,¹¹⁶ and

¹¹² See, e.g., Pluyette, 74.

¹¹³ Neil E. McDonnell, "The Availability of Provisional Relief in International Commercial Arbitration", 22 Colum J Tran's L 272 (1984). For another publication that sheds light to laws of seventeen jurisdictions in a slightly later period, see David W. Shenton / Wolfgang Kuhn (eds.), *Interim Court Remedies in Support of Arbitration* (International Bar Association 1987). It was noted in 1991 that the source and scope of arbitral powers were described as evolving "ill-defined area of the law". Higgins, 1521.

¹¹⁴ These jurisdictions were Australia, Austria, Czechoslovakia, Denmark, Finland, Greece, the Federal Republic of Germany, Italy, Rumania, Sweden, Switzerland, and Yugoslavia. McDonnell, 277-78. In these jurisdictions, an application to a court for interim measures was not considered as circumvention of agreement to arbitrate. The substance of a dispute would remain within the arbitral domain. See, for example, Sergei N. Lebedev, *Handbook on Foreign Trade Arbitration in CMEA Countries* (Moscow 1983), 66.

¹¹⁵ That jurisdiction was the U.S. See McDonnell, 278-80. On this issue, see also *infra* Chapter II, Part 4.2.

¹¹⁶ Only courts could order coercive measures whereas both courts and arbitral tribunals could grant non-coercive measures. The jurisdictions opting for the concurrent jurisdiction approach were Algeria, Belgium, Indonesia, Mexico, the Netherlands, the United Kingdom, Syria, and Zurich (Switzerland). McDonnell, 275. On the coercive/non coercive measure distinction, see *id.*, 276.

timing of a request for a measure¹¹⁷. Alternatively, in certain jurisdictions, parties were free to make their applications any time to any forum.¹¹⁸

Nearly, the half of the jurisdictions surveyed by McDonnell empowered arbitrators to grant provisional measures. The increase in the number of jurisdictions recognising and remedying the commercial need for arbitral powers for the issuance of such measures and court assistance to arbitration reflects that the tide was begun to turn. The legislatures and courts entrusted to the integrity of arbitration and arbitrators. The political will to leave interim protection of rights within the domain of judiciary was creepingly faded away. The historical rivalry between arbitration and courts was begun to pave the way for cooperation for better distribution of justice. This transformation of the role of courts and arbitrators owed much to the re-boom of international business and trade in the 1980s.

Conclusion

Interim protection of adjudicating parties' rights has a long history. Roman law, for instance, provided for such protection.¹¹⁹ In international plane, the idea of interim protection found its place in international treaties in the beginning of the last century.¹²⁰ This idea mirrored in arbitration rules.¹²¹ Indeed, within the same period, the availability of interim protection of merchandise or rights was considered a commercial necessity, whilst modern international commercial arbitration rules were in the process of creation. The recognition of the need was related to the satisfaction of expectations;

¹¹⁷ Prior to formation of an arbitral tribunal, a measure could be ordered by a court thereafter the tribunal has exclusive jurisdiction. This approach was taken mainly by Luxembourg and Portugal and a part of the United States. See *id.*, 276-77.

¹¹⁸ The Federal Republic of Nigeria, France, and Israel. *Id.*, 277.

¹¹⁹ See Chapter I, *supra* note 1 and accompanying text.

¹²⁰ See Chapter I, *supra* note 4 and accompanying text.

namely, interim protection of the rights of all users of arbitration at a time when the volume of international commercial transactions and business interactions were increased immensely in the first quarter of the 20th Century.¹²² A provision on interim protection was found its place in the 1915 Plan aimed to resolve disputes between American and Argentinean business persons.¹²³ A special committee was established under the arbitration rules attached to such Plan. This committee was empowered to deal with, *inter alia*, a request for a provisional measure. The 1915 Plan constitutes the basis for interim protection of rights in arbitration.

The dispute resolution system created by the 1915 Plan evolved, recognising the commercial need, into two distinct systems. Some rules empowered a head or a special committee itself or along with arbitrators to grant a provisional measure.¹²⁴ The aim was to create a system under which a request for a measure could, at any time, (without the need of elapse of time) be considered and, if appropriate, be remedied. This system recognised an inherent problem with arbitrators' jurisdiction that prior to their appointment, arbitrators could not issue any provisional measure. The system was, indeed, the initial response of the drafters of arbitration rules to the lack of availability of provisional measures from a party-determined authority at the pre-formation stage. Other arbitration rules, along with the above power or solely, empowered an arbitral tribunal to issue a provisional measure.¹²⁵

The reaction of national legislatures and courts to empowering an arbitral tribunal to grant a provisional measure was, except for a couple

¹²¹ See Chapter I, *supra* Part 1.

¹²² See Chapter I, *supra* Part 1.1.

¹²³ See Chapter I, *supra* Part 1.1.1.

¹²⁴ See Chapter I, *supra* Parts 1.1.2 and 1.1.3.

¹²⁵ See Chapter I, *supra* Parts 1.1 and 1.2.

of national laws, excessively reluctant.¹²⁶ This reaction was mainly related to the historical prejudice towards arbitration. This prejudice found its roots in the perception by judiciary that arbitrators were their rivals. The prejudice was also related to the fact that the increase in arbitration practice (and decrease in judicial remedies) might endanger state jurisdiction and high ideals of impartial justice. Further, the reaction was related to another inherent problem with arbitrators' jurisdiction; namely, arbitrators' lack of powers to coerce the compliance with their decision.

Due to the above reaction, the drafters of arbitration rules dropped from the contents of arbitral powers to grant provisional measures within the midst of the 20th Century.¹²⁷ Further, since the adoption of the ICC Arbitration Rules 1939, both arbitration rules and laws generally accepted that a request to a court for such measures was neither incompatible with nor violation of the arbitration agreement.¹²⁸

It did not take too long for the arbitration rules to re-consider their position. Indeed, it was the UNECE Arbitration Rules that initially re-discovered the need for interim protection of rights by arbitrators.¹²⁹ National laws too recognised such need in the 1980s.¹³⁰ Such recognition much owed to the re-boom of international commerce and business. The commercial need changed the political will by overcoming the historical prejudice. Thus, the negative attitude of national legislatures creepingly faded away. Many national laws, within the last quarter of the 20th Century, expressly adopted the concept of concurrent jurisdiction of arbitrators and of courts.¹³¹ In this period of

¹²⁶ See Chapter I, *supra* Part 2.1.

¹²⁷ See Chapter I, *supra* Part 1.2.

¹²⁸ See Chapter I, *supra* Parts 1.2, 2.2, and 2.3.

¹²⁹ See Chapter I, *supra* Part 1.2.2.4.

¹³⁰ See Chapter I, *supra* Part 2.3.

¹³¹ *Id.*

time, courts' involvement into arbitration was regarded of co-operative but not of competitive nature.¹³²

The approach taken in the 1980s towards the issues of arbitral powers and of the court's role concerning interim protection of rights constitutes the basis for the approach taken today in respect of those issues by arbitration conventions, laws, rules, and commentators.

¹³² *Id.*

CHAPTER II

FORUM TO SEEK PROVISIONAL MEASURES

There are traditionally two main *fora* to seek provisional measures: arbitral tribunals and courts. Contracting parties may also determine, by agreement, some other authorities (e.g. emergency arbitrators, pre-arbitral referees or indeed arbitration institutions) to remedy provisional measure requests.¹ Provisional measures may be available and sought from any one or, in some cases, all of those *fora* at the same time.

It is widely accepted today that an arbitrator is the “natural judge” for interim measures of protection where there is an agreement to arbitrate for a final remedy.² There are many reasons supporting this view.³ Perhaps the most important of those reasons is the principle of party autonomy: the agreement to arbitrate or refer a dispute to a party-determined authority. This principle should be respected for both final and provisional remedies. The ICSID Convention, for example, accepts this view. The Convention envisages for the exclusion of, unless otherwise agreed, all local remedies, including interim ones.

¹ See, generally, *infra* Chapter III.

² See, e.g., Kessedjian, *Court Decisions*, 7; Redfern, *Arbitration and the Courts*, 86; Julian D.M. Lew, “LCIA New Arbitration Rules 1998 - Jurisdiction, Interim Relief and Award”, Kings College Conference (5 June 1998), 4 (unpublished) (indicating that “[t]here is an increasing view that if parties have chosen arbitration as the forum for settlement of their disputes, the arbitrators should also be the first source of interim relief.”) (“Jurisdiction”); and Lew / Mistelis / Kröll, para. 23-14 (stating that “[i]t is now widely recognised that the arbitration tribunal will often be the best forum to determine the appropriateness of specific interim measures for each case.”). This view reflects “the increasing acceptance of arbitration as a satisfactory mechanism for resolving complex international commercial disputes and increasing recognition by national courts that interlocutory judicial interference in the arbitral process is often counterproductive.” Born, *International Arbitration*, 924. See also generally *supra* Chapter I.

³ See Chapter II, *infra* Part 1.1.

In contrast, some legal systems and arbitration rules, mainly as a reflection or residue of the outdated concept of mistrust to arbitration, refrain from empowering arbitrators to grant provisional measures.⁴ This, however, reflects a minority view, at least in connection with developed arbitration systems.

Indeed, most modern legal systems and arbitration rules, in contrast, accept that court assistance to arbitration is essential and useful for effectiveness of arbitration. Thus these systems and rules adopt the concurrent jurisdiction approach. The acceptance and adoption is related to and stems from inherent problems and shortcomings of arbitration. Arbitration is generally considered very effective dispute resolution mechanism for final protection of arbitrating parties' rights.⁵ However, the effectiveness of arbitration today is hampered by its nature and operation.

There are three salient problems and certain other shortcomings⁶ of arbitral jurisdiction concerning interim protection of rights.⁷ These salient problems are:

- an arbitral tribunal needs to be constituted before it can deal with any request for interim protection;

⁴ This view has generally faded away as explained in *supra* Chapter I, Part 2.

⁵ Hence, the frustration of arbitration agreement is prevented. In other words, contracting parties cannot, by disregarding their agreement to arbitrate, seek to adjudicate the substance of their dispute in any other forum but arbitration. See, e.g., Article II(3) of the New York Convention; Article 26 of the ICSID Convention; and Article 8(1) of the Model Law.

⁶ See Chapter II, *infra* Part 4.1.

⁷ These problems and shortcomings might perhaps have been overcome, at least to a certain extent, were an international arbitration court to be established. On the issue of international arbitration court see, e.g., Howard Holtzmann, "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards", in: Martin Hunter / Arthur Marriott / V.V. Veeder (eds.) *The Internationalisation of International Arbitration* (London Dordrecht Boston: Graham Trotman / Martinus Nijhoff 1995), 109-113; and Stephen M. Schwebel, "The Creation and Operation of an International Court of Arbitral Awards", in: Hunter / Marriott / Veeder (eds.), 115-123.

- the tribunal does not have *imperium* thus it could not coerce enforcement of any measure it granted nor could it grant certain measures which intrinsically require the use of *imperium*; and
- the tribunal could not grant provisional measures against third parties to arbitration due to the contractual nature of arbitration.

There are efforts to minimise the negative effects of the above problems through introducing complementary mechanisms⁸ and making of arbitral provisional measures enforceable⁹. These efforts aim to make arbitration more effective. The efforts either provide parties alternatives to a judicial authority for interim protection or make competence of a party-determined authority more effective through enforcement of arbitral provisional measures. Although the efforts minimise, to a certain extent, the need for concurrent jurisdiction, they do not fully diminish such need yet.

This Chapter examines (i) the general jurisdiction of arbitrators to grant provisional measures, and (ii) the exclusive arbitral jurisdiction for issuing these measures, (iii) the exclusive jurisdiction of courts in respect of such measures, and (iv) the concurrent jurisdiction approach for the grant of provisional measures.

1 General Jurisdiction of Arbitrators to Grant Provisional Measures

This Part discusses why arbitrators should be the natural forum for interim measures of protection. It then deals with the source of arbitral jurisdiction, its variation and exclusion, and the effect of mandatory rules of municipal laws on it.

⁸ See generally *infra* Chapter III.

⁹ See generally *infra* Chapter V.

1.1 Reasons In Support of Arbitral Jurisdiction

There are several reasons supporting the view that arbitration should be the “natural forum” for interim protection of rights once parties submit their disputes to arbitration:¹⁰

- Perhaps the most important reason is utmost respect to the sanctity of contract, the agreement to arbitrate. When parties chose arbitration to resolve a dispute their primary aim is simply to reach resolution of whatever disputes they may have before arbitrators and to avoid resorting to any other forum. The forum that parties seek to avoid is a court and such aim should normally be respected.¹¹ Respecting that aim is a reflection of the principle of party autonomy. The resort to a court may undermine the arbitration agreement.¹²
- Respecting the risk allocation agreed between the contracting parties at the time the contract was entered into also supports arbitral jurisdiction.¹³ Indeed, the chosen arbitral

¹⁰ The reasons that make contracting parties prefer arbitration over litigation and other dispute resolution mechanisms generally support arbitral jurisdiction as regards interim protection of rights. See, e.g., Sanders, *Quo Vadis*, 2-9; and Ziad Mody / T. T. Arvind, “Redeeming Sisyphus: The Need to Invigorate Interim Relief in International Commercial Arbitration” in: Albert J van den Berg (ed.), *International Arbitration and National Courts: The Never Ending Story*, ICCA Congress Series No. 10 (The Hague/London/New York: Kluwer 2001), 126 (“The Never Ending Story”).

¹¹ Judicial assistance to arbitration is generally welcome in appropriate circumstances. See Chapter II, *infra* Part 4.

¹² Bösch (ed.), 4. Bösch indicates that “the unrestricted availability of provisional relief from public courts despite the existence of an arbitration agreement could threaten to destroy completely the advantages of arbitration.” *Id.*, 5. The examples to destruction of advantages are, for instance, an attachment of substantial assets to put pressure on the opponent or a threat of obtaining a judicial injunction to make the underlying dispute public. Indeed, although interim in nature, a judicial measure may have serious or irreparable consequences. *Id.*, 4.

¹³ Such respect is also supported with the principle of neutrality in arbitration. See e.g., Jan Paulsson, “A Better Mousetrap: 1990 ICC Rules for a Pre-arbitral Referee Procedure”, 19 *Int’l Bus Law* 214, 215 (1990), reprinted in 5 *Int’l Arb Rep Sec F* (1990) (“Better Mousetrap”). In fact, contracting parties generally prefer a neutral place for resolution of their disputes. For the principle of neutrality, see, e.g., Pierre Lalive, “On the Neutrality of the Arbitrator and of the Place of Arbitration”, in:

forum is an important element in allocation of risks between contracting parties. At the time of entering into a contract, a party may have the intention not to take the risk of dealing with “vagaries of laws” of a foreign country or of a foreign court practice.¹⁴ Such intention should be respected.

- If resolution of a final remedy in regard of a dispute is entrusted to arbitrators, the same trust should logically be shown to arbitral domain in determining a provisional remedy concerning the same dispute.¹⁵
- Arbitrators are generally in a better position than judicial authorities to identify whether a request for a provisional remedy is used as a dilatory tactic¹⁶ or as an offensive / abusive weapon¹⁷ or there is a genuine need.¹⁸ This is because the arbitrators generally are far more “acquainted with the facts” than judicial authorities and the arbitrators

Swiss Arbitration Association (ed.), *Swiss Essays on International Arbitration* (Zurich: Schulthess 1984), 23-33.

¹⁴ See, e.g., *McCreary Tire and Rubber Co. v. CEAT, S.p.A.*, 501 F.2d 1038 (3 Cir. 1974). Martin Hunter / Jan Paulsson, “A Code of Ethics for Arbitrators in International Commercial Arbitration”, 13 *Arbitration* 153 (1984) (arguing that the expectation of parties from their arbitrators is a decision unaffected from national legal constraints.); and Higgings, 1520 (indicating that arbitration is a “de-politicized forum that does not harbor potential biases toward nationals of the domestic courts’ jurisdiction.”).

¹⁵ Broches indicated during the preparation of the ICSID Convention that “[i]f a dispute was properly before the arbitral tribunal, it would seem reasonable to empower it to order the parties not to take action which would make it impossible to comply with a later award.” History, 515. See also, e.g., Pierre A. Karrer, “Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory Please” in: Albert J van den Berg (ed.), *International Arbitration and National Courts: The Never Ending Story*, ICCA Congress Series No. 10 (The Hague / London / New York: Kluwer 2001) (“The Never Ending Story”), 98 (“Less Theory”); and Berger, *International*, 348.

¹⁶ E.g., *MacDonnell*, 273. A court should too refrain from issuing measures “conducive to dilatory tactics of the [arbitrating] parties.” See, e.g., *CLOUT Case No. 68* (1993) (Federal Court of Canada, Trial Division).

¹⁷ *Rubino-Sammartano*, 364 (arguing that provisional measures could be used “improperly to damage the other party.”); and *Cremades, The Need*, 226, 227 (indicating that “[a]buses in the request for or adoption of conservatory and preliminary measures must be controlled to the benefit of trade.”).

¹⁸ *Berger, International*, 336.

follow the case “from start to finish”.¹⁹ There is always a possibility that a request for a measure aims at delaying arbitration proceedings. Indeed, the application to a court for interim measures may be used as a tactical-oppressive weapon to delay the proceedings.²⁰ It is true that dealing with that request, however little it may be, takes some time, although the arbitrators are generally equipped with the necessary powers and experience to assess such request and to take appropriate measures for minimizing the request’s negative effect.²¹ An underlying aim of a request could also be a distraction of the opponent party’s attention, effort and finance.²² Further, in many cases, the reference to a court is a tactical decision to gain advantage over the adversary. For instance, a party may apply to its own national court, which may be receptive of an interim measure request. The grant of the request may have an impact on the arbitral tribunal’s decision,²³ on the responding party, or on both. To this end, such party may, because of, for instance, financial difficulties, have to cave in and settle the dispute in

¹⁹ Christian Hausmaninger, “The ICC Rules for a Pre-Arbitral Referee Procedure: A Step Towards Solving the Problem of Provisional Relief in International Arbitration?”, 7(1) ICSID Rev. - FILJ 82, 85 (1992) (“Pre-Arbitral Referee”). See also Berger, *International*, 348. The preference of an arbitral tribunal over a court is sensible and advisable where the request for an interim measure is made after the tribunal is formed and accustomed with the case in dispute. Apparently, the arbitrators’ knowledge of the case assists effective protection of rights and avoids the grant of unjustified measures.

²⁰ The Arbitration Rules of the American Film Marketing Association (the “AFMA”) provides that “[t]hese [court] proceedings [in respect of an application for a provisional measure] shall not delay ... [the] arbitration proceedings.” Article 10.

²¹ Also, the tribunal gets accustomed with the case and parties’ positions through interim measure applications. Karrer, *Less Theory*, 110. If the measure turned out to be wrongly taken, the tribunal tend to speed up the arbitration proceedings to minimise the negative effect of the wrongly taken measure. *Id.* Apparently, in such case, damages could also be available. On the issue of damages, see Chapter II, *infra* Part 4.4.3.

²² For instance, an interim measure application could be costly. But the tribunal could require the party who is abusing its right to request a measure to bear those costs. See, e.g., Karrer, *Less Theory*, 110. See also *infra* Chapter IV, Part 9.

unfavourable terms to it.²⁴ Arbitrators would generally be in a far better position than courts to determine whether or not a request is made for tactical purposes.

- It is arguable that arbitrators' expertise²⁵ in regard of a given case makes them a more suitable forum in some circumstances to deal with the case and a request for interim protection of rights in a speedier manner than judicial authorities.²⁶
- Arbitration, generally, has a less disruptive effect (in comparison to litigation) on the parties' overall commercial relationship.²⁷ Carrying a dispute away from arbitral domain for an interim measure may have an inflammatory effect on the adjudication process and, consequently, on that relationship.²⁸
- It is highly likely that, in proceedings for a provisional measure before arbitrators, parties' arguments, subject matter of arbitration (e.g. trade secrets), and, in some cases, mere existence of arbitration may remain confidential.²⁹ In

²³ Wirth, 44.

²⁴ See, e.g., Hubbard v. Vosper [1972] 2 QB 84, 96; and Francis Gurry, "The Need for Speed", Biennial IFCAL Conference (24 October 1997, Geneva, Switzerland), 3 (unpublished).

²⁵ It is highly likely that arbitrators will be appointed among those who are experts on issues in question by either parties or the appointing authority.

²⁶ Hausmaninger, Pre-Arbitral Referee, 85. In this regard, see also Kevin J. Brody, "An Argument for Pre-Award Attachment in International Arbitration under the New York Convention", 18 Cornell Int'l LJ 99, n.1 (1985); and Douglas Reichert, "Provisional Remedies in the Context of International Commercial Arbitration", 3 Int'l Tax & Bus Law 369 (1986).

²⁷ See, e.g., Bösch (ed.), 3.

²⁸ See, e.g., Hausmaninger, Pre-Arbitral Referee, 86.

²⁹ See e.g., Berger, International, 349; and Hausmaninger, Pre-Arbitral Referee, 85-86. The issue of confidentiality is highly debated. For court cases on the issue, see, e.g., Esso/BHP v. Plowman, reprinted in 11(3) Arb Int'l 235 (1995); United States v. Panhandle Eastern Corp., 681 F.Supp. 229 (D.Del. 1988); Hassneh Insurance v. Mew [1993] 2 Lloyd's Rep 243; and A. I. Trade Finance Inc v. Bulgarian Foreign Trade Bank Ltd, (Svea Court of Appeal), reprinted in 14(4) Mealey's IAR A-1 (1999). For views of commentators, see, e.g., Expert Reports in Esso/BHP v. Plowman of Stephan Bond, S.C. Boyd, Julian Lew, and Hans Smit, collectively published in 11(3) Arb Int'l 213-283 (1995); Jan Paulsson / Nigel

regard of judicial measures, however, the confidentiality cannot (always) be assured. Most proceedings before courts in many countries are public;³⁰ consequently, decisions of courts on provisional relief are not confidential.

- The type and form of arbitral measures are rarely fixed; consequently, arbitrators, unlike judicial authorities,³¹ may issue the most suitable type and form of the decision by taking into consideration various aspects of a case.³²
- Finally, arbitral provisional measures are comparatively less costly than judicial measures. One reason for the comparatively little cost is that there is generally no appeal against a decision of arbitrators concerning interim measures³³ though, under changed circumstances, reconsideration could in principle be sought.³⁴ Another important reason is that arbitrators, generally, have the freedom, by taking into consideration circumstances of each case (e.g. parties' likely motives, urgency, importance of the request, type and form of the measure sought, the right whose protection is sought), to make decisions on several issues that affect costs. Those issues may be whether or not

Rawding, "The Trouble with Confidentiality", 5(1) ICC Int'l Ct Arb Bul 48-60 (1994); and Patrick Neill, "Confidentiality in Arbitration", 12(3) Arb Int'l 287-318 (1996).

³⁰ See, e.g., Hausmaninger, Pre-Arbitral Referee, 86, n. 12.

³¹ Courts have no option but to apply the applicable law, which clearly defines the form and type of a measure that may be granted (*forum regit processum*).

³² See arbitral provisional measures referred to in, e.g., Sperry International Trade, Inc. v. Government of Israel, 532 F. Supp. 901 (S.D.N.Y. 1982), aff'd. 689 F. 2d 301 (2nd Cir. 1982); and Rochester City School District v. Rochester Teachers Association, 394 N.Y.S.2d 179 (1977).

³³ Hausmaninger, Pre-Arbitral Referee, 86. It should, however, be noted that a second instance arbitral appeal is available under a small number of arbitration rules, mainly in commodities arbitration. See, e.g., the Grain and Feed Trade Association ("GAFTA"); and the Federation of Oils, Seeds and Fats Associations ("FOSFA") arbitrations. It is also noteworthy that an arbitral decision on provisional measures is subject to appeal in India. See Lalit Bhasin, "The Grant of Interim Relief Under the Indian Arbitration Act of 1996" in: van den Berg (ed.), The Never Ending Story, 93, 96.

³⁴ See *infra* Chapter IV, Part 6.

to have a hearing, to have only written submissions, to hear witnesses or experts and so on. In many occasions, if arbitrators consider that, for instance, a request for a measure is used as a tactical weapon they simply deny it or refrain from, say, holding hearings, or appointing experts for simplifying the provisional remedy adjudication. Indeed, in this author's experience, arbitrators simply deny, for variety of reasons generally not apparent from their face, requests for interim measures in simple orders, which surely do not cost much to make. Nevertheless, it should be accepted that requests to arbitrators for interim protection of rights might occasionally cost as much as, if not more, requests to courts for the same.

1.2 Sources of Arbitral Power

The jurisdiction of an arbitral tribunal to grant provisional measures stems from different sources. It is a common practice nowadays that arbitrating parties expressly empower the tribunal to grant provisional measures.³⁵ National laws may also provide for default / fall back powers for such purpose. Where neither the arbitration agreement nor the *lex arbitri*, the law governing the arbitration³⁶ expressly provide for such power, it may be necessary to investigate whether the tribunal

³⁵ This trend partly owes its existence to the evolution of laws, rules and practice on the provisional measures within the 20th century. See *supra* Chapter I, Part 2. The trend is also reinforced by the wide recognition of the UNCITRAL Arbitration Rules and the Model Law. Both texts contain a provision on the power of an arbitrator to grant provisional measures.

³⁶ This is generally the law of the place of arbitration. On cases where the tribunal is referred to such law whilst making decision on an interim measure request, see, e.g., ICC Interim Award 8786, extracts published in 11(1) ICC Int'l Ct Arb Bull 81 (2000); and NAI Interim Award 1694 of 1996, extracts published in XXIII YCA 97 (1998). For arbitrators' power to grant provisional measures such laws as the law governing the arbitration procedure, the law governing the arbitration agreement, the applicable substantive law as the case may be, or the law of the place of enforcement may further be relevant.

would have inherent, implied or other powers for interim protection of rights.

In granting provisional measures, an arbitral tribunal observes variations or restrictions to their jurisdiction introduced by the arbitrating parties. The tribunal also abides mandatory rules of the applicable law on its jurisdiction.

This Part deals with the effect of a party agreement and *lex arbitri* on the arbitral jurisdiction to grant provisional measures as well as arbitrators' inherent, implied and other powers to grant these measures. Further, it examines the variation and exclusion of such jurisdiction and the role of mandatory rules of the applicable law.

1.2.1 Parties' Agreement and *Lex Arbitri*

Arbitral tribunals' power to grant provisional measures may be expressly included in the arbitration agreement itself. This inclusion is done either through express stipulation in the arbitration agreement or through incorporation, by a reference to *ad hoc* or institutional arbitration rules that permit arbitral provisional measures. It should be noted that the express stipulation in the agreement is *hardly ever* done in practice.³⁷ Arbitrators are *almost always* empowered to grant provisional measures through reference to arbitration rules. In other words, the most likely source of power is arbitration rules which constitute, through reference or incorporation, part of the parties'

³⁷ See Lew, Interim Measures, para. 15. However, a number of agreements make an express reference to provisional measures. See, e.g., Sperry International Trade, Inc. v. Government of Israel, 532 F. Supp. 901, 908-909 (S.D.N.Y. 1982), *aff'd*, 689 F. 2d 301 (2nd Cir. 1982) (where the agreement between the parties contained a reference to provisional measures). Also it should be noted that, for example, a standard European Bank for Reconstruction and Development loan agreement contain an arbitration clause dealing with provisional measures. For examples of clauses providing express stipulations concerning provisional measures, see, e.g., Paul D. Friedland, *Arbitration Clauses for International Contracts* (New York: Juris Publishing 2000), 56-59.

arbitration agreement, in *ad hoc* or administered arbitration.³⁸ For this reason, this thesis examines the approach of seventy-two sets of arbitration rules to provisional measures. Forty-three out of the seventy-two rules surveyed including the AAA, ICC, ICSID and UNCITRAL Arbitration Rules empower an arbitral tribunal to grant provisional measures.

The *lex arbitri*³⁹ may also contain provisions empowering arbitrators to grant interim measures of protection.⁴⁰

³⁸ The power may also be contained in other documents. For instance, in ICC arbitration, the terms of reference may too contain that power. The terms of reference is one of the unique features of ICC arbitration. Apart from its historical purpose, the aim of the terms of reference is to set forth, basically, the parties' claims, counter claims, applicable laws, etc. in order for the smooth commencement of arbitration proceedings. See Article 18 of the ICC Arbitration Rules 1998. The concept of terms of reference is also adopted by such other arbitration institutions as Article 24 of the Belgian Centre for Arbitration and Mediation ("CEPANI") Arbitration Rules, Article 24 of the Italian Arbitration Association ("AIA"), Article 15 of the Japan Commercial Arbitration Association ("JCAA") Arbitration Rules, and Article 23(7) of the Euro-Arab Chamber of Commerce Arbitration Rules.

³⁹ In some cases, there is no law governing arbitration but it is subject to an international convention. See, e.g., Article 47 of the ICSID Convention (empowering arbitrators to "recommend" provisional measures.).

⁴⁰ Default powers are given to arbitrators, for instance, in all Model Law countries. See *supra* Chapter I, note 14. See also, e.g., Algeria (Article 458bis 9(1) of the CCP 1966, as amended); Belgium (Article 1696(1) of the Judicial Code 1972, as amended); Bolivia (Article 35 of the Law on Arbitration and Conciliation 1997); Colombia (Article 32 of the Decree No. 2279 of 1989); Costa Rica (Article 52 (1) of the Law for Alternative Resolution of Disputes and the Promotion of Social Peace); Ecuador (Article 9 of the Law on Arbitration and Mediation 1997); Panama (Article 24(1) of the Decree Law 5 of 1999); Portugal (see Smit / Pechota, 2350); Sweden (Section 25(4) of the AA 1999); Switzerland (Article 183(1) of the Private International Law Act 1987); Uruguay (Article 492 of the General CCP 1990); and Venezuela (Article 26 of the Commercial Arbitration Law 1998). In addition, in such countries as Antigua & Barbuda (Article 13(6)(2) of the AA 1975); Commonwealth of Australia (Article 23 of the International AA 1974, as amended); France (Bösch (ed.) 257); Hong Kong (Section 2(GB) of the AO), Netherlands (Articles 1022 and 1051 of the AA 1986); the Oman (Article 24(1) of the Law of Arbitration on Civil and Commercial Matters); Jordan (Article 23(1) of the Law No. 31/2001 on Arbitration); Pakistan (Article 41(2) of the AA 1940, as amended); and the U.S. (see, e.g., Born, *International Arbitration*, 924-25, J. Stewart McClendon (ed.), *Survey of International Arbitration Sites*, 3rd ed. (AAA 1993), 123), national laws provide for "opt in approach." Under this approach, arbitrators' power to grant provisional measures arise from contracting parties' express agreement thus in the absence of such agreement no provisional measure is available. To this end, it should be noted that Section 38 of the EAA 1996 gives powers to arbitrators to

1.2.2 Inherent, Implied or Other Powers

Where there is no explicit or default power given to arbitrators for interim measures, it is submitted that such measures may be granted on the basis of inherent or implicit powers of arbitrators,⁴¹ or of their powers to conduct the arbitration proceedings.

The source of an inherent power is neither an arbitration agreement nor a statute but the status of the arbitral tribunal as an organ entrusted with the resolution of a dispute.⁴² Inherent powers are generally relied on by a small number of arbitral tribunals in international arena.⁴³ The concept of inherent powers is rightly criticised since inherent powers is

order certain limited number of interim measures but Section 39 provides for opt in approach for all other kind of measures. It should also be noted that such national laws as Concordat (Article 26) provide for non-binding powers to arbitrators for interim protection of rights.

⁴¹ Considering that arbitrators operate within a territorial boundary of which is marked by *lex arbitri*, it can be stated that arbitrators are generally empowered to grant provisional measures as laws of many states provide for arbitral competence to grant provisional measures. Thus, in practice, a party agreement and *lex arbitri* sufficiently provides for a basis today to grant an interim measure of protection. Consequently, there is little need to seek another basis for such protection.

⁴² Hausmaninger, Pre-Arbitral Referee, 92. For arguments supporting inherent powers, see, e.g., David D. Caron, "Interim Measures of Protection: Theory and Practice in Light of the Iran-United States Claims Tribunal", 46 *RabelsZ* 465, 476 etc. (1986) ("Interim Measures"). See also Michael F. Hoellering, "Interim Measures and Arbitration: The Situation in the United States", 46(2) *Arb J* 22 (1991) ("Interim Measures"); Hoellering, "Interim Relief in Aid of International Commercial Arbitration", 1 *Wisc Int'l LJ* 1, 2 (1984) reprinted in: *Arbitration & the Law* (1984), 123 ("Interim Relief"); Craig / Park / Paulsson, *ICC Arbitration 2000*, 460; Sigvard Jarvin, "Choosing the Place of Arbitration: Where Do We Stand?", 16 *Int'l Bus L* 417, 422 (1988); Berger, *International*, 332; Schwartz, *Provisional Measures in: ICC (ed.), Conservatory Measures*, 62; Craig / Park / Paulsson, *ICC Arbitration 2000*, 460; and Donald F. Donovan, "Powers of the Arbitrators to Issue Procedural Orders, Including Interim Measures of Protection, and the Obligation of Parties to Abide by Such Orders", 10(1) *ICC Int'l Ct Arb Bull* 65-66 (1999). See also *Charles Construction Company v. Derderian*, 586 N.E.2d 992 (Mass. 1992) (accepting that an arbitrator has inherent and implied authority to grant a security for claim.); *Konkar Maritime Enter., SA v. Compagnie Belge d'Affretement*, 668 F.Supp. 267 (S.D.N.Y. 1987); *Southern Seas Navigation Ltd v. Petroleos Mexicanos of Mexico City*, 606 F.Supp. 692 (S.D.N.Y. 1985); *Island Creek Coal Sales Co. v. Gainsville*, 729 F2d 1046 (6th Cir. 1984); and *Sperry International Trade, Inc. v. Israel*, 689 F2d. 301 (2d Cir. 1982).

⁴³ E.g., the Iran-US Claims Tribunal, and certain other arbitral tribunals. See Hausmaninger, Pre-Arbitral Referee, 92-93. Inherent powers are mainly relied on

a common law concept “alien to the civil law tradition”.⁴⁴ That is mainly because the concept infringes the principle of legality: it lacks statutory foundations.⁴⁵

It is further submitted that arbitral jurisdiction to grant provisional measures derive from implied powers entrusted to arbitrators.⁴⁶ Implied powers are based on the argument that parties, by submitting to arbitrate a dispute, implicitly empower arbitrators to issue provisional measures. Implied powers are considered to be an implicit extension of the power to adjudicate the parties’ dispute as envisaged in the arbitration agreement.⁴⁷ Such extension is justified by broad interpretation of the arbitration agreement.⁴⁸ The broad interpretation may be made where it is permitted under the applicable law.

In addition, if it exists,⁴⁹ the eventual power of a tribunal to conduct arbitral proceedings may provide a basis for interim protection of

by international tribunals (see, e.g., Caron, Interim Measures, 476 etc.) and courts of common law jurisdictions (see, e.g., Hausmaninger, Pre-Arbitral Referee, 92).

⁴⁴ Hausmaninger, Pre-Arbitral Referee, 93.

⁴⁵ Id. Hausmaninger also argues that the exercise of inherent powers not conferred upon the arbitrators contradicts with the contractual nature of arbitration. Id.

⁴⁶ In the absence of express stipulation, many argue that jurisdiction of an arbitrator to grant a provisional measure is based on party autonomy (*voluntas partium facit arbitrum*) or, in other words, “flows directly from the arbitration agreement itself.” See, e.g., Berger, International, 331; Holtzmann / Neuhaus, 530; and Higgins, 1535-36. Parties, by conveying to an arbitral tribunal the power to adjudicate a dispute, confer the tribunal, by “implication” or “extensive interpretation” of the arbitration agreement a power to grant interim protection of rights. See, e.g., Karrer, Less Theory, 99. On the criticism concerning the use of implied powers in commercial arbitration, see, e.g., Hausmaninger, Pre-Arbitral Referee, 94.

⁴⁷ This is a reflection of the principle of party autonomy. See, e.g., Karl-Heinz Bockstiegel, “The Role of Party Autonomy in International Arbitration”, Dis Res J 24 (Summer 1997); and Klaus Peter Berger, “Party Autonomy in International Economic Arbitration: A Reappraisal”, 4(1) Am Rev Int’l Arb 1 (1993). It is submitted, for instance, that arbitrating parties are obligated “not to worsen the dispute nor to delay unduly the arbitration proceedings.” Bucher / Tschanz, para. 169. This obligation arises from the arbitration agreement or can be “based on the principle of good faith.” See generally id.

⁴⁸ E.g., Karrer, Less Theory, 99. The principles of effectiveness and good faith assist in interpreting an arbitration agreement. See Caron, Interim Measures, 478.

⁴⁹ See, e.g., Article 16 of the International Arbitration Rules of the American Arbitration Association (the “AAA”) International Center for Dispute Resolution

rights.⁵⁰ However, in such circumstances, it seems that only certain provisional measures that are considered as procedural in nature may be issued.⁵¹

1.3 Amendment and Exclusion of the Power

Arbitrating parties are free to design the terms of their arbitration agreement as they see fit due to party autonomy.⁵² Consequently, the arbitrating parties are at freedom to exclude or amend the power of arbitrators to grant provisional measures.⁵³

(“ICDR”); Article 11 of the Arbitration Rules 1981 of the Copenhagen Court of the International Arbitration; Article 20 of the Rules of International Arbitration of the Croatian Chamber of Commerce; Article 15 of the Arbitration Rules of the ICC, Rule 6 of the Rules for the Conduct of Commercial Arbitration 1981 of the Institute of Arbitrators Australia, Article 23 of the Arbitration Rules of the Netherlands Arbitration Institution (“NAI”); Article 20 of the Arbitration Rules of the Stockholm Chamber of Commerce (“SCC”), Article 15 of the UNCITRAL Arbitration Rules; and Article 38 of the Arbitration Rules of the World Intellectual Property Organization (the “WIPO”).

⁵⁰ The ICC Arbitration Rules 1988 did not expressly deal with the power to grant a provisional measure. This lack of clarity gave rise to, *inter alia*, an argument that the tribunals’ power to grant those measures implicitly derives from the procedural powers granted to arbitrators to conduct arbitral proceedings in accordance with Article 11 of those Rules. For instance, in ICC case 7544, the tribunal partly relied on its power to conduct arbitration proceedings in granting an interim measure. ICC Second Interim Award 7544 of 1996, extracts published in 11(1) ICC Int’l Ct Arb Bull 56 (2000). Similarly, in ICC case 6632, the arbitral tribunal, after stating that the ICC Arbitration Rules 1988 provided a self-sufficient set of rules, noted that “[t]he arbitrators have to decide on all procedural, factual or legal aspects that appear necessary for the resolution of the dispute and, as such, they undoubtedly have the authority to issue interim orders/awards.” ICC Interim Award 6632 of 1993 (unpublished.). In cases where the procedural rules are determined by arbitral tribunal, it may make a reference to a national law or draw up its own rules. See ICC, *Guide to Arbitration*, ICC Publication No. 382 (1983), 39. The power to grant certain interim measures may also derive from some other principles of arbitration. For instance, the power to stop adverse advertising campaign may be based on the principle of confidentiality, particularly where the campaigner is under the duty in accordance with applicable arbitration rules or laws. See Bucher / Tschanz, para. 169.

⁵¹ If provisional measures are classified as procedural matters, as is normally the case, then the rules and laws applicable to procedure govern these measures. See Schwartz, *Provisional Measures in: ICC (ed.), Conservatory Measures*, 58. On the procedural /substantive distinction, see Chapter II, *infra* note 91.

⁵² A restriction on arbitrating parties may be imposed as to an amendment of arbitration rules by the administering authority. It should, however, be noted that arbitration rules generally contain no such restrictions.

⁵³ Articles 7(9) of the Arbitration Rules 2000 of the Chartered Institute of Arbitrators (the “CIA”); Article 20 of the Arbitration Rules 1998 of the German Arbitration Institution (“DIS”); Article 23 of the Arbitration Rules 1998 of the ICC; Article 19(1)

1.4 Mandatory Rules of Applicable Law

Mandatory rules of the applicable law (generally the law of place of arbitration), including the law of the place of enforcement⁵⁴ may restrict or prohibit the jurisdiction of an arbitral tribunal to grant provisional

of the Rules for International Arbitration 1994 of the Italian Association for Arbitration (the "AIA"); Article 25 of the Arbitration Rules 1998 of the London Court of International Arbitration ("LCIA"); Rule 25 of the Arbitration Rules 1997 of the Singapore International Arbitration Centre (the "SIAC"); Article 31 of the Arbitration Rules 1999 of the Arbitration Institute of the SCC; Articles 1(1) and 26 of the UNCITRAL Arbitration Rules; Article 28 of the International Arbitration Rules 1989 of the Zurich Chamber of Commerce (the "ZCC"); and Article 17 of the Model Law. Further, it is accepted that the jurisdiction of an ICSID tribunal to recommend provisional measures may be amended or excluded by an express party agreement. See Article 47 of the ICSID Convention. See also Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press 2001), Article 47, 215, para. 8; Brower / Goodman, 434-435; C. F. Amerasinghe, "Submissions to the Jurisdiction of the International Centre for Settlement of Investment Disputes", 5 J Mar L & Com 211 (1974); and History, 815. The amendment may be negative. That is to say it restricts arbitral power "with respect to the circumstances under which they [provisional measures] are to be recommended or with respect to the types of measures which will be permissible." Schreuer, Article 47, 214, para. 7. Neither the recent model clause nor the earlier one deals with variations on or exclusions of Article 47. However, the first ICSID model clause did cover exclusion agreements. One of two versions of the recommended clause provides:

XXVI. No arbitral Tribunal constituted pursuant to this agreement shall, without the special consent of the parties hereto, be empowered to recommend any provisional measures before rendering its award.

See 7 ILM 1159, 1179 (1968). The amendment may also be positive. That is to say parties may empower an ICSID tribunal to grant binding arbitral provisional measures. Schreuer, Article 47, 214, para. 7. See also A. Masood, "Provisional Measures of Protection in Arbitration under the World Bank Convention", 1 *Delhi Law Review* 138, 145 (1972). In this respect, the second version of the model clause provides:

XXVII. The parties hereto agree to abide by and comply with any provisional measure [unanimously] recommended by an Arbitral Tribunal constituted pursuant to this agreement.

See 7 ILM 1159, 1179 (1968). The parties should be very cautious prior to entering into such exclusion agreement as courts of some states may deny granting an interim measure and refer parties to arbitration. See Chapter II, *infra* Part 4.2. The exclusion of arbitrators' jurisdiction "rarely happens in practice." Berger, *International*, 333. But see Gaillard / Savage (eds.), para. 1319.

⁵⁴ Apparently, the law of the place of enforcement is taken into account where such place is known to the arbitrators. However, it should be noted that, unless otherwise indicated during the proceedings, arbitrators are generally unaware where their decisions will be or will attempted to be enforced.

measures.⁵⁵ Arbitrators generally comply with such limitation or restriction in practice to the extent possible.⁵⁶

There are several concerns behind compliance with the mandatory rules of the applicable law. A conflicting decision with the applicable law may be set aside where it is rendered⁵⁷ or enforcement of such decision may be resisted.⁵⁸

⁵⁵ Indeed, five out of the forty-three rules surveyed indicate that the jurisdiction concerning interim measures of protection of an arbitral tribunal exists to the extent it is permissible under the applicable law. Article 14 of the International Arbitration Rules 1996 of the Chamber of National and International Arbitration of Milan; Article 21 of the Arbitration Rules 1997 of the European Court of Arbitration (the "ECA"); Articles 18 and 19 of the Rules for International Arbitration 1994 of the AIA; Rule 25 of the Arbitration Rules 1997 of the SIAC; and Article 27 of the UNECE Arbitration Rules 1966. It should also be noted that none of the rules surveyed do permit in express terms the tribunal to act contrary to the mandatory principles of the applicable law.

⁵⁶ See ICC Interim Award 9301 of 1997 (unpublished) (denying the request to impose a penalty for a failure to comply with a direction in an arbitration because of the fact that such imposition is prohibited under the law of the place of arbitration, Belgian law); ICC Interim Award 8786 of 1996, extracts published in 11(1) ICC Int'l Ct Arb Bull 81 (2000); ICC Second Partial Award 8113 of 1995, extracts published in 11(1) ICC Int'l Ct Arb Bull 65 (2000); ICC Final Award 7895 of 1994, extracts published in 11(1) ICC Int'l Ct Arb Bull 81 (2000); ICC Second Interim Award 7544 of 1996, extracts published in 11(1) ICC Int'l Ct Arb Bull 56 (2000); ICC Interim Award 6251 of 1990 (unpublished); ICC First Interim Award 5835 of 1988, extracts published in 8(1) ICC Int'l Ct Arb Bull 67 (1997); ICC Second Interim Award 5835 of 1992 (unpublished); and ICC Award 3540 of 1980, extracts published in (1981) *Clunet* 914; and VII YCA 124, 129-130 (1982). It is noteworthy, in this respect, that the restrictions imposed under the applicable law to the arbitral jurisdiction do not, however, prohibit arbitrators to render a decision in formally non-binding form (e.g., order, recommendation) concerning a request for a provisional measure.

⁵⁷ See, e.g., Article 34(2)(a)(iv) of the Model Law; and ICC Interim Award 9301 of 1997 (unpublished) (referring to the decision of a court setting aside an arbitral decision conflicting with the Belgian law on imposing a penalty payment.).

⁵⁸ See, e.g., Article V(1)(d) of the New York Convention. Further, no sanction could be imposed upon the failure to comply with the conflicting decision because of the above reasons. Accordingly, the decision would be toothless. Moreover, arbitrators are generally hesitant to be in conflict with the applicable law. It should be noted, in this respect, that practice of commercial arbitration evolved over the years by avoiding direct conflict with national laws. In addition, arbitrators may have a duty "to make every effort to make sure" that their decision is enforceable at law. Article 26 of the ICC Arbitration Rules 1988; and Article 35 of the ICC Arbitration Rules 1998. See also Schwartz, *Provisional Measures*, 62. Thus, the arbitrators may refrain from rendering unenforceable decisions.

2 Exclusive Arbitral Powers to Grant Provisional Measures

It seems that out of the arbitration conventions, only the ICSID Convention provides for, unless otherwise agreed, the exclusive jurisdiction to arbitrators to grant provisional measures.⁵⁹ There is no national law that empowers arbitrators exclusively to grant provisional measures.⁶⁰ Parties may, however, oust courts' jurisdiction in regard of interim protection of rights to an extent permitted.⁶¹ The main benefit of exclusive arbitral jurisdiction for interim protection of rights is the resolution of issues regarding both partial and final protection within one forum, which was agreed upon by the parties.

The ICSID Convention has created, for the aim of depoliticisation⁶² of investment disputes, an "autonomous" and a "self-contained" arbitration

⁵⁹ See Articles 26 and 47 of the Convention; and Rule 39(5) of the ICSID Arbitration Rules. The exclusivity is not only related to judicial proceedings but also other (non-ICSID) arbitral proceedings.

⁶⁰ It is noteworthy that, for instance, the power to grant security for costs is reserved, unless otherwise agreed by the arbitrating parties, to arbitrators under Section 38(3) of the EAA 1996. This provision changed the pre-act law which set forth in the House of Lords' controversial decision in *Coppée-Lavalin SA/NV v. Ken-Ren Chemicals and Fertilizers Ltd (In Liquidation)*, [1994] 2 All E.R. 449. On the criticism of this case, see, e.g., Jan Paulsson, "The Unwelcome Atavism of Ken Ren: The House of Lords shows its Meddle", (1994) ASA Bull 439; David Branson, "The Ken Ren Case: It is an Ado Where More Aid is Less Help", 10 Arb Int 303 (1994). See also, e.g., section 2GB(1) of the Hong Kong Arbitration Ordinance ("AO").

⁶¹ Indeed, four out of the seventy-two rules surveyed provide for exclusive arbitral jurisdiction. One of those, the Arbitration Rules for the Court of Arbitration for Sport (the "CAS") clearly exclude jurisdiction of courts in regard of provisional measures. Article R37. The ICSID Arbitration Rules also provide for, in line with the ICSID Convention, exclusive jurisdiction of an arbitral tribunal subject to parties' contrary agreement. Article 26 of the ICSID Convention; and Rule 39 of the ICSID Arbitration Rules. The Arbitration Rules of the Court of Arbitration of Northern Europe (the "CANE") envisage a partial exclusivity. In accordance with Clause 28 of these Rules, once the subject matter is seized by an arbitral tribunal, the jurisdiction of a judicial authority is ousted in respect of interim payment. Further, Article 25(3) of the LCIA Arbitration Rules provides for partial exclusivity: arbitrators are solely empowered to deal with requests on security for costs. This is, indeed, in line with Section 38(3) of the EAA 1996.

⁶² On the depoliticisation of investment disputes, see, e.g., Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA* (Washington D.C.: ICSID 1992).

system.⁶³ Article 26 of the ICSID Convention⁶⁴ provides for the rule of “exclusive remedy” as part of its self-contained and autonomous characteristics.⁶⁵ That is to say no court of a contracting state should adjudicate, even for a provisional remedy, a dispute arising from an agreement under which a valid consent is given to the jurisdiction of the International Centre for the Settlement of Investment Disputes (“ICSID Centre”). The rule of judicial exclusivity had been the subject of

⁶³ See, e.g., Aron Broches, “A Guide for Users of the ICSID Convention”, 8(1) News from ICSID 5 (1991); and George R. Delaume, “Foreign Sovereign Immunity: Impact on Arbitration”, 38(2) Arb J 34, 35 (1983) (“Sovereign Immunity”). The arbitration system is autonomous and self-contained mainly because ICSID arbitration operates “in total independence from domestic laws, including the law prevailing at the seat of arbitration.” See George R. Delaume, *Transnational Contracts Applicable Law and Settlement of Disputes (A Study in Conflict Avoidance)* (New York: Oceana Publications, Dobbs & Ferry 1990), v. II, Booklet 17, 37 (“Transnational Contracts”). See also, e.g., Broches, 5; and Antonio R. Parra, “The Power of the Arbitrator and the Experience of the Arbitral Institutions – The Practices and the Experience of the ICSID” in: ICC (ed.), *Conservatory Measures*, 37, 38 (“The Practices”). In this respect, see also Articles 27, 44, 53, and 54 of the ICSID Convention. But see S. J. Toope, *Mixed International Arbitration – Studies in Arbitration Between States and Private Persons* (Cambridge: Grotius 1990), 223-245.

⁶⁴ This Article provides that “[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.”

⁶⁵ This rule is also expressed as the “rule of judicial abstention.” See, e.g., George R. Delaume, “ICSID Arbitration Proceedings: Practical Aspects”, 5 Pace L Rev 563, 565 (1985).

controversy⁶⁶ until the 1984 amendment of the ICSID Arbitration Rules.⁶⁷ Rule 39(5) of the Rules provides:

Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to the institution of the proceeding, or during the

⁶⁶ For the list of commentators' arguments for both in favour and against the rule of judicial exclusivity, see, e.g., Schreuer, Article 26, para. 81-83. For court decisions in favour of the rule of judicial exclusivity see, e.g., *Maritime International Nominees Establishment v. Government of the Republic of Guinea (MINE v. Guinea)*, Decision of the Geneva *Autorité de surveillance des offices de poursuite pour dettes et faillite*, 7 October 1986, extracts of the English translation from the French original published in 4 ICSID Rep 45 (ruling that Article 26 meant, in the absence of any stipulation to the contrary, "renunciation of all other recourse"); and *Guinea and Sogui pêche v. Atlantic Triton*, (Decision of the Court of Cassation, 18 November 1986), extracts of the English translation from the French original published in 26 ILM 373 (1986) (holding that "the power of the national judge to order conservatory measures is not excluded by the [ICSID] Convention of Washington and can only be excluded by the express agreement of the parties or by a tacit agreement arising from the adoption of arbitration rules including such a renunciation."). For a recommendation of an ICSID tribunal confirming the rule of exclusivity, see, e.g., *MINE v. Guinea*, Decision of Tribunal, 4 December 1985, cited in 4 ICSID Rep 41.

⁶⁷ This amendment is in line with the French Court of Appeal decision in *Atlantic Triton*. See 26 ILM 373 (1986). The amendment was proposed "as an elaboration upon Article 26 of the Convention" (see, e.g., Parra, *The Practices*, 38) and unanimously adopted by the ICSID Administrative Council (see Res. AC(18)/RES/57, *Annual Report*, 14, 18 (1985)). See, e.g., Gaillard / Savage (eds.), para. 1309. However, Collins, for instance, rightly argues that national courts may disregard Rule 39(5) because they may find that this Rule "may be outside the scope of the rule-making power in Article 44 of the Convention, and that some national courts will on grounds of public policy regard the agreement to oust their jurisdiction ineffective." Collins, *Provisional*, 105. This is, particularly, so where no arbitral tribunal is in existence at the time when the request is made. It should, however, be noted that no court yet found Article 39(5) ineffective on any ground since the Rules' amendment. If parties wish to empower local courts to grant provisional measures they should do so by an express agreement. In fact, a suggested text for such an agreement is provided in the recent ICSID model clauses:

Without prejudice to the power of the Arbitral Tribunal to recommend provisional measures, either party hereto may request any judicial or other authority to order any provisional or conservatory measure, including attachment prior to the institution of the arbitration proceeding, or during the proceeding, for the preservation of its rights and interests.

See ICSID Model Clauses, Doc. ICSID/5/rev., clause 14 (1993), reprinted in 4 ICSID Rep 357, 365. Although the above clause is fully effective against an investor, it may be "curtailed by considerations of sovereign immunity" against a state. Delaume, *Transnational Contracts*, 45. It was also stated that the examples of express agreements, which provide access to local courts for the grant of provisional measures may be found, in practice, in financial agreements between bankers and foreign governmental borrowers. See Delaume, *Practical Aspects*, 582.

proceeding, for the preservation of their respective rights and interests.

3 Exclusive Judicial Powers to Grant Provisional Measures

A small number of national laws⁶⁸ and arbitration rules⁶⁹ empower judicial authorities exclusively to grant provisional measures. There are several arguments for the exclusive court jurisdiction.⁷⁰ Historically, judiciary disapproved the idea of arbitrators, private individuals adjudicating disputes.⁷¹ The reasons were generally related to the arguments that arbitral jurisdiction “might endanger state jurisdiction

⁶⁸ Argentina (Article 753 of the National Code of Civil and Commercial Procedure 1982), Austria (Articles 588 and 589(1) of the Austrian CCP 1895, as amended), Brazil (see Matthew Heaphy, “The Intricacies of Commercial Arbitration in the United States and Brazil: A Comparison of Two National Arbitration Statute,” 37 USFL Rev 441, 455 (2003)), China (Articles 28 and 46 of the Arbitration Law), Czech Republic (Section 22 of the Law on Arbitral Proceedings and Enforcement of Arbitral Awards 1994), El Salvador (Smit / Pechota, 1558), Finland (Section 5(2) of the AA 1992), Italy (Article 818 of the CCP 1990), Japan (Smit / Pechota, 1942), Libya (Article 758 of the CCP), Liechtenstein (Article 605 of the CCP), Malaysia (McClendon, 73), Oman (Smit / Pechota, 2205), Panama (Article 1444 of the Judicial Code 1988), Philippines (Section 14 of the Arbitration Law 1953), Quebec (Article 940(4) of the Arbitration Law), Singapore (McClendon, 94), and, arguably, Spain. It seems that even the new Spanish Civil Procedure Code 2001 does not expressly empower arbitrators to grant provisional measures. To this end, opponents of arbitral provisional measures seem to boost their position with the new law’s lack of regulation. This author wishes to thank to his colleague Rosa Lapiedra for her insightful comments on the new Spanish legislation.

⁶⁹ Out of the arbitration rules surveyed only the Arbitration Rules of the Chinese International and Economic Trade Arbitration Commission (the “CIETAC”) expressly oust the arbitral jurisdiction for the grant of provisional measures. Under the CIETAC Rules, the parties cannot directly make their application to the relevant judicial authority. This application can only be made through the Arbitration Commission of the CIETAC. The Court will then pass the application to the relevant judicial authority. It is stated that requests for provisional measures are rarely made before the CIETAC. See Jonathan Crook, “Leading Arbitration Seats in the Far East: A Comparative Study” in: Frommel / Rider (eds.), 63, 71. It seems that the Arbitration Court has no discretion in regard of passing the application on to the relevant judicial authority. See Article 28 of the Chinese Arbitration Law. See also Cecilia Håkansson, *Commercial Arbitration Under Chinese Law* (Uppsala: Iustus 1999), 145. Whether or not a request for a measure can be made directly to a court prior to making application for arbitration with the commission is not clear. Some courts accepted such application whereas others denied them due to the fact that they were not made through the Commission. *Id.*, 146-147.

⁷⁰ Indeed, arguments made in favour of concurrent jurisdiction approach may, to a certain extent, be used for supporting exclusive-court-jurisdiction approach.

⁷¹ See *supra* Chapter I, Part 2.

and the high ideals of impartial justice”.⁷² Although the jealousy and those fears are now redundant in majority of jurisdictions, their residue can still be found in a number of states, particularly in states where arbitration laws have not recently been reformed. Today, it seems that the choice of exclusivity is more political than philosophical.

Hence, it is argued that since arbitrators have no coercive powers to enforce their decision on provisional measures they should not render such decisions in any case.⁷³ It is further indicated, perhaps because of arbitrators’ lack of power concerning coercive measures, that “the grant of provisional relief is not to be subject of a legal dispute with respect to which parties may enter into a binding private settlement agreement”⁷⁴ As a result, “[p]arties cannot refer to arbitration issues that they would not be entitled to settle.”⁷⁵ Moreover, it may be argued that the main benefit of exclusive judicial jurisdiction to issue a provisional measure today is the possibility of having enforceable measures at anytime and anyplace within the state where the measure granted.⁷⁶ Further, in this regard, it is arguable, for a small number of

⁷² Id. There were also “practical problems of one party only (ex parte) applications, the time inevitably taken to bring the tribunal together, and the need for enforcement powers on the part of the forum making the order.” See Lew / Mistelis / Kröll, para. 23-10.

⁷³ To this end, Bernardini states that empowering arbitrators to grant provisional measures is prevented by “[t]he traditional view that the coercive powers are vested only with State courts.” Piero Bernardini, *The Italian Law on Arbitration – Text and Notes* (The Hague: Kluwer 1998), 15, n. 30. This outdated view has long been abandoned by many states. To this end, arguments for distinguishing jurisdiction to grant interim measures and jurisdiction to enforce those measures were also very helpful. See, e.g., Robert Briner, “Special Considerations Which May Effect the Procedure (Interim Measures, Amiable Composition, Adaptation of Contracts, Agreed Settlement)”, in: Albert Jan van den Berg (ed.), *Planning Efficient Arbitration Proceedings – The Law Applicable to International Arbitration*, ICCA Congress Series No. 7 (The Hague: Kluwer 1996), 362 (“Planning Efficient Arbitration”).

⁷⁴ Bösch (ed.), 52.

⁷⁵ Id., 377.

⁷⁶ Karrer, *Less Theory*, 108. It should, however, be noted that the arbitrating parties or the subject matter of arbitration generally has no connection with that state. Thus enforceability within the state where the measure is granted would not be a great benefit. See *infra* Chapter V, Part 3.2.

cases, that judicial authorities may be a speedier and, thus, more efficient forum than arbitrators for the grant and execution of interim measures of protection.⁷⁷

None of the above reasons justify, in this author's view, the exclusive jurisdiction of courts for interim measures of protection due mainly to principle of party autonomy in arbitration and the other reasons in favour of arbitral jurisdiction to grant such measures.⁷⁸

Where courts have exclusive jurisdiction to deal with provisional measures, an interesting question may arise: could arbitrators grant provisional measures regardless of courts' exclusive jurisdiction? An arbitral tribunal could in all circumstances "recommend" or "propose" to the parties certain measures for protection of rights, e.g. measures for non-aggravation of disputes.⁷⁹ Apparently, whether that

⁷⁷ It is interesting to note Article 753 of the National Code of Civil and Commercial Procedure 1982 of Argentina, which provides: "[a]rbitrators cannot issue orders of compulsion or enforcement. They must request compulsory measures from the court which shall lend its assistance *in order to achieve speediest and most efficient conduct of arbitral proceedings*." (Emphasis added.) However, one should be reminded of the arguments in favour of jurisdiction of arbitrators to grant provisional measures. See Chapter II, *supra* Part 1.1.

⁷⁸ See Chapter II, Part 1.1.

⁷⁹ Some commentators argue that the tribunal has the power to issue orders or awards on interim measures despite the fact that the law of the place of arbitration reserves such power exclusively to national courts. See, e.g., Briner, 364; Bucher / Tschanz, para. 170; and Blessing, paras. 850-51. They state that the prohibitions of the *lex arbitri* on the arbitral power come into play where the arbitral measure granted necessitates court assistance at the seat of the tribunal. Briner, 364; and Blessing, para. 851. In this regard see also *Warth Line, Ltd v. Merinda Marine Co.*, 778 F.Supp. 158 (S.D.N.Y. 1991) (denying the claim that arbitrators do not have power to grant provisional measures due to foreign law exclusively empowering courts to order such measures.). But see Born, *International Arbitration*, 922 (arguing that an [a]rbitrator will seldom grant provisional measures unless he is satisfied that the national arbitration legislation applicable to the arbitral proceedings allows him to do so."). Further, whether the form of the measure is a recommendation or not, arbitrator should not sanction the non-compliance where the *lex arbitri* prohibits arbitral provisional measures.

recommendation/proposition is complied with depends upon how co-operative the parties are.⁸⁰

4 Concurrent Powers of Judicial Authorities and of Arbitrators

It is undisputed that an arbitral tribunal is the “natural judge” for deciding provisional measures.⁸¹ However, the tribunal’s exercise of jurisdiction for such measures is, in some cases, impossible or ‘ineffective’⁸². This is because arbitration has certain inherent problems and shortcomings in respect of interim remedies. These problems and shortcomings are mainly related to nature and operation of arbitration. Because of the above problems and shortcomings of arbitral competence, most legal systems,⁸³ arbitration rules,⁸⁴ and commentators accept the benefit of concurrent jurisdiction of arbitrators and of courts for the grant of provisional measures.⁸⁵ This concurrent jurisdiction aims to provide resolution to the problems and shortcomings. Court involvement makes arbitration an effective means of dispute resolution and thus assisting its survival as a dispute resolution mechanism.⁸⁶

⁸⁰ As indicated by Article 26(2) of the Concordat, the parties “may voluntarily submit to provisional orders proposed by the arbitral tribunal.”

⁸¹ See Chapter II, supra Part 1.

⁸² Id.

⁸³ There are two arbitration conventions dealing with provisional measures. The European Convention recognises the concurrent jurisdiction of arbitrators and of courts. See Article VI(4). However, under Article 26 of the ICSID Convention, the court involvement for assistance is, unless otherwise agreed, prohibited. See Chapter II, supra Part 2. For examples of national laws adopting concurrent jurisdiction approach, see Chapter II, infra Part 4.4.

⁸⁴ Annex.

⁸⁵ See, e.g., Kessedjian, Court Decisions 1 (stating that “[i]nternational commercial arbitration cannot entirely ignore national courts. Now, in the year 2001, this is a fact, not a matter for intellectual controversy.”). See also Chapter II, infra Part 4.4.

⁸⁶ To this end, it should be noted that without the assistance of a court, contracting parties would be extremely hesitant to choose arbitration as their dispute resolution mechanism due to the problems and shortcomings concerning arbitral jurisdiction for providing interim protection of rights. See, e.g., “Note – Arbitration – Availability of Provisional Remedies in Arbitration Proceedings”, 17 NYULQ Rev 638 (1940). But see Peter S. Caldwell, “Contemporary Problems in Transnational Arbitration”, in: *APEC Symposium on Alternative Mechanism for the Settlement of*

The concurrent jurisdiction approach naturally accepts that even if a request is made to a court for interim protection of rights, the substance of the case remains within the arbitral domain, and that such request is compatible with the agreement to arbitrate.

The regulation of concurrent jurisdiction varies. It is necessary to examine the variations to propose “clear rules aimed at avoiding chaotic results” and at enhancing the effectiveness of arbitration.⁸⁷ The approach of the national laws, court decisions, arbitration rules to concurrent jurisdiction shapes the respective roles of arbitrators and of judges. This approach reflects both philosophical and political choices.⁸⁸

The examination of the laws, rules and decisions demonstrate that most national laws and rules accept the freedom-of-choice approach. Under this approach, parties are free to make applications either to an arbitrator or a court. However, today the trend is that arbitral competence to grant provisional measures is primary to judicial competence. Thus some national laws provide for restrictions to the parties’ freedom to choose the forum to seek interim measures. So do some arbitration rules.⁸⁹ Restrictions, be it contractual or statutory, generally aim to avoid abuse of access to courts for provisional measures. Consequently, the restrictions assist in making arbitration more efficient and fair.

The concurrent jurisdiction approach inevitably invites positive and negative conflicts of jurisdictions.

Transnational Commercial Disputes, 27-28 April 1998, Bangkok (Thailand: The Arbitration Office 1998), 6.

⁸⁷ Kessedjian, *Court Decisions*, 11.

⁸⁸ See, in this regard, Cremades, *The Need*, 226.

The concurrent jurisdiction approach raises certain other important issues. These issues are whether or not (i) exclusion of judicial or arbitral power is permissible, (ii) court assistance to foreign arbitration is allowed, and (iii) damages could be obtained for provisional measures and forum to seek them.⁹⁰ The law of the country where the court is

⁸⁹ It is generally considered that a party agreement may restrict that freedom.

⁹⁰ There are many other issues, which are not examined in detail in this thesis. These issues are, *inter alia*, the initiation of application for judicial measures, types of and requirements for granting of the measures. There are mainly four means of referral of a petition for court assistance: Arbitrators may alone be allowed to make an application to a court for provisional measures (e.g., Article 183(2) of the SPIL). Alternatively, contracting parties can make such application only after the permission of the tribunal. Or the parties in some cases along with arbitrators may be free to apply to a court for provisional measures. Finally, the initiation may be left solely to parties. The initial two approaches are aimed to give the arbitrators an initial screening power for vexatious interim remedy applications to a court. The third and the fourth approaches are more in line with the principle of party autonomy than the first two approaches. Particularly, the last approach is recognised by many national laws. Those two approaches are not free from criticism. The main criticism is the lack of initial screening done by arbitrators (unlike the initial two approaches) for avoiding oppressive applications. However, the lack of such preventive measure may be overcome through screening by courts and arbitral tribunals of the application after it is made. To this end, there is a burden, under those approaches, on both judicial authorities and arbitrators to avoid vexatious applications. There is also a burden on the parties in choosing the rules applicable to arbitration and the place of arbitration. The parties are advised to act prudently in choosing the applicable rules and the place of arbitration, that allow courts or arbitrators to avoid vexatious applications for interim measures. The types of measures that could be granted by judicial authorities differ from one country to another. The types are generally left to the procedural law of the country where the court assistance is sought. Some national laws, for instance, provide for list of measures that could be granted for assisting arbitration. See, in this regard, e.g., California (Section 1297.93 of the CCP); England (Sections 43-44 of the AA 1996); Hong Kong (Section 2GB of the Arbitration Ordinance), Hungary (Section 37 of the Act LXXI on Arbitration 1994); India (Article 9 of the Arbitration and Conciliation Ordinance), Ireland (Section 7 of the AA 1998); New Zealand (Article 9(2) of the First Schedule to the AA 1996); Oregon (Section 36.470(3) of the International Commercial Arbitration and Conciliation Act); Scotland, (Article 9 of Schedule 7 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990); Singapore (Section 27(1) of and the Second Schedule to the AA); Texas (Section 172.053 of the Act Relating to Arbitration or Conciliation of International Commercial Disputes); and Zimbabwe (Article 9 of the AA 1996)). It is noteworthy, in regard of England that the courts' powers exercisable in assistance to arbitration include, for instance, an interim injunction restraining a party to remove its assets from the jurisdiction (freezing order (*Mareva* injunction)), and an order for preservation of evidence (search (*Anton Piller*) order). It is also noteworthy that Section 44(2)(a) of the EAA 1996 is related to the taking/collection of evidence but not preservation of evidence. See, in this regard, *Viking Insurance Co v. Rosedale and Others*, *Commerce & Industry Insurance Co. of Canada and Another v.*

located⁹¹ would be applicable to those issues. Any application to a judicial authority should be notified to arbitrators for such applications may affect the substance of the case and may result in conflicting / overlapping decisions, and for as a matter of courtesy.⁹²

Certain Underwriters at Lloyds and Others, [2002] 1 WLR 1323, [2002] 1 Lloyd's Rep 219. The drafters of the Model Law, in contrast, found it unnecessary to specifically list the various possible measures; instead, they found it more appropriate that Article 9 of the Model Law contain a general formula perhaps partly because the measures "were an integral part of the general procedural law applied by the court." See UN Doc A/CN.9/245, para. 188, reprinted in Holtzmann / Neuhaus, 340; and UN Doc A/CN.9/216, para. 69, reprinted in Holtzmann / Neuhaus, 336-37. It is, in respect of the types of measures, interesting to further note that a contractual limitation, if it is held valid, could restrict the types of judicial measures. See, e.g., Article 10(3) of the Arbitration Rules of the AFMA. On the requirements to grant provisional measures, it should be noted that they too differ from one legal system to another. In very broad terms, *fumus boni juris* and *periculum in mora* are required in various legal systems. On these requirements see, generally, *infra* Chapter IV, Part 3.

⁹¹ Even if the parties are agreed to arbitrate the issue under national law different from the law of the place of arbitration, the court at such place shall apply its own law as regards issues on a request for a provisional measure so long as the measure is considered as procedural but not substantive (*forum regit processum*). The distinction between procedural and substantive is by no means clear-cut (see, e.g., Lawrence Collins (gen. ed.), *Dicey and Morris on Conflict of Laws*, 12th ed. (London: Sweet & Maxwell 1993), 170) and should be examined, in accordance with the applicable laws in each case. For instance, under Swiss law, certain provisional measures concerning, e.g., intellectual property and competition law are considered substantive. See H. U. Freimuller, "Switzerland" in: Shenton / Kuhn (eds.), 245. On procedural/substantive distinction, see, e.g., Lew / Mistelis / Kröll, para. 23-9 (indicating that "[t]he power to order interim relief is generally classified as a matter of procedure and therefore governed primarily by the law governing the arbitration."); Born, *International Arbitration*, 922; and Sigvard Jarvin, "To What Extent Are Procedural Decisions of Arbitrators Subject to Court Review?" ("Procedural Decisions") in: Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series No. 9, (The Hague: Kluwer 1999), 367 ("Improving the Efficiency") (referring arbitral provisional measures as procedural decisions). Further, Sanders states that an order regarding sale of perishable goods "contains a decision on a matter of substance." Sanders, *Quo Vadis*, 270. But see *Watkins-Johnson Company v. Iran*, Case No. 370, Interim Award No. ITM 19-370-2 (26 May 1983), reprinted in 2 Iran-US CTR 362-363; and *Ford Aerospace and Communications Corporation, Aeronatic Overseas Services v. The Air Force of Iran*, Case No. 159, Interim Award No. ITM 28-159-3 (20 October 1983), reprinted in 3 Iran US CTR 384-389. For analysis of these cases and the Iran-US Claims Tribunal's approach in this regard, see Caron, *Interim Measures*, 500-501.

⁹² The applicant is generally required to make the notification either directly or through the arbitral tribunal (e.g., Section 12 of the Arbitration Rules 1996 of the Arbitration Court Attached to the Economic Chamber of Commerce of the Czech Republic; and Article 25 of the Arbitration Rules 1998 of the LCIA). The duty of notification, for instance, has been part of the ICC Arbitration Rules since 1939 (Article 23(2) of the 1998 Rules, Article 8(5) of the 1975 and 1988 Rules, Article 13(5) of the 1955 Rules, and Article 11(4) of the 1939 Rules). In fact, under the

This Part examines (i) reasons in support of concurrent jurisdictions of courts and of arbitrators, (ii) jurisdiction on the merits and principle of compatibility, (iii) court assistance to foreign arbitration, (iv) the manner in which the distribution of the jurisdiction between courts and arbitrators is done, (v) exclusion agreements, and (vi) conflict of jurisdictions.

4.1 Reasons In Support of Concurrent Jurisdiction

There are several reasons in support of concurrent jurisdiction of arbitrators and of courts for interim protection of rights. These reasons are related to nature and operation of arbitration. The reasons derive from arbitration's three salient problems and various shortcomings in responding to contracting parties' need for interim protection of rights. This Part examines these problems and shortcomings, respectively:

- Arbitrators, prior to their appointment,⁹³ are not in a position to grant any interim measure. It may take months to form an arbitral tribunal.⁹⁴ In order to overcome this first salient

ICC Rules, any application for, and the grant of a provisional measure should be notified to the ICC Secretariat without delay. The consequence of failure to comply with the duty to inform arbitrators is not dealt with in any of the rules surveyed. Such failure should not affect the validity of the application or the measure in question. See ICC Award 2444 of 1976, extracts published in (1977) *Clunet* 932, and Sigvard Jarvin / Yves Derains, *Collection of ICC Arbitral Awards 1974-1985* (Deventer / Boston: ICC Publishing / Kluwer 1990), 285; ICC Award 4415 of 1984, extracts published in (1984) *Clunet* 952, 957, and ICC Award 5103 of 1988, extracts published in (1988) *Clunet* 1206. See also Yves Derains, "Note", (1977) *Clunet* 932, 935. In case the applicable rules or laws do not provide for it, informing the tribunal of the request is advisable as it demonstrates the relevant party's good will in its action. At least, it is a courtesy to the tribunal and to the relevant arbitration institution to make such a notification.

⁹³ Even if the tribunal is appointed it needs, in some cases, to await transmittal of the file to it prior to issuing any measure. See, e.g., Article 23(1) of the ICC Arbitration Rules.

⁹⁴ This statement is particularly true where the tribunal consists of more than one members. Also, a party might delay proceedings for provisional relief by simply not appointing an arbitrator. Hausmaninger, *Pre-Arbitral Referee*, 89. Such delay may frustrate, at least to a certain degree, the proceedings for interim protection. Apparently, this is where the concept of interim measures is considered as a procedural matter. On the procedural / substantive distinction see Chapter II,

problem, various complementary mechanisms are proposed. Under these mechanisms, a party-determined authority is empowered to issue emergency measures prior to appointment of arbitrators.⁹⁵ However, in any case, courts may grant those measures any time (generally, at a day or night) when a need arises.

- Arbitrators have no power (jurisdiction) over third parties to arbitration agreement due to contractual (consensual) nature of arbitration.⁹⁶ In international arbitrations, involvement of such third parties as banks (as issuers of letters of credit or bank guarantees) and persons (who, e.g. may legally hold goods in dispute; subcontractors) is sometimes unavoidable. However, since arbitrators' power derives from arbitration agreement, no arbitral power could be exercised over legal rights of third parties to arbitration. Indeed, an arbitral tribunal has "no power to give directions to third parties (e.g. to banks where funds of the opponent are placed)."⁹⁷ For this reason, it was argued that "arbitrators' conservatory orders

supra note 91. In such cases, an aggrieved party may press for constitution of the tribunal despite the resistance from the opponent through a petition either to, where possible, party-determined authorities or, in general, to judicial authorities. See, e.g., Section 44 of the EAA 1996.

⁹⁵ See, generally, *infra* Chapter III.

⁹⁶ Indeed, the Model Law indicates that an arbitral tribunal operating under the law may order "any party" to take interim measures. Article 17.

⁹⁷ ICC First Interim Award 5835 of 1988, extracts published in 8(1) ICC Int'l Ct Arb Bull 67 (1997). See also ICC Final Award 9324 of 1998, extracts published in 11(1) ICC Int'l Ct Arb Bull 103 (where the arbitral tribunal refrained from extending an injunction for suspension of payment of a bank guarantee issued by a court against a bank due to the fact that the main dispute arose); ICC Final Award 10062 of 2000 (unpublished) (where the arbitral tribunal refrained from making an order against a bank, in an arbitration arising from a sale/purchase agreement to which the bank was not a party); and *Lance Paul Larsen v. Kingdom of Hawaii* (indicating, in procedural order no. 3, that the tribunal has no jurisdiction over third parties to the arbitration agreement involved.), available at <www.pca-cpa.org/PDF/LHKAward.pdf> last visited at 28 October 2003.

are under ... [certain] aspects less protective than attachment orders rendered by a state court.”⁹⁸

Despite the unavailability of arbitral provisional measures against third parties, it should be noted that an interim measure may be extended to, as the case may be, arbitrating parties’ “officers, agents, servants, employees, and attorneys” and those persons controlled by the parties or their officers.⁹⁹ Further, in some cases, an arbitral direction to an arbitrating party could have the intended result. For instance, an arbitral tribunal does not have the power to issue a freezing order towards a non-party bank but it can order the relevant party before it to refrain from moving the assets elsewhere.¹⁰⁰ It should also be noted that the tribunal’s decision “reflects on the rights of third parties.”¹⁰¹ For instance, despite the fact that an arbitral tribunal does not have any power, as indicated above, to issue a provisional measure over a guarantor who is not a party to the arbitration agreement, an arbitral decision on the main obligation unavoidably affects the guarantor.¹⁰²

- Arbitrators’ power, even over arbitrating parties, is restricted since arbitrators have no coercive powers (*imperium*) to enforce their decisions. Coercive powers are within the

⁹⁸ ICC First Interim Award 5835 of 1988, extracts published in 8(1) ICC Int’l Ct Arb Bull 67 (1997). See also Redfern / Hunter, para. 7-24 (indicating that arbitral orders on provisional measures could be directed to “any persons or entities” within the parties’ control.).

⁹⁹ In Order of 1999 in AAA Case No. 52 153 00116 87, the tribunal expressly extended its order to the above persons (unpublished). On this case, see *infra* Chapter IV, note 115.

¹⁰⁰ Such an order should not, in the view of this author, infringe the doctrine of comity due to the principle of party autonomy. See, in this regard, Chapter II, *infra* note 272 and accompanying text. But see Karrer, *Less Theory*, 106. On the doctrine of comity, see, e.g., Joel R. Paul, “Comity in International Law”, 32 Harv Int’l LJ 1 (1991).

¹⁰¹ Karrer, *Less Theory*, 105.

prerogative of a state and no state would delegate such powers to private individuals. An arbitrator is not “an emanation” of any state.¹⁰² Hence, “[n]ot even the arbitrators’ directions to the parties themselves are self-executing.”¹⁰³ Also, there is no “contempt to court” in arbitration.¹⁰⁴ Accordingly, arbitrators generally refrain from ordering measures that intrinsically require the use of coercive powers.¹⁰⁵ However, as compared to arbitral measures, judicial provisional measures may provide relatively more legal protection. These considerations led to the view that arbitral measures are “often” ineffective as they lack “coercive elements”.¹⁰⁶ However, it should be noted that effectiveness of arbitral provisional measures would not necessarily be harmed in each case. Arbitrators have certain other powers

¹⁰² For further examples see, e.g., *id.*

¹⁰³ Bond in: ICC (ed.), *Conservatory Measures*, 14. See also Julian D. M. Lew, *Applicable Law in International Commercial Arbitration* (Dobbs Ferry / New York: Oceana 1978), 535 (arguing that “an international arbitration tribunal is a non-national institution; it owes no allegiance to any sovereign State; it has no *lex fori* in the conventional sense”). On the last point see, e.g., A. F. M. Maniruzzaman, “International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview”, 7(3) *J Int’l Arb* 53-64 (1990); Klaus Peter Berger, “The International Arbitrators’ Application of Precedents”, 9(4) *J Int’l Arb* 5-22 (1992); and Lew / Mistelis / Kröll, para. 6-33. For a view to the contrary, see David, 76-77. It is noteworthy in this regard that adjudication of a dispute by a private individual was allowed by the state under Roman law for a period of time. See Introduction, note 33.

¹⁰⁴ ICC First Interim Award 5835 of 1988, extracts published in 8(1) *ICC Int’l Ct Arb Bull* 67 (1997). See also Stalev, 110. It should be noted that arbitral decisions on provisional measures are enforceable through the assistance of courts. See *infra* Chapter V, Part 3.

¹⁰⁵ *In re Arbitration Between Unione Stearinerie Lanza & Wiener*, [1917] KB 558, 559 (holding that an arbitrator has no power to hold a party contempt to a court or to issue a writ of attachment.).

¹⁰⁶ See, e.g., ICC Final Award 7828 of 1995 (unpublished) (holding that “it exceeds the arbitrator’s competence to subject the Defendant to attachment if he fails to pay the ordered amount within the period of two weeks.”); and ICC Final Award 7589 of 1994, extracts published in 11(1) *ICC Int’l Ct Arb Bull* 60 (2000) (holding that the arbitral tribunal does not have power to order measures “designed to ensure enforcement of a possible award such as attachment of assets at third-party debtors such as banks, or orders directed to third-party debtors to take or omit certain actions (e.g. *Mareva* Injunction)”).

¹⁰⁷ Hausmaninger, *Pre-Arbitral Referee*, 87.

and means that may make their decision to carry some weight.¹⁰⁸ Indeed, arbitral provisional measures are often complied with.¹⁰⁹ Further, there is a growing tendency under national laws for making such measures enforceable.¹¹⁰

- The arbitrators may not always have the necessary powers to issue interim measures.¹¹¹ Indeed, some national laws and arbitration rules, to a certain extent, prohibit or restrict arbitral provisional measures. To this end, it is noteworthy that some national laws¹¹² and arbitration rules¹¹³ restrict the types of measures that could be granted by an arbitrator.
- It was argued that arbitrators may hesitate granting provisional measures for various reasons and such hesitation

¹⁰⁸ See *infra* Chapter V, Part 1. Also, arbitral decisions can be far more flexible than judicial provisional measures. See this Chapter II, *supra* Part 1.1. Such flexibility enhances, in some cases, the effectiveness of the measures.

¹⁰⁹ See *infra* Chapter V, note 2.

¹¹⁰ See *infra* Chapter V, Part 3.

¹¹¹ Arbitrators are not allowed to grant measures that intrinsically require use of coercive powers, e.g., attachments.

¹¹² See, e.g., Article 17 of the Model Law, and Article 38(4) of the EAA 1996 (both imposing restrictions as to the “subject-matter of the dispute” or “the subject of the arbitral proceedings”, respectively.). On the nature and extent of these restrictions, see Chapter II, *infra* note 113.

¹¹³ For instance, the texts of Article 21 of the AAA-ICDR Arbitration Rules; Article 26 of the UNCITRAL Arbitration Rules; and Article 17 of the Model Law appear to contain a restriction on subject matter of dispute. See, e.g., Redfern / Hunter, paras. 7-22 & 7-23; and Grégoire Marchac, “Interim Measures in International Commercial Arbitration under the ICC, AAA, LCIA and UNCITRAL Rules”, 10 *Am Rev Int’l Arb* 123, 128 (1999). If such interpretation is accepted, then an arbitral tribunal cannot grant such provisional measures as those aiming at preserving *status quo* or at prevention of flight of assets. *Id.*, paras. 7-21, and 7-26. However, the texts of the above provisions should not be literally read. The limitation as to the subject matter ought to be related to the rights regarding the subject matter. Indeed, it is an established rule that “interim measures are intended to protect rights relating to the subject-matter of the dispute.” Caron, *Interim Measures*, 485. See also, e.g., Case Concerning the Polish Agrarian Reform and the German Minority (Poland v. Germany), Order of 29 July 1933, PCIJ Judgments Orders and Advisory Opinions, Series A/B, No. 58; and RCA Globcom Communications and The Islamic Republic of Iran, Interim Award No. 30-160-1 (30 October 1983), reprinted in 4 *Iran-US CTR* 5-8. The limit of interim protection is, accordingly, “actions prejudicial to rights not a part of the dispute.” *Id.* The practice of the Iran-US Claims Tribunal supports this view. *Id.* See further Otto Sandrock, “The *Cautio Judicatum Solvi* in Arbitration Proceedings or The Duty of an Alien Claimant to Provide Security for the Costs of the Defendant”, 14(2) *J Int’l Arb* 17, 35 (1997); and Lew / Mistelis / Kröll, para. 23-41.

is a shortcoming of arbitration justifying concurrent jurisdiction.¹¹⁴ The hesitation may be based on the fear that, by proving wrong, arbitrators might be held liable.¹¹⁵ However, the existence of that fear is theoretical as no arbitrator has, in practice, been held liable.¹¹⁶ The hesitation may also be related to the arbitrators' desire not to be appearing to "favour one litigant at an early stage of the

¹¹⁴ See, e.g., Lew, Jurisdiction, 6. It is, for instance, submitted that arbitrators from civil (continental) law countries are less likely to grant provisional measures than those from common law countries. It is argued that the difference in those countries is laid down on varying legal traditions: it is often more difficult to obtain an interim remedy in a civil law country than that in a common law country. See Cremades, *The Need*, 230. This author, however, disagrees with the above argument. Also, that argument does not reflect the arbitral practice today. There are several reasons for that. The main reason is perhaps the fact that arbitrators should not have prejudices towards the parties and the case in dispute. Further, many arbitrators today have theoretical and practical knowledge of both common and civil law.

¹¹⁵ Hausmaninger, *Pre-Arbitral Referee*, 89.

¹¹⁶ Sanders, as an academic and practitioner involved in arbitration over 60 years, states that "[c]ourt proceedings against arbitrators ... are highly exceptional and if instituted as far as I [he] know, unsuccessful." Sanders, *Quo Vadis*, 236. See also Karrer, *Less Theory*, 109. Arbitrators are generally not held personally liable where their decisions rendered in good faith. Under the approach accepted by many laws, liability of arbitrators is restricted to very limited circumstances. For instance, arbitrators may be held liable for "deliberate wrongdoings" or their acts or omission of "bad faith." See, e.g., Section 29 of the EAA 1996; and Article 7(E) of the Turkish International AA. See also, in this regard, Sanders, *Quo Vadis*, 234. On the issue of liability see, e.g., Julian D. M. Lew (ed.), *The Immunity of Arbitrators* (London: Lloyd's of London Press 1990); Alan D. Redfern, "The Immunity of Arbitrators" in: ICC (ed.), *The Status of the Arbitrator* (ICC Publishing, 1995), 121; Eric Robine, "The Liability of Arbitrators and Arbitral Institutions in International Arbitrations Under French Law", 5(4) *Int'l Arb* 323 (1989); Christian Hausmaninger, "Civil Liability of Arbitrators-Comparative Analysis and Proposals for Reform", 7(4) *J Int'l Arb* 5 (1990); and Susan D. Franck, "The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity", 20 *NY Law School J Int'l And Comp Law* 1 (2000). See also *Cubic Defense Systems, Inc. v. International Chamber of Commerce*, extracts from the French original published in XXIVa YCA 287 (1999) (15 September 1998, Court of Appeal, Paris) (holding that the ICC could only be held liable where its breach of duty is proved.); and *Corbin v. Washington Fire & Marine Insurance Co.*, 278 F. Supp. 393 (D.S.C. 1968), app'd 398 F. 2d 543 (4th Cir. 1968). It is also noteworthy that, under the ICC Arbitration Rules 1923, arbitrators were contractually immune from liability for damages arising from decisions as regards provisional measures. The immunity dropped forever from the Rules in 1927 along with the provision on interim measures. See *supra* Chapter I, Part 1.2.1. Restricting arbitrators' liability aims to provide for the proper environment in which arbitrators can distribute justice free from considerations of being held liable. Any damages arising from wrongful measures could be compensated from, if obtained, the security for damages.

proceedings”.¹¹⁷ Generally, the court, which grants a provisional measure is generally not the same as the one that adjudicates the merits. This fact, however, should not be a basis for an argument that arbitrators giving a decision in regard of a request for a provisional measure not on the merits of a case appears favouring one side over the other. It may be considered that such appearance occurs where arbitrators take into account likelihood of success on the merits. Nonetheless, it is not always the case that arbitrators take into account likelihood of success on the merits. They rather take into account whether or not there is a *prima facie* case.¹¹⁸ Even if a tribunal considers the likelihood of success on the merits and renders a provisional decision, it can change its decision after thoroughly examining the merits.¹¹⁹ It should further be noted that arbitrators’ hesitation for the granting of provisional measures is in the sharp decrease.¹²⁰

- In international arbitrations, decision making even after the appointment of arbitrators may be comparatively slow. This is because an arbitral tribunal usually consists of “several members in different, even in distant countries.”¹²¹ The members are generally from different countries due to the principle of neutrality. This fact, for some, “casts doubt on the tribunal’s ability to take truly urgent measures.”¹²² Such doubt relies on inability of such tribunals to act with the necessary speed on a petition for those measures.¹²³ The

¹¹⁷ Paulsson, *Better Mousetrap*, 215; and Marchac, 129.

¹¹⁸ See *infra* Chapter IV, Part 3.1.2.

¹¹⁹ See *infra* Chapter IV, Part 6.

¹²⁰ See arbitral cases generally referred to in *infra* Chapter IV.

¹²¹ ICC First Interim Award 5835 of 1988, extracts published in 8(1) ICC Int’l Ct Arb Bull 67 (1997).

¹²² Hausmaninger, *Pre-Arbitral Referee*, 88; and Craig / Park / Paulsson, *ICC Arbitration 2000*, 471.

¹²³ Craig / Park / Paulsson, *ICC Arbitration 2000*, 471.

assumption that tribunals act slower because the members are from different and distant countries to each other is not entirely true. Arbitrators may communicate over a telephone, video-link or internet for a decision on the petition. Further, it should be kept in mind that the chairman of the tribunal may alone be empowered to deal with urgent situations or to decide on such procedural issues as interim measures.¹²⁴

- In cases where arbitrators have no legal background, it is contended that they “may often *lack the proficiency* required to handle adequately a provisional remedies procedure.”¹²⁵ Parties and arbitration institutions as appointing authorities are randomly careless in appointing inexperienced arbitrators. Further, experience demonstrates that arbitrators who are appointed from outside the legal profession are generally very experienced in a particular field with a certain degree of knowledge on legal issues, and that non-legal arbitrators are generally appointed along with arbitrators with legal background. In fact, it is not a general practice in international commercial arbitration that the sole arbitrator or the chairman of arbitral tribunal is appointed from outside the legal profession.
- Finally, it is contended that because arbitration is “typically a one instance procedure,” such remedies available against typical judicial measures as “motion to appeal, vacate or modify” “will generally be absent in an arbitration proceeding [against arbitral orders].”¹²⁶ It is added that “since provisional measures cannot readily be issued as (interim) awards, the

¹²⁴ This is where the interim measure requested is considered as a procedural matter. See Chapter II, *supra* note 91.

¹²⁵ Hausmaninger, Pre-Arbitral Referee, 89 (Emphasis in the original).

¹²⁶ *Id.*, 91. Certain commodity arbitrations constitute exceptions to arbitrations being one-instance procedure. See Chapter II, *supra* note 33.

responding party is practically left without means to have the arbitral order set aside.”¹²⁷ Although these arguments are true to a certain extent, they underestimate the facts that an arbitral order could always be amended or revoked under new circumstances and that, in arbitral practice, provisional measures are, in some cases, granted in the form of award.¹²⁸

4.2 Jurisdiction on the Merits and Compatibility of Request for Judicial Provisional Measure with Agreement to Arbitrate

A request to a judicial authority for a provisional measure, either before or during the arbitral proceedings is compatible with the agreement to arbitrate.¹²⁹ One aspect of the doctrine of compatibility reflects dual principles, which are, in fact, a logical conclusion of acceptance of the concurrent jurisdiction approach:¹³⁰ (i) the request is not a waiver of the right to arbitrate;¹³¹ (ii) nor does the existence of an arbitration agreement prevent a judicial authority from granting an interim measure¹³². What naturally derives from the latter principle is that

¹²⁷ Hausmaninger, Pre-Arbitral Referee, 91.

¹²⁸ See *infra* Chapter IV, Part 4.

¹²⁹ The doctrine of compatibility sets forth that “the ‘negative effect’ of an arbitration agreement, which is to exclude court jurisdiction, does not operate with regard to such interim measures.” See UN Doc A/CN.9/264, para.1, reprinted in Holtzmann / Neuhaus, 343.

¹³⁰ See, e.g., Article 9 of the Model Law. These principles seem to be adopted in almost all of the Model Law jurisdictions and jurisdictions that accept arbitral powers to grant provisional measures (e.g., Belgium (Article 1679(2) of the Judicial Code 1972, as amended), and the U.S. (see Born, International Arbitration, 959)). Thirteen of the arbitration rules surveyed contain this principle. See Annex. Further, Article VI(4) of the European Convention accepts the principle of compatibility. In this regard, see also, e.g., *Bahia Industrial, S.A. v. Eintacar-Eimar, S.A.*, XVIII YCA 616 (1993) (*Audencia provincial of Cadiz*, 12 June 1991).

¹³¹ For instance, under Article 9 of the Model Law, the principle of the non-waiver is applicable regardless of where the arbitration takes place. See Article 1(2) of the Model Law. See also, e.g., ICC Award 4156 of 1983, extracts published in (1984) *Clunet* 937, and Jarvin / Derains, 515; and ICC Award 4415 of 1984, extracts published in (1984) *Clunet* 952.

¹³² This principle is adopted in Article 9 the Model Law for clarifying the practice under the New York Convention. See, e.g., UN Doc A/CN.9/168, para. 29, reprinted in Holtzmann / Neuhaus, 333-34; and UN Doc A/CN.9/207, para. 61, reprinted in

despite the initiation of the request, the merits of the case in question remains within the arbitral domain. In other words, so long as the request is for a provisional measure,¹³³ the arbitration agreement is not waived.

As to the judicial grant of provisional measures, national laws, arbitration rules and scholars generally and rightly accept that an agreement to arbitrate *does not* and *should not* hinder the grant of the measures by courts. This is simply because the court intervention does not hinder but assists the effectiveness of arbitration. Indeed, the unavailability of judicial provisional measures in arbitration proceedings would normally be one of the most important reasons for not choosing

Holtzmann / Neuhaus, 334-35. In other words, the negative effect of an arbitration agreement; namely, the exclusion of court's jurisdiction is not operable as regards provisional measures. That is mainly because of the fact that "the availability of such measures is not contrary to the intentions of the parties agreeing to submit a dispute to arbitration and that the measures themselves are conducive to making the arbitration efficient and to securing its expected results." UN Doc A/CN.9/26, para. 1, reprinted in Holtzmann / Neuhaus, 343. On the principle of non-waiver, see also, e.g., ICC Award 2444 of 1976, extracts published in (1977) Clunet 932. Whether or not the measure granted is an interim measure is determined under the law of the country where the application for the measure is made for. For instance, Article 9 of the Model Law does not restrict the courts' grant of any particular kind of interim measures. See, e.g., UN Doc A/40/17, para. 96, reprinted in Holtzmann / Neuhaus, 345.

¹³³ Whether or not a relief is qualified as 'provisional' is subject to the applicable law. The treatment under national laws may vary. In any case, the examples to measures that would probably be considered provisional are the issuance of "payment of bond in summary proceedings" (e.g., ICC Partial Award 6566 of 1993, extracts published in 11(1) ICC Int'l Ct Arb Bull 48 (2000), application for garnishee order (e.g., ICC Interim Award 6023 of 1989 (unpublished.)), a request for a referee proceedings (e.g., ICC Interim Award 6709 of 1991, extracts published in (1992) Clunet 998; 5(1) ICC Int'l Ct Arb Bull 69 (1994); and Jean-Jacques Arnaldez / Yves Derains / Dominique Hascher, *Collection of ICC Arbitral Awards 1991-1995* (The Hague / London / Boston: ICC Publishing / Kluwer, 1997), 435. For further examples, see, e.g., Schwartz, *Provisional Measures*, 53. However, where the application to a court is not for an interim injunction but for a permanent injunction such application may constitute a waiver of the right to arbitrate. See, e.g., ICC Interim Award 5896 of 1991, extracts published in 11(1) ICC Int'l Ct Arb Bull 37 (2000) (holding that a request for a permanent injunction on the issue that, by agreement, fell within the arbitral domain was a waiver of the right to arbitrate.); and ICC Partial Award 10372 of 2000 (unpublished) (indicating, by implication, that a request to a court for a permanent injunction in regard of the dispute that was initially referred to arbitration would be considered as a waiver of the right to arbitrate.).

arbitration as a dispute resolution mechanism.¹³⁴ However, some U.S. courts take the view that the courts' duty to refer the parties to arbitration under Article II of the New York Convention prevents the assistance of the courts to grant pre-judgment attachments.

Neither the text nor the preparatory materials of the Convention deal with provisional measures. Where contracting parties agree to arbitrate their disputes and a party, regardless of that agreement initiates a court action, Article II of the Convention requires the courts to "refer the parties to arbitration," unless it finds the arbitration agreement "null and void or incapable of being performed."

In almost all of the contracting states of the New York Convention, it is clear that Article II refers to the substance of a dispute and that it does not prevent a court to intervene, for effective protection of rights and execution of the arbitration agreement, with arbitration proceedings to assist.¹³⁵ Some U.S. federal and state courts, however, interpreted the language of that Article as a bar for court assistance to arbitration in respect to pre-award attachments. Those decisions and the unfortunate result of their interpretation are vigorously challenged by some other U.S. courts. There is at the moment an "unfortunate split of authority" within the U.S. concerning the availability of pre-award attachments where a case falls within the ambit of the New York Convention.¹³⁶

¹³⁴ See, e.g., Note – "Arbitration-Availability of Provisional Remedies in Arbitration Proceedings", 17 NYULQ Rev 638 (1940).

¹³⁵ The historical evolution also supports this conclusion. Indeed, Article II is originated from Article IV of the Geneva Protocol of 1923. Article IV aimed to prevent courts to adjudicate substance of a case where the parties were in agreement to arbitration.

¹³⁶ Howard M. Holtzmann / Donald Francis Donovan, "United States", in: Jan Paulsson (gen. ed.), International Handbook on Commercial Arbitration,

Article II of the Convention requires courts to stay adjudicating merits of a case that was previously agreed to be resolved through arbitration. According to some courts, the word “stay” means no court assistance available to arbitration. This line of interpretation was initially recorded in *McCreary Tire and Rubber Co. v. CEAT, S.p.A.*¹³⁷ The dispute in this case related to alleged breaches of an exclusive distributorship agreement entered into between McCreary, a Pennsylvania corporation, and CEAT, an Italian corporation. The agreement referred disputes to arbitration under the ICC Arbitration Rules in Brussels, Belgium. McCreary, in an attempt to frustrate the arbitration agreement, attached certain debts owed to CEAT and initiated a lawsuit. CEAT removed the case to a federal court. One of the issues before the Third Circuit was whether or not the pre-judgment attachment should be removed. The Court referred the parties to arbitration in accordance with Article II of the New York Convention and further held that the request for a pre-award attachment “seeks to bypass the agreed upon method of dispute resolution.”¹³⁸

The opposite view, which seems to be the prevailing one, was taken in, for instance, *Carolina Power and Light Co. v. Uranex*.¹³⁹ The dispute in

Supplement 28 (January 1999), 37 (The Hague / London / New York: Kluwer) (“International Handbook”).

¹³⁷ 501 F.2d 1032 (3 Cir. 1974).

¹³⁸ *Id.* See also *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981). For a number of lower courts followed the McCreary line, see, e.g., *Cooper v. Ateliers de la Motobecane S.A.*, 442 N.S.2d 1239 (S.D.N.Y. 1982); and *Metropolitan World Tanker, Corp. v. P.N. Pertamina Minjakdangas Bumi Nasional (P.M. Pertamina)*, 427 F.Supp 2 (S.D.N.Y. 1975). In this respect, it is noteworthy that, where the *McCreary* line is accepted, there is a risk of negative conflict of jurisdiction; both courts and arbitrators deny the issue of interim measures; e.g., where under the applicable rules or laws arbitrators are not empowered to grant provisional measures. Such negative conflict brings the risk of denial of justice. See Sigvard Jarvin, “Is the Exclusion of Concurrent Courts’ Jurisdiction Over Conservatory Measures to be Introduced by a Revision of the Convention”, 6(1) *J Int’l Arb* 176 (1989).

¹³⁹ 451 F. Supp. 1044 (N. D. Cal. 1977). See also, e.g., *E.A.S.T., Inc. of Stanford, Conn. M/V Alaia*, 876 F.2d 1168 (5th Cir. 1989). This line of view supported by several commentators. See, e.g., Hoellering, *Interim Relief*, 12-13; Lawrence F.

this case arose from the contract between Carolina Power, a North Carolina public utility company and Uranex, a French company for sale of uranium concentrates. Upon the dramatic increase in the price of the uranium, Uranex ceased the delivery on the contract price and requested renegotiation. The parties agreed to submit their disputes to arbitration. Carolina Power attached a debt owed to Uranex for satisfaction of a future arbitral award in its favour. Uranex moved to lift the attachment. The *Uranex* court expressly refrained from following the reasoning and the outcome of the *McCreary* court by stating, *inter alia*, that “the availability of provisional remedies encourages rather than obstructs the use of agreements to arbitrate.”¹⁴⁰ To this end, it should be noted that in *Uranex*, the parties had no intention to frustrate the agreement to arbitrate.

Ebb, “Flight of Assets From the Jurisdiction ‘In the Twinkling of a Telex’: Pre-and Post Award Conservatory Relief in International Commercial Arbitration”, 7(1) J Int’l Arb 9 (1990); Charles Brower & W. M. Tupman, “Court-Ordered Provisional Measures under the New York Convention”, 80 Am J Int’l L 24 (1986); Joseph D. Becker, “Attachments in Aid of International Arbitration-The American Position”, 1(1) Arb Int’l 40 (1985); New York City Bar Report on the Advisability and Availability of Provisional Remedies in the Arbitration Process, *The Record*, 625, 629 (December 1984); Reichert, 368; P. Fitzpatrick, “Attachment Prior to the Enforcement of International Arbitral Awards Under the New York Convention”, 6 Fordham Int’l LJ 556 (1983). It should also be noted that some courts, including the Second Circuit, distinguished *McCreary*. They held that interim measures other than attachments should be available under the New York Convention. See, e.g., *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1983), cert. denied, 464 U.S. 1070; *Rogers, Burgin, Shanine & Deschler, Inc. v. Dongsan*, 598 F. Supp. 754 (S.D.N.Y. 1984); *Ortho Pharmaceutical Corp v. Amgen Inc.*, 882 F.2d 806 (3rd Cir 1989); *Borden, Inc. v. Meiji Milk Products Co.*, 919 F.2d 822 (2d Cir. 1990); and *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 910 F.2d 1049 (2nd Cir 1990).

¹⁴⁰ 451 F. Supp. 1052.

The *McCreary* has found little support within the U.S.¹⁴¹ and it is not followed in international arena.¹⁴² The best display for the decline is perhaps *Channel Tunnel Group Ltd and Another v. Balfour Beatty Construction Ltd and Others*.¹⁴³ In this case, twelve British and French companies acting as a joint venture entered into a construction contract with the Channel Tunnel Group Ltd to design and commission the Channel Tunnel. The construction contract contained a dispute resolution system, including arbitration in Brussels, Belgium. A dispute arose over a variation order on payments regarding the cooling system. Upon the contractors' threat that they would suspend to work until a decision has been reached on the cooling system, the Channel Tunnel Group made a request in England for an interim injunction to prevent the contractors from suspending the work. The contractors resisted. The case went all the way to the House of Lords. On the issue of whether or not a court could order an interim measure when the case fell within the domain of arbitration and of the New York Convention,

¹⁴¹ Indeed, several U.S. courts took the same line of interpretation with the *Uranex* court. See, e.g., *Borden Inc. v. Meiji Milk Products Co.*, 919 F.2d 822 (2d Cir. 1990), cert. denied, 500 U.S. 953 (1991). For lower court decisions adopting the *Uranex* line, see, e.g., *Daye Nonferrous Metals Co. v. Trafigura Beheer BV*, 1997 WL 375680 (S.D.N.Y. 1997); *Alvenue Shipping v. Delta Petroleum (U.S.A.), Ltd*, 876 F.Supp. 482, 487 (S.D.N.Y. 1994); and *Filantro SpA v. Chilewich Int'l Corp.*, 789 F.Supp. 1229 (S.D.N.Y. 1992). See also Section 7502(c) of the New York Civil Practice Law and Rules. In this regard, it should be noted that, under Section 8 of the Federal AA, attachments are permitted for maritime matters regardless of the agreement to arbitrate the underlying dispute. See, e.g., *Anaconda v. American Sugar Refining Co.* 322 U.S. 42 (1944); *Construction Exporting Enterprises v. Nikki Maritime, Ltd*, 558 F.Supp. 1372 (S.D.N.Y. 1983); *E.A.S.T., Inc. of Stamford v. M/V Alaia*, 876 F.2d 1168 (5th Cir. 1989); and *Unitramp, Ltd. V. Mediterranean Brokerage & Agents, S.A.S.*, 1993 U.S. Dist. LEXIS 13304 (E.D. La. 13 September 1993). Many commentators also support the availability of attachments in maritime industry see, e.g., Nicholas J. Healy, "Obtaining Security in Aid of Arbitration", 3 LMCLQ 267 (1976); and Higgins, 1519.

¹⁴² See, e.g., *Scherk Enterprises AG v. Societe des Grandes Marques*, No. 3989, IV YCA 286 (1979) (Corte di Cassazione, 12 May 1977); and *Rena K*, The [1978] 1 Lloyd's Law Rep 545. See also van den Berg, The New York Arbitration Convention, 139-140.

¹⁴³ [1993] AC 334. As indicated above, many national laws and arbitration rules decline to follow the views of the *McCreary* court by expressly adopting the principle of compatibility. See Chapter II, *supra* note 130.

Lord Mustill, with whom all the other Lords were in agreement, expressly disagreed with the *McCreary* and stated:¹⁴⁴

The purpose of interim measures of protection [by courts] ... is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.

In sum, the principle of compatibility should be accepted even if a case falls within the ambit of the New York Convention.¹⁴⁵ In other words, courts should have the power to grant provisional measures but they should exercise utmost caution in exercising such power.¹⁴⁶ That is to say, courts should distinguish and deny oppressive and vexatious applications, e.g. a request to circumvent an arbitration agreement.

4.3 Court Assistance to Foreign Arbitration

Court assistance is generally available to arbitrations taking place in a country where the court is located. However, vital evidence or a party's assets from which an award would be satisfied might be in a country foreign to the place of arbitration. In such cases, convenience and efficiency requires availability of provisional measures in aid of arbitration whose seat is or is deemed to have been in a foreign country (or simply foreign arbitration).

¹⁴⁴ [1993] AC 365. The current EAA enacted in 1996 too contains an express provision recognising court assistance whilst arbitration taking place. Section 44.

¹⁴⁵ For facilitating world-wide harmonisation, the principle is adopted in Article 9 of the Model Law. See, e.g., UN Doc A/CN.9/264, paras. 1-3, reprinted in Holtzmann / Neuhaus, 343.

¹⁴⁶ See, e.g., Hoellering, Interim Relief, 13 (indicating that courts should be guided with "minimal interference" and they "should exercise discretion in determining why parties seek protective measures."). See also Born, International Arbitration, 948.

In most arbitration agreements, contracting parties specify the place of arbitration.¹⁴⁷ For such specification, parties usually opt for a neutral and geographically convenient place.¹⁴⁸ Such place is generally neutral to parties, dispute, performance of a contract, and ultimately the outcome of the arbitration. Nevertheless, a need may arise to obtain provisional measures in a place foreign to the place of arbitration.¹⁴⁹ In those circumstances, court assistance to foreign arbitration may be necessary for convenience, effectiveness of arbitration and protection of arbitrating parties' rights. The availability of such assistance is a relatively new issue. Indeed, most national laws are silent on this issue.¹⁵⁰ Under laws of some countries, court assistance to foreign arbitration seems to be unavailable.¹⁵¹ On the contrary, under laws of some other countries, court assistance to foreign arbitration, in recognition of the need for such assistance, seems to be permitted.¹⁵²

¹⁴⁷ For instance, in 2001, contracting parties determined the place of arbitration in 84% of ICC cases. See 13(1) ICC Int'l Ct Arb Bull 11 (2002).

¹⁴⁸ Arbitral institutions are generally authorised to determine, failing a party agreement, the place of arbitration. In exercising such authority, they consider, *inter alia*, neutrality and convenience.

¹⁴⁹ For preservation of evidence, status quo (see, e.g., Channel Tunnel Group Ltd and France Manche SA v. Balfour Beatty Construction Ltd and others, [1993] AC 334; [1993] WLR 262; [1993] 1 All ER 664; [1993] 1 Lloyd's Rep 291), or prevention of dissipation of assets.

¹⁵⁰ Even the new German arbitration law does not deal with the issue. See Article 1025 of the German CCP.

¹⁵¹ Brazil (Bösch (ed.), 112-13); China (id. at 165); India (see, e.g., Mariott International Inc. v Ansal Hotels Limited, extracts published in XXVI YCA 788-806 (2001) (Delhi High Court). But see cases referred to in, e.g., Prathiba M. Singh / Devashish Krishan, "The Indian 1996 Arbitration Act – Solutions for a Current Dilemma", 18(1) J Int'l Arb 41-58 (2001); and Lira Goswami, "Interim Reliefs: The Role of Courts" in: van den Berg (ed.), The Never Ending Story, 111.); and Panama (Bösch (ed.), 525).

¹⁵² Austria (Bösch (ed.), 58-60); Belgium (id., 88); Canada (id., 140-141); Denmark (id., 179); England (see Sections 2(3) and 44 of the AA); Finland (Bösch (ed.), 234-235); France (id., 264); Hong Kong (see CLOUT Case No. 42 (1992) (High Court of Hong Kong) (stating that it is "at least open to argument" that in international cases a Model Law court might be "more ready to assist a party to an international arbitration agreement, notwithstanding the fact that the arbitration had its seat elsewhere."); Italy (Bösch (ed.), 379); Korea (id., 394); Articles 1(2) and 9 of the Model Law; the Netherlands (Article 1074(2) of the Netherlands AA. See A. J. van den Berg / R. van Delden / H.J. Snijders, *Netherlands Arbitration Law* (Deventer/Boston: Kluwer 1993)); Norway (Bösch (ed.), 509, 511); the Republic of South Africa (id., 639); Sweden (id., 680); Turkey (Articles 1(3) and 6 of the

It is clear that the assistance to foreign arbitration enhances the effectiveness of interim protection of rights in arbitration and, accordingly, of arbitration. For this reason, this author is of the belief that such assistance should be permitted.

In order to grant a measure, a foreign court should initially examine, considering that there is a valid arbitration clause, whether it is appropriate for the court to be involved in a case referred to arbitration.¹⁵³ If the response is positive, since the necessity and convenience are the primary reasons supporting court assistance to foreign arbitration, the court, examining a request for such assistance, should broadly consider whether it is the most appropriate or convenient forum to grant a provisional measure.¹⁵⁴ If, for instance,

International Arbitration Law); and the U.S. (see, e.g., *Borden, Inc. v. Meiji Milk Products Co., Ltd*, 919 F2d 822 (2d Cir. 1990); *Tampinex Oil Ltd v. Latina Trading Corp.*, 558 F.Supp. 1201 (S.D.N.Y. 1983); *Atlas Chartering Services v. World Trade Group*, 453 F.Supp. 861, 863 (S.D.N.Y. 1978); and *Carolina Power & Light Co. v. Uranex*, 451 F.Supp. 1044 (N.D.Calif. 1977). But see *Contichem v Parsons Shipping Co.*, 229 F3d 426 (holding that a New York rule permitting attachment is restricted to domestic arbitration and does not allow attachment in assistance to maritime arbitration in London.)). However, it should be noted that some U.S. courts, e.g., the Third and the Fourth Circuits are generally against court intervention for interim protection of rights. Accordingly, no court assistance would be available from such courts to arbitration taking place outside the U.S. See Wagoner, 71.

¹⁵³ The response to this question is given in Chapter II, *infra* Part 4.4.

¹⁵⁴ The test derived from combination of factors required by *Channel Tunnel* and *Borden* courts. On summary of these factors as well as some other proposed factors, see Born, *International Arbitration*, 970. Craig / Park / Paulsson indicate that, in intervening with arbitral process, courts should consider “whether justice requires their intervention, notwithstanding the existence of an arbitration clause.” Craig / Park / Paulsson, *ICC Arbitration 2000*, 477. In this regard, it should be noted that, in each country, court assistance to foreign arbitration may be made under various grounds. For instance, for French courts’ support to foreign arbitration, there has to be a link or a contact between any given case and the jurisdiction. This link could be established where the place of execution of a measure is in France (jurisdiction *rationae loci*) or a measure is sought against a French national (jurisdiction *rationae personae*). Pluyette, 76. Apparently, an application for a measure should not be “artificial or fraudulent”. *Id.* The limitation to prevent undue interference in the affairs of a foreign court - the court may refuse to exercise these powers if the choice of seat outside England and Wales “makes it inappropriate to do so.” See Lord Mustill / Stewart C. Boyd, *Commercial Arbitration – 2001 Companion*, 2nd ed. (London: Butterworths 2001), 324; and Kelda Groves, “Virtual Reality: Effective Injunctive Relief in Relation to International

there is another forum that is more appropriate for the grant of a provisional measure, the court should refrain from intervening. For instance, a court of a country A where the contractor's headquarters is located should, in principle, not issue an injunction against the Employer located in country B in a construction contract in respect of building a highway in the latter country. That is mainly due to fact that it is very difficult to establish the case against such Employer even on a *prima facie* basis as the work is performed in a foreign country and that such injunction could not be directly enforceable against the Employer.¹⁵⁵ The test of convenience or appropriateness aims to avoid conflict of jurisdictions between courts, e.g. court of a place of arbitration and a foreign court.

Once the court establishes that it is the most appropriate forum to grant the judicial provisional measure requested, it should then apply, in principle, the standards and criteria under its own law to order such measure.¹⁵⁶

Arbitrations", [1998] Int ALR 188, 192. In this regard, see also *Commerce & Industry Co. of Canada and Another v. Certain Underwriters at Lloyds of London*, [2002] 2 All ER (Comm.) 204; and *Viking Insurance Co v. Rossdale and Others, Commerce & Industry Insurance Co. of Canada and Another v. Certain Underwriters at Lloyds and Others*, [2002] 1 WLR 1323, [2002] 1 Lloyd's Rep 219. Where there is little or no contact with the forum in which a provisional measure was sought, state courts are generally reluctant to grant such measure. See Bond, 12; and *HSBC Bank USA v National Equity Corp*, 719 NYS 2d 20 (2001).

¹⁵⁵ However, such kinds of injunctions are used in practice, in some countries, to stop payment of letter of credits/bank guarantees.

¹⁵⁶ See, e.g., UN Doc A/CN.9/524, para. 77. For a different view, see *id.* To this end, it is noteworthy that the harmonisation of standards for the grant of judicial provisional measures would be extremely difficult in an international document. For this reason, for instance, the current draft of the Judgments Convention prepared by the Hague Conference on Private International Law contains a very brief clause on interim measures, indicating that the (draft) Convention does not prohibit in any way the grant of judicial provisional measures. See Preliminary Doc No 8 (March 2003), Preliminary Result of the Work of the Informal Working Group on the Judgments Project available at < [ftp.hcch.net/doc/genaff_pd08e.pdf](ftp://ftp.hcch.net/doc/genaff_pd08e.pdf) > last visited at 28 October 2003. Thus, the issue of standards for judicial measures should be left with national procedural laws.

4.4 Relationship Between Arbitral Jurisdiction and Courts' Jurisdiction

Judicial involvement in the arbitral process has been widely recognised, although "in almost every case"¹⁵⁷ no such involvement is necessary once arbitrators are appointed.¹⁵⁸ Professor Sanders commented, some twenty-five years ago about that involvement, that "[i]nternational arbitration is like a young bird, trying to fly; it rises in the air but from time to time falls back upon its home nest."¹⁵⁹

In determining court involvement into arbitration, the principle of party autonomy has to be taken into account and is given utmost significance.¹⁶⁰ Foremost upholding party autonomy is a direct result of recognition of international arbitration as a mechanism for resolving international disputes.¹⁶¹ However, the principle of party autonomy should not extend to total autonomy.¹⁶² This is for mainly so for "ensuring that international commercial arbitration is effective",¹⁶³

¹⁵⁷ Redfern / Hunter, para. 7-10.

¹⁵⁸ Id.

¹⁵⁹ Pieter Sanders, "Trends in the Field of International Commercial Arbitration", (1975-II) RCADI 207, 288. Lord Mustill describes the involvement in a similar fashion:

Ideally, the handling of arbitrable disputes should resemble a relay-race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organisation which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award. But in real life the position is not so clear-cut. Very few commentators would now assert that the legitimate functions of the court entirely cease when the arbitrators receive the file, and conversely very few would doubt that there is a point at which the court takes on a purely subordinate role.

Lord Mustill, 119.

¹⁶⁰ Pluyette, 75-76.

¹⁶¹ Id., 74-75.

¹⁶² See, e.g., Goldman, 259; and Gaillard / Savage (eds.), para. 1302. For those problems and shortcomings, see Chapter II, supra Part 4.1.

¹⁶³ Goldman, 257. See also Redfern / Hunter, para. 7-10, 345. It should be noted that arbitration "cannot survive, much less prosper, without the active and effective support of the national courts" Jacques Werner, "Should the New York

consequently, contributing the aim of “effectiveness and good administration of [international] justice”.¹⁶⁴

The effectiveness and good administration of justice are the determinative balancing factors for reconciling the tension¹⁶⁵ between involvement of courts into arbitral process and parties' will to keep courts out from involving in resolution of their disputes by opting for arbitration.¹⁶⁶ This reconciliation also satisfies the needs of international commerce; namely, balancing certainty with flexibility in arbitration by avoiding any abuse of court involvement.¹⁶⁷ The reconciliation requires collaboration or co-operation of arbitrators and of courts.¹⁶⁸ The role allocated to courts under the concept of co-operation is “one of *assistance* and *control*.”¹⁶⁹ International and national legislatures generally indicate circumstances where a court *intervenes or interferes* with arbitral process to make international arbitration more effective. Two apparent examples for intervention to arbitration process are setting aside an award¹⁷⁰ and refusal of recognition and enforcement¹⁷¹. In addition, international and national legislations specify, in most cases, circumstances where *assistance of*

Convention be Revised to Provide for Court Intervention in Arbitral Proceedings?”, 6(3) J Int'l Arb 113, 115 (1989).

¹⁶⁴ Pluyette, 73. Holtzmann indicates that judges and arbitrators are “associates in a system of international justice.” H. M. Holtzmann, “L'arbitrage et les Tribunaux des Associes dans un Systeme de Justice Internationale”, (1978) *Revue de l'Arbitrage* 253, 302. See also Goldman, 259. The effectiveness and good administration of justice require, *inter alia*, assistance for proper conduct of arbitration (e.g., preservation of evidence). See Redfern / Hunter, para. 7-10.

¹⁶⁵ Redfern observes that “the tension ... inevitably exists between arbitration and the courts of law....” Redfern, Arbitration and the Courts, 72. See also Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd, [1993] AC 334, 367-68.

¹⁶⁶ Pluyette, 73. See also Reichert, 370 (stating that court assistance “should be exercised with discretion. If appropriately administered, such judicial assistance would bolster the utility of international commercial arbitration, foster international trade, and decrease the workload of courts.”).

¹⁶⁷ Cremades, Exclusion, 112.

¹⁶⁸ See Goldman, 257-58.

¹⁶⁹ Id, 275 (Emphasis in the original.).

¹⁷⁰ See, e.g., Sections 67-68 of the EAA 1996, Article 1484 of French New CCP, Article 34 of the Model Law, and Article 190 of the SPIL.

courts could be lent to arbitration. The grant of provisional measures is among those circumstances.¹⁷²

Once judicial involvement in support of arbitration is accepted, a need to regulate co-existence of jurisdictions of judicial authorities and arbitrators arises. This is because both jurisdictions are generally “similar or identical”, and they sometimes overlap and may even be in conflict.¹⁷³ Due to such “overlapping and possibly conflicting”¹⁷⁴ nature of concurrent jurisdiction, the co-ordination of the powers of courts and arbitrators is felt necessary. The concept of co-ordination recognises the overwhelming need of cooperation and is in line with principles of legal protection and legal certainty.¹⁷⁵ The coordination contributes to the effectiveness of arbitration and to the effective distribution of justice.

International conventions do not regulate the method of co-ordination between arbitrators and courts.¹⁷⁶ Most national arbitration laws including the Model Law are silent too. Similarly, arbitration rules do not generally deal with the issue of coordination.¹⁷⁷

Only a handful of national laws and a number of arbitration rules deal with methods of co-ordination.¹⁷⁸ Under some of those laws and rules, parties are free to apply to either *fora*; the choice is truly open. This freedom of choice approach is, however, against the principle of party

¹⁷¹ See, e.g., Article V of the New York Convention.

¹⁷² For examples of other circumstances, see, e.g., Goldman, 275-281.

¹⁷³ Cremades, Exclusion, 111; Rubino-Sammartano, 365; and Hausmaninger, Pre-Arbitral Referee, 96.

¹⁷⁴ Hausmaninger, Pre-Arbitral Referee, 96.

¹⁷⁵ *Id.*, 96.

¹⁷⁶ Under ICSID arbitration, involvement of courts is not, unless otherwise agreed, permitted. See Chapter II, *supra* Part 2. Article VI(4) of the Geneva Convention, although expressly accepts the co-operation of courts and arbitral tribunals, does not deal with the method of the co-operation.

¹⁷⁷ Thirty-nine out of seventy two sets of rules surveyed are silent on the issue. See Annex.

¹⁷⁸ See Chapter II, *infra* Part 4.4.2.

autonomy and is free invitation for abuse. Thus such approach hinders the effectiveness of arbitration. So in order to make arbitration more effective and to avoid any such invitation, some other laws and rules envisaged for restricted access to courts.¹⁷⁹ Under the restricted-access approach, access to courts for interim measures of protection is allowed under “appropriate” circumstances. The courts’ role is described as complementary, prior to the appointment of the arbitral tribunal and subsidiary thereafter. In any case, the court, in assisting arbitration, should exercise “utmost caution and should be prepared to act when the balance of advantage plainly favour the grant of relief.”¹⁸⁰ Further, the grant of security for costs and provisional payment should, in principle, be left to arbitrators as there is generally no immediate urgency in regard of such measures and assessment of likelihood of success on the merits and of the need for those measures are better made by arbitrators than courts.¹⁸¹

It should further be noted that courts should endeavour to do everything in their power to prevent abuse of either of the coordination methods. In this regard, any abuse can be the source of liability of the abuser. In addition, the arbitration rules’ coordination of jurisdiction of arbitrators and of courts is subject to the parties’ ability to restrict or exclude courts’ jurisdiction.¹⁸²

¹⁷⁹ Apparently, the coordination of jurisdictions under arbitration rules is subject to applicable law.

¹⁸⁰ See *Channel Tunnel Group Ltd and France Manche SA v. Balfour Beatty Construction Ltd and others*, [1993] AC 334, 367; [1993] WLR 262; [1993] 1 All ER 664; [1993] 1 L’loyds Rep 291.

¹⁸¹ See, e.g., Article 38(3) of the EAA 1996. A court in England has no power under the EAA 1996 to order security for costs in aid of arbitration. See, e.g., David St John Sutton / Judith Gill, *Russell on Arbitration*, 22nd ed. (Sweet & Maxwell 2003), para. 7-142. On security for costs granted by arbitrators, see *infra* Chapter IV, Part 7.4.

¹⁸² See Chapter II, *infra* Part 4.4.4.

This part examines the freedom of choice and restricted-access approaches. It further deals with the issues of damages in regard of abusive requests for court assistance and exclusion agreements.

4.4.1 Freedom of Choice Approach

The general approach in many states, which accept concurrent jurisdiction is that parties are, unless otherwise agreed,¹⁸³ given a free choice both prior to the appointment of arbitrators or during arbitration proceedings.¹⁸⁴ They are free to make applications to arbitrators or courts with no hindrance at any time.¹⁸⁵ A similar approach is adopted under most of the arbitration rules surveyed.¹⁸⁶

The freedom of choice approach should be approached with great care. When a party is given a free choice to determine the forum to apply for a measure, such freedom is susceptible to abuse.¹⁸⁷ Indeed, such abuse, in some cases, is seen in practice. A request for a measure could be used as a procedural weapon.¹⁸⁸ Particularly, a court should be aware of the possibility of abuse and they, consequently, should not accept any request where the court finds that the request is not

¹⁸³ See Chapter II, *supra* Part 1.3.

¹⁸⁴ One prominent example seems to be Switzerland. See Wirth, 42-43; Stephen V. Berti, (Commentary on) Article 183 in: Stephen V. Berti (ed.), *International Arbitration in Switzerland* (London: Kluwer 2000), para. 5. The Swiss approach “rests on the argument that an arbitral tribunal is not in a position to ultimately grant the same effective legal protection as a state court since the measures ordered by an arbitral tribunal are generally not directly enforceable by the tribunal itself but need almost always be enforced with the assistance of a state judge.” (Citation omitted.) Wirth, 42-43. The freedom of choice approach is reflected in lack of regulation of the manner of how concurrent jurisdiction would be exercised.

¹⁸⁵ Apparently, conflicts, if any, need to be resolved. See Chapter II, *infra* Part 4.5.

¹⁸⁶ A prominent example to the blank cheque approach is Article 26(3) of the UNCITRAL Arbitration Rules. Perhaps because of that liberty, the number of requests from arbitral tribunals to grant provisional measures, for instance under the Iran-U.S. Claims Tribunal’s practice, “appears to be relatively low.” See Pellonpää / Caron, 451; and Caron, *Interim Measures*, 467.) It should, in this regard, be noted that if a party chooses to make a request to a court, generally no restrictions do apply to it. For instance, Article 26(3) of the UNCITRAL Arbitration Rules seems to provide no restriction in that respect.

¹⁸⁷ See Chapter II, Part 1.1.

genuine, that there is no urgency, and that it aims at gaining tactical advantage over a respondent. Further, the freedom of choice approach, if accepted in full, intervenes with the principle of party autonomy and parties' choice of arbitration over litigation.

Party autonomy demands prejudice toward arbitral jurisdiction. When parties agree on arbitration to resolve their disputes, this agreement should be upheld if and where it is possible. Parties, apparently, can always opt in, by agreement, for assistance of judicial authorities in regard of interim protection. In fact, they are at liberty to exclude jurisdiction of arbitrators in full in that regard.¹⁸⁹ Otherwise, the prejudice should be in favour of arbitral jurisdiction. In other words, the degree of equilibrium between party autonomy and court involvement should be on the side of the former. The outside intervention should only be accepted where the exercise of arbitral power to grant provisional measures is, in general, ineffective or such power is not available at all. Such intervention is justified for maintaining effective legal protection thus effective distribution of justice.

Parties are advised to follow a common sense approach in choosing the forum to make their interim relief applications.¹⁹⁰ They should not abuse the freedom of choice approach.¹⁹¹ Otherwise they might be held liable for damages arising from such abuse.¹⁹²

¹⁸⁸ See Chapter II, *supra* notes 16-17 and accompanying text.

¹⁸⁹ See Chapter II, *supra* Part 1.3.

¹⁹⁰ If the choice is "truly open", parties should examine the nature of the relief sought in making the choice of the forum to apply. See Redfern / Hunter, para. 7-17.

¹⁹¹ Redfern / Hunter give the following practical advice, which would certainly be useful to follow in regard of cases where the applicable national law does not clearly deal with the co-ordination of arbitral and judicial jurisdiction:

the answer to the question of whether to seek interim relief from the court or from the arbitral tribunal is likely to depend upon the particular circumstances of each case. If, for example, the arbitral tribunal is not yet in existence (or, in an ICC case, has not yet received the file), and the matter is one of urgency [or, alternatively arbitrators do not have necessary powers to grant the measure to be applied for], the only possibility *is* to apply to the relevant national court for

4.4.2 Restricted-Access Approach: Principles of Complementarity and Subsidiarity

A small number of national laws delicately regulate the issue of concurrent jurisdiction. The same sensitivity in coordinating the concurrent jurisdiction is demonstrated by a few arbitration rules. Under these laws and rules, varying degree of equilibrium between party autonomy and court involvement is maintained.

The national laws and arbitration rules generally accept that courts' role prior to constitution of arbitral tribunals is complementary: where no party-appointed authority is in existence, courts step in and assist arbitration proceedings.¹⁹³ After appointment of arbitrators, courts' role is subsidiary: arbitrators have priority to deal with provisional measure requests and where circumstances are not appropriate for them to grant these measures then, only then, national courts step in and provide for their assistance.¹⁹⁴ The role of courts also remains subsidiary if arbitrating parties previously agreed for one of the emergency measure mechanisms. In such case, since a request for a

interim measures, whilst at the same time taking steps to move the arbitration forward, so as to show that there is every intention of respecting the agreement to arbitrate. Where the arbitral tribunal *is* in existence, it is appropriate to apply first to that tribunal for interim measures, unless the measures sought are ones that the tribunal itself does not have the power to grant. (Emphasis in the original.) (Citation omitted.)

Redfern / Hunter, para. 7-18.

¹⁹² See Chapter II, *infra* Part 4.4.3.

¹⁹³ Even prior to the formation of a party-appointed authority, a court should exercise a self-restraint. The court should lend its assistance where the moving party proves a compelling need not to await the appointment of such authority. Wagoner, 69.

¹⁹⁴ Whether circumstances are appropriate or not is determined by the applicable law or the relevant arbitration rules. In determining whether a circumstance is appropriate, the nature of the relief may be taken into account. Redfern / Hunter, para. 7-17. For instance, measures for preservation of evidence (where there is urgency); coercive measures (e.g., attachments), certain injunctions (courts should be extremely careful in regard of injunctions, as in some cases, the grant of an injunction by a court would affect the case at hand thus jurisdiction of arbitrators). E.g., *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd*, [1993] AC 334; and *Patel v. Patel*, [2002] Q.B. 551, [1999] 1 All ER (Comm) 923, [1999] 3 WLR

measure could be made to a party-determined authority, there is generally no need for courts' complement.¹⁹⁵

The validity of the restricted-access approach envisaged by arbitration rules largely depends upon the permission under the applicable law.¹⁹⁶

This Part studies the approach of national laws and of arbitration rules concerning the restricted-access approach.

4.4.2.1 Approach of National Laws

The approach of national laws in relation to the coordination of jurisdictions varies considerably. For instance, in Malaysia, interim measures are initially to be sought from arbitrators.¹⁹⁷ In Belgium,¹⁹⁸ Luxembourg,¹⁹⁹ and North Carolina²⁰⁰ those measures are sought from courts until constitution of an arbitral tribunal and generally from the tribunal once it is constituted or seized of the matter in question.

Similarly, under the 1986 Dutch AA, if a party seeks interim relief from a court notwithstanding the arbitration agreement, the court may decline to assert jurisdiction in regard of such relief by "taking into account all circumstances."²⁰¹

322. The courts should not interfere with arbitration for security for costs applications. Redfern / Hunter, paras. 7-29-7-32.

¹⁹⁵ On the complementary mechanisms, see, generally, *infra* Chapter III.

¹⁹⁶ This issue is dealt with in Chapter II, *infra* Part 4.4.4.

¹⁹⁷ P.G. Lim, "Malaysia" in: Paulsson (gen. ed.), *International Handbook* (Supplement 32, December 2000), 21.

¹⁹⁸ Lambert Matray, "Belgium" in: Paulsson (gen. ed.), *International Handbook* (Supplement 20, October 1995), 19.

¹⁹⁹ Ernest Arendt / Théa Harles-Walch, "Luxembourg" in: Paulsson (gen. ed.), *International Handbook* (Supplement 18, September 1994), 11.

²⁰⁰ Section 1-567.39 of the *International Commercial AA* (providing that except for prior to an arbitral tribunal's appointment or unavailability of it, a party shall seek provisional measures from arbitrators.).

²⁰¹ Article 1051(2). In this regard, it is noteworthy that under Section 2712.36 of the *Ohio Code on International Commercial Arbitration*, a party may directly apply to a court for interim measures. However, the court should not grant the measure requested "[u]nless the party shows that an application to the arbitral tribunal for

In France, the role of courts in granting interim relief depends upon the constitution of tribunal. Prior to the tribunal's constitution, the role of courts is complementary and is justified with the considerations of urgency and risk.²⁰² After the formation of a tribunal, courts' role is to assist the arbitrators under exceptional circumstances and is subsidiary.²⁰³ Their role is justified again where there is urgency, and risk. Further, in some cases, the justification arises from a situation in which inaction could be considered denial of justice. This last ground could be invoked "if the circumstances reveal a total paralysis of the arbitral tribunal and its powerlessness to fulfil its function, thus depriving a party of the fundamental right of 'judgment' under fair conditions."²⁰⁴

Section 2GC(6) of the 1997 Hong Kong AO states that a court may decline to give its assistance to arbitration in regard of interim measures (i) where the case "is currently subject of arbitration proceedings"; and (ii) the court "considers it more appropriate for the matter to be dealt with by the relevant arbitral tribunal." A commentator indicates that a case is most likely to be referred to a court where, *inter alia*

[i] the rights of a third party are involved, [ii] an *ex parte* application is required, [iii] the arbitral tribunal does not have power to grant all the interim relief sought in a single application or [iv] the court's powers of enforcement are more effective than those of an arbitrator (for example, with regard to an injunction).²⁰⁵ (Citations omitted.) (Emphasis added.)

Similarly, section 44 of the EAA 1996, after stating that parties can empower arbitrators to grant interim measures, sets forth the rules for

the measure of protection would prejudice the party's rights and that an interim measure of protection from the court is necessary to protect their rights."

²⁰² Pluyette, 79-87.

²⁰³ *Id.*, 89.

²⁰⁴ *Id.*, 90.

²⁰⁵ Neil Kaplan, "Hong Kong" in: Paulsson (gen. ed.), *International Handbook* (Supplement 29, December 1999), 56.

court involvement to arbitration. Section 44 contains the most elaborate rule on the court assistance out of the laws surveyed.²⁰⁶ This rule should, in this author's view, be taken as example by other laws. Section 44(5) provides that court assistance will only be available where arbitrators have no power to act or are unable to act timely and effectively. A tribunal has no power nor can act, for instance, prior to its formation or where for some reason it is paralysed afterwards, against third parties, in regard of measures require use of coercive powers, e.g. freezing or search orders.²⁰⁷

Section 44 further distinguishes circumstances in which court assistance is available by taking into account the urgency of the matter. Section 44(3) deals with circumstances in which urgency exist. Under such circumstances, a party or a proposed party, generally prior to appointment of an arbitral tribunal can make application to preserve evidence or assets. This Section provides for a judicial power in assistance to arbitral proceedings to make, for instance, a search (*Anton Pillar*) order.²⁰⁸

Where there is no urgency, in accordance with Section 44(4), a party can apply to a court upon notice to other parties and the tribunal, with the agreement of those other parties or the permission of the tribunal.

²⁰⁶ The philosophy behind Section 44 is:
if a given power could possibly be exercised by a tribunal, then it should be, and parties should not be allowed to make unilateral applications to ... [a court]. If, however, a given power could be exercised by the tribunal, but not as effectively, in circumstances where, for example, speed is necessary, the ... [court] should be able to step in.

Departmental Advisory Committee on Arbitration Law, 1996 Report on the Arbitration Bill, para. 216 (the "1996 DAC Report").

²⁰⁷ See, e.g., Johnson, 15; and the 1996 DAC Report, para. 214. In this regard, see also *In Re Q's Estate*, [1999] 1 Lloyd's Rep. 931, [1999] 1 All E.R. (Comm.) 499. The principles set out in Section 44 of the EAA 1996 seems to be generally accepted in India. Goswami, 116.

²⁰⁸ Section 44 of the EAA 1996.

Apparently, that Section aims to prevent any suggestion that a court "might be used to interfere with or usurp the arbitral process"²⁰⁹

4.4.2.2 Approach of Arbitration Rules

There are a few rules, which elaborate the circumstances where a request to a judicial authority is authorised. The prominent example of these rules is the ICC Arbitration Rules 1998.²¹⁰ These Rules accept the co-existence of the jurisdiction of the courts and tribunals in providing interim protection of rights. Under Article 23(2) of the ICC Arbitration Rules 1998, courts are entrusted with the power to grant provisional measures before the formation of the tribunal and, under appropriate circumstances,²¹¹ even thereafter. The acceptance of the court assistance for interim protection of rights at the stage prior to the constitution of an arbitral tribunal²¹² is a reflection of the complementarity principle under arbitration rules.²¹³ The acceptance of courts' involvement under appropriate circumstances after the

²⁰⁹ The 1996 DAC Report, para. 215.

²¹⁰ See also Article 21 of the ECA Arbitration Rules 1997 ("[i]t is desirable that the decision whether to grant or not, upon a party's application, holding measures or interlocutory injunctions, be made by the arbitral tribunal rather than by state courts.").

²¹¹ See Article 23 of the ICC Arbitration Rules. Alternatively, "under exceptional circumstances" under Article 8(5) of the ICC Arbitration Rules 1988. The exceptional circumstances are also required for courts' assistance under Clause 28 of the CANE Arbitration Rules; and Article 25 of the LCIA Arbitration Rules 1998.

²¹² Or prior to transmittal of the file to it. Under the ICC Arbitration Rules, the file is transmitted to the tribunal as soon as it is constituted. However, the advance on costs requested by the Secretariat of the ICC International Court of Arbitration has to be paid before the transmission under Article 13 of the ICC Arbitration Rules. The advance on the costs is determined in accordance with Article 30 of the same Rules.

²¹³ Schwartz indicates that parties to an ICC arbitration are "clearly at liberty to apply to the courts for" provisional measures at the pre-constitutional stage. Schwartz, *Provisional Measures*, 47. He further states that at the pre-constitutional stage, provisional measures "would not otherwise be available unless the parties had agreed to an alternative procedure [emergency measures]" *Id.*, 54-55. These alternative procedures may generally be called as emergency measure procedures. See, generally, *infra* Chapter III. In this regard, see also ICC Partial Award 6566 of 1993, extracts published in 11(1) ICC Int'l Ct Arb Bull 48 (2000); ICC Interim Award 6023 of 1989 (unpublished.); and ICC Final Award 5650 of

appointment of arbitrators reflects the principle of subsidiarity under these arbitration rules.²¹⁴

The ICC Rules contractually allocate the judicial and arbitral jurisdiction concerning provisional measures to the extent permitted under the applicable law. Thus, the arrangement is valid where exclusion or limitation to the courts' jurisdiction is allowed.²¹⁵ The arrangement recognises a unique principle, which favours arbitrators over judicial authorities as a forum to seek provisional measures: "once the arbitrators have been seized of the file, applications for interim and conservatory measures should normally be addressed to them."²¹⁶

This principle may be referred to as the "principle of priority." Under Article 23(2) of the ICC Arbitration Rules, court assistance is permitted where the circumstances are "appropriate". These Rules do not provide further guidance as what qualifies circumstances as appropriate. The views of the commentators and the ICC arbitration practice shed light to the uncertainty about the circumstances.

This Part examines the principle of priority and appropriate circumstances.

4.4.2.2.1 The Principle of Priority

The ICC Arbitration Rules, since 1975, recognise arbitral tribunals' priority over the courts to deal with applications for provisional

1989, extracts published in 16 YCA 85 (1991); and Arnaldez / Derains / Hascher, 34.

²¹⁴ The ICC Arbitration Rules acknowledge this principle since 1975. It should be noted that the parties' right to apply to a court for provisional measures was first recognised under the ICC Arbitration Rules 1939. See *supra* Chapter I, Part 1.2.1.

²¹⁵ See Chapter II, *infra* Part 4.4.4.

²¹⁶ ICC Second Partial Award 8113 of 1995, extracts published in 11(1) ICC Int'l Ct Arb Bull 65 (2000) (citing Schwartz, *Provisional Measures*, 54-55).

measures.²¹⁷ This principle is expressed in a negative manner. The ICC Rules state that parties may apply to the courts for provisional measures where the circumstances are “exceptional” (under the 1975-1988 Rules) or “appropriate” (under the 1998 Rules).²¹⁸ The positive way of making such statement is that the jurisdiction of an arbitral tribunal to grant provisional measures, on one hand, is primary.²¹⁹ On the other hand, the jurisdiction of judicial authorities in that respect remains subsidiary. In other words, unless there is a justified reason, e.g. an appropriate circumstance, to apply to a court, an application for a provisional measure should be addressed to an arbitral tribunal.

4.4.2.2.2 Appropriate Circumstances

Article 23(2) of the ICC Arbitration Rules 1998 provides that a party is at liberty to apply to a judicial authority for a provisional measure in “appropriate circumstances.”²²⁰

When the ICC Arbitration Rules 1988 underwent an amendment in 1998, the term “exceptional circumstances” replaced to “appropriate

²¹⁷ See Article 8(5) of the ICC Arbitration Rules 1988; and Article 23(2) of the ICC Arbitration Rules 1998. On the former, see *supra* Chapter I, Part 1.2.2.3.

²¹⁸ This negative expression owes its existence to the negative attitude taken towards arbitral provisional measures since the beginning of the last century. See, generally, *supra* Chapter I.

²¹⁹ The principle of priority is supported by the fact that the Rules generally seem to regulate the jurisdiction of the tribunal prior to dealing with concurrent jurisdiction. See, e.g., Article 23 of the ICC Arbitration Rules; and Article 26 of the UNCITRAL Arbitration Rules. This pattern of regulation is perhaps because of the fact that arbitration rules generally aim at regulating arbitral jurisdiction. Accordingly, the drafters’ primary concern is to deal with the issue of arbitral jurisdiction, rather than to regulate concurrent jurisdiction. An alternative interpretation of this may be that the rules are designed to remind the parties that their primary option for obtaining interim measures is their arbitral tribunal. If the tribunal is unable, for any reason, to assist the parties in regard of interim protection of their rights, the parties would have an option to refer their requests to courts. But see Article 23(1) of the Arbitration Rules 1992 of the Chamber of Commerce and Industry of Geneva (the “CCIG”).

²²⁰ The ICC Arbitration Rules contain this Article without change in most part since 1975 to create “a hierarchy in favour of applications being made to the arbitrators whenever possible.” As explained by Schwartz to the Working Party entrusted to prepare ICC Arbitration Rules 1998 (unpublished).

circumstances.” The latter term was particularly subject to criticism, as, for instance, arguably the tribunal’s lack of power under the applicable law may not be construed as an exceptional circumstance.²²¹

The term “appropriate circumstances” is not defined in the ICC Rules.²²² Nor the 1988 Rules did define the term “exceptional circumstances.” The determination of the appropriate or exceptional circumstances, according to one view, is generally to be made by arbitral tribunals or “by the competent [local] authorities in accordance with their [own] law.”²²³

Some commentators attempt to examine the meaning of the appropriate circumstances. Goldman states:

[n]othing indicates, in the rules, of what may consist the exceptional situations to which the text refers [Article 8(5) of the 1975 and 1988 Rules]; it will of course be for the state judge seized to decide this. One can, however, think that the exception should only be admitted in cases of extreme urgency and where there is manifestly a threat of imminent harm; for example, to avoid the rotting of perishable goods, or to ensure the conservation or recovery of documents or things exposed to possible destruction by a natural catastrophe in situations where the arbitral tribunal would not be in a position to intervene in due time.²²⁴

²²¹ See, e.g., *id.* The LCIA Arbitration Rules still contain the use of the term “exceptional circumstances.” See Article 25. Perhaps, the lack of such power may be construed as an exceptional so long as the term “exceptional circumstances” is construed broadly.

²²² Article 25 of the LCIA Arbitration Rules is also silent on the definition of the term “exceptional circumstances.”

²²³ ICC Interim Award 8786 of 1996, extracts published in 11(1) ICC Int’l Ct Arb Bull 81 (2000) (citing Craig / Park / Paulsson, ICC Arbitration 2000, 423). However, it should be noted that whether or not the circumstances were appropriate would be taken into account by an arbitral tribunal where a subsequent request for the same or a different measure is made to the tribunal or where the tribunal is asked to consider damages arising from a request to a court claimed to be made under inappropriate circumstances. See Chapter II, *infra* Parts 4.5 and 4.4.3, respectively.

²²⁴ Berthold Goldman, “Arbitrage Commercial International”, *Jurisclasseur Droit International*, Fascicule 586-5-2, No. 77 (1991) as translated by Schwartz, *Provisional Measures*, 55, note 35.

Further, Jarvin construes the term “appropriate circumstances” as “where the urgency of the matter so requires or where the party considers this to be more effective.”²²⁵ Calvo, within the same line, construes the same term as “a situation of urgency and/or the prevention of further damages, as well as circumstances recognized as appropriate by any competent judicial authority”²²⁶ Similarly, according to Craig / Park / Paulsson, urgent or binding and enforceable provisional measures can only be obtained from a court.²²⁷ Moreover, according to these authors, an interim measure against a third party or conservatory measure for the storage, preservation or sale of the perishable goods may also be examples to appropriate circumstances.

The ICC practice demonstrates that a circumstance is “exceptional” or “appropriate” where²²⁸ (i) there is urgency; (ii) the tribunal lacks the power to grant the measure requested; and (iii) the tribunal is paralysed or otherwise unable to act.

4.4.2.2.1 Urgency

Urgency is certainly one of the most important requirements for granting provisional measures.²²⁹ Urgency should be considered along with the

²²⁵ Jarvin, 43.

²²⁶ M. A. Calvo, “The New ICC Rules of Arbitration - Substantial and Procedural Changes”, 14(4) J Int’l Arb 41, 50 (1997).

²²⁷ Craig / Park / Paulsson, ICC Arbitration 2000, 471.

²²⁸ See, generally, Schwartz, Provisional Measures, 54-55. Moreover, there are various other circumstances that may *not* be construed as appropriate. See, e.g., ICC First Interim Award 5835 of 1988, extracts published in 8(1) ICC Int’l Ct Arb Bull 67 (1997) (stating, *inter alia*, that “[i]t is in international commercial arbitration not all exceptional, but normal that one of the parties is, as seen from the other party’s point of view, a “foreign” company. It is not exceptional either that the party, being a foreign party, does not hold any assets in the state of residence of a claimant party; therefore, the fact that such foreign company is liquidating its business in claimant’s country and abandoning it, may not create an exceptional situation.”).

²²⁹ See also Clause 28 of the CANE Arbitration Rules.

requirement of serious or irreparable harm.²³⁰ The degree of urgency may be observed in three folds.

First of all, the degree of urgency qualifies as extraordinary or, perhaps, exceptional where an instant action is required in order to avoid a serious or irreparable harm.²³¹ In such a case, it is appropriate to apply to a court for a provisional measure.

Second, the degree of urgency may not always require an instant action. In this case, the tribunal, once constituted, may be able to avoid the harm by a measure, and accordingly a request to a court for that measure is not appropriate.²³²

Finally there may be no urgency at all. That means no harm will, in principle, be done for the period up to the final award if the measure requested is not granted. In such cases, interim protection is not appropriate at all.

²³⁰ See *infra* Chapter IV, Part 3.1.3.

²³¹ For instance, in ICC case 4156, the parties applied to a local court for an appointment of an expert in order to ascertain some facts regarding their dispute. The question before the tribunal was whether or not this application accounts to a waiver of the parties' right to arbitrate. The tribunal concluded that parties did not waive their rights in the application by holding that the parties resorted to the court because of the urgency of the matter in question, and that the court did not decide on the merits of the case. See (1984) *Clunet* 952. See also ICC Award 2444 of 1976, extracts published in (1977) *Clunet* 932, and Sigvard Jarvin / Yves Derains, *Collection of ICC Arbitral Awards 1974-1985* (Deventer/Boston: ICC Publishing / Kluwer 1990), 285. Further, for instance, court assistance may be appropriate, in a construction contract, for determination of the contractor's performance or technique used prior to evidence being lost. Moreover, there is urgency in cases of sale and disposition of perishable or seasonal goods.

²³² For instance, no instant action is, in principle, required for security for costs and provisional payment. Consequently, these measures should generally be requested from an arbitral tribunal.

4.4.2.2.2 Limits of the Tribunals' Power

If a grant of a provisional measure is not within the limits of arbitrators' power, then the parties can apply for this measure to a court.²³³ For instance, arbitrators do not have power against third parties to arbitration. Further, they cannot grant attachments or freezing orders that intrinsically require use of coercive powers. For instance, in ICC case 7589,²³⁴ the tribunal was asked to determine whether or not the Respondent was entitled to damages allegedly related to an attachment obtained by the Claimant from a local court before the file is transmitted to the tribunal. The tribunal held:

Article 8.5 of the [1988] Rules does state that in "exceptional circumstances", a party shall be at liberty to apply to a competent judicial authority for conservatory interim measures. *One can argue that this "exceptional circumstances" limitation should not apply in this case, since the conservatory measure sought - an attachment - is one that the Arbitral Tribunal does not have the power to grant.* (Emphasis added.)

In cases where the measure cannot be granted by an arbitral tribunal, its granting could be requested from a competent court. However, in those cases, prior to making such request, the applicant should consider whether or not (not the same one but) an effective alternative provisional measure may be obtained from a tribunal.²³⁵

4.4.2.2.3 Paralysed Tribunal

Provisional measures may be requested from a court where the tribunal is paralysed or otherwise unable to act because of resignation, death, challenge of an arbitrator(s), or any other reason. This is because the

²³³ Apparently, limitations as regards jurisdiction of the arbitral tribunal also fall into this category. On the extent of such limitation, see Chapter II, *supra* notes 111-113.

²³⁴ ICC Final Award 7589 of 1994, extracts published in 11(1) ICC Int'l Ct Arb Bull 60 (2000).

²³⁵ For instance, rather than asking the tribunal to stop the withdrawal of a letter of credit, a party may request from its tribunal to prohibit the other party withdrawing such letter.

tribunal by being paralysed becomes unable to act upon any request for interim protection of rights.

4.4.3 Damages as Compensation for Judicial Provisional Measures Incompatible with Arbitration Agreement or Found to be Unjustified

The grant of a provisional measure brings itself with the risk of, however small it may be, unjustified interim decision. In such cases, damages suffered due to such decision, including costs associated with proceedings regarding such measure may be recoverable.²³⁶ Damages arising from arbitral provisional measures should normally be sought from an arbitral tribunal.²³⁷ Damages arising from judicial provisional measures, where the substance of the case is subject to arbitration, should too be recoverable from arbitrators and, alternatively, from courts.²³⁸

The advantage of dealing with the issue of damages before arbitrators is adjudicating all remedies (be it interim or final) before one forum. This seems to be more in line with party autonomy and parties' desire to resolve their disputes before a party-determined forum. Thus, it enhances effectiveness of arbitration. Further, whether or not interim relief is justified in many occasions depends upon the decision of tribunal on the merits. Rather than making a fresh request to a court for damages, the tribunal can determine once and for all issues relating to

²³⁶ See, e.g., Section 6212 of the New York Civil Practice Law.

²³⁷ See *infra* Chapter IV, Part 10.

²³⁸ Only a handful of national laws seem to make reference to forum where to seek damages. In such countries as France and Germany, arbitrators are solely empowered to deal with the issue of compensation. See Bösch (ed.), 271, 298, respectively. In such other countries as Canada, China, Italy, and the U.S., both judicial authorities and arbitrators seem to be generally empowered to deal with that issue. *Id.*, 152, 170, 383, respectively. In Norway and Scotland, parties seem to be able to make an agreement to refer any issue on damages to arbitrators. *Id.*, 515, 608, respectively. See also, e.g., *Warth Line, Ltd v. Merinda Marine Co., Ltd*,

the underlying dispute including the damages regarding judicial provisional measures. In sum, the tribunal is better equipped to deal with such issue and it is more convenient forum than a court.²³⁹

A potential pitfall of seeking a claim for damages in regard of judicial provisional measures from arbitrators is that they may be hesitant to grant such claims.²⁴⁰ The hesitation may be based on the fact that the issue of damages is very closely connected to jurisdiction of courts. In order to minimise the denial of a claim for damages, parties are well-advised to include such claim in their statement of claims if a measure was already obtained. In any case, the parties are further advised to seek security for damages regardless of the issuing forum: a court or an arbitrator.

778, F.Supp. 158 (S.D.N.Y. 1991) (confirming an arbitral decision on damages arising from foreign court proceedings.).

²³⁹ It seems that an arbitration clause covering all disputes connected to the underlying relationship is wide enough to permit any claim on damages arising from unjustified interim remedies relating to such relationship.

²⁴⁰ For instance, in ICC case 8445, the Claimant applied to a local court for an injunction. The local court granted the injunction; however, the appellate court vacated it. The Respondent made a claim for the costs of these local proceedings. The tribunal indicated that such proceedings were ostensibly for provisional measure only. It further noted that the application for such claim was specifically authorized under the relevant arbitration rules (Article 8(5) of the ICC Arbitration Rules 1988) and “cannot be considered, in and of itself, a breach” of the agreement to arbitrate. According to the tribunal, the appellate local court, “presumably in accordance with that court’s discretion and local rules of procedure, determined that no costs be assessed” in its vacation order. The tribunal came to the conclusion that “[i]t is not within the purview of this Arbitral Tribunal’s authority to reconsider, or take other decisions with respect to, such court related costs.” (Emphasis added.). ICC Final Award 8445 of 1996 (unpublished.). On this case, see Yesilirmak, Interim Measures, 35-36. Similarly, in ICC case 7536, the tribunal was asked to decide whether or not the attachment granted by the local court has “*raison d’être*” since evidence obtained in the hearings suggested that the invoices upon which the attachment based were paid. The tribunal initially found out that “out of the total of these invoices, only an amount of . . . was due by [the Respondent] to [the Claimant].” The tribunal, however, held that it “*has no jurisdiction to draw the consequences of that situation on the maintenance of the Attachment, a power which lies within the jurisdiction of the . . . courts.*” (Emphasis added.). ICC Final Award 7536 of 1996, extracts published in 11(1) ICC Int’l Ct Arb Bull 52 (2000). It should be noted that the applicable procedural law, in this

In examining recovery of damages, the difference between the damages relating to measures incompatible with arbitration agreement and the ones relating to measures compatible with arbitration agreement should be taken into account.

4.4.3.1 Damages Arising From Judicial Provisional Measures Incompatible with Arbitration Agreement

The damages arising from judicial provisional measures incompatible with arbitration agreement should be recoverable as they arise from a breach of such agreement. The agreement is breached where its terms are infringed or where an arbitral decision is not complied with.

Where parties were validly agreed to restrict their access to a court for provisional measures then such restriction should be respected. For example, according to Article 23(2) of the ICC Arbitration Rules, an arbitrating party's access to a judicial authority for a provisional measure is restricted to "appropriate circumstances" after the arbitration file is transmitted to the arbitral tribunal. Article 23 would be breached where an application to a court is made under "inappropriate circumstances."²⁴¹ The moving party may be ordered to compensate the damages arising from such application.

For instance, in ICC case 5650, the dispute arose out of an agreement "to study and carry out the complete extension program for [a hotel] on the property set aside for this purpose and according to the program submitted for this project."²⁴² The respondent requested an appointment of a referee from a local court and brought a suit in a court

case, was the Italian law, under which arbitral tribunals are not allowed to grant conservatory measures. Article 818 of the Italian CCP.

²⁴¹ The meaning of the term "appropriate circumstances" is dealt with above. See Chapter II, *supra* Part 4.4.2.2.2.

²⁴² ICC Final Award 5650 of 1989, extracts published in XVI YCA 85 (1991); and Arnaldez / Derains / Hascher, 34.

on the merits of the case. The claimant filed a request for arbitration in order to cease, *inter alia*, the court action brought against him, and to recover costs of all court proceedings. The tribunal held that an appointment of a referee can be construed as a conservatory measure in the sense of Article 8(5) of the ICC Arbitration Rules 1988.²⁴³ The Tribunal also ruled that the filing of a suit was a clear violation of agreement to arbitrate and Article 8(5). This filing, according to the Tribunal, could “in no way be qualified as ‘interim or conservatory measures’.”²⁴⁴ As a result, the tribunal held that the respondent should bear the costs of arbitration entirely due to the above violation.

An arbitral tribunal may order any of the parties to refrain from an act. Non-compliance with such order may also be held an infringement of arbitration agreement as by such agreement parties are considered to abide their tribunal’s decision. Consequently, the infringing party may be asked to compensate damages arising from such non-compliance.

For example, in ICC case 8887,²⁴⁵ there was a contract providing for technical and engineering services in connection with liquid petrochemical transshipment facility. The claimant asserted that the respondent breached the contract by failing to pay for the services rendered. In the course of arbitration, the sole arbitrator requested from the respondent not to take any further action in the local courts.

²⁴³ The tribunal held that “the task of the group of experts [is] to ‘provide all technical and other elements of fact likely to allow, should the case arise, the relevant jurisdiction, to determine the liabilities possibly incurred and to evaluate, if necessary, the sustained damages’. . . .” It also indicated that “new expertise would always have been possible in the framework of an ICC Arbitration.”

²⁴⁴ The tribunal noted that “[t]his point was so self-evident that, during the oral hearing, the counsel of the defendant recognized that [Claimant] should not have been involved in the suit” Similarly, the English Court of Appeal held that a request made to Italian courts for interim relief despite the parties’ agreement to exclude court’s jurisdiction for interim protection is considered a breach of such agreement. Such breach gave rise to damages. *Mantovani v. Caparelli SpA*, [1980] 1 Lloyd’s Rep 375.

However, the arbitrator later found out that such order was not abided with. Consequently, the arbitrator, upon the claimant's request, ruled that the respondent was in breach of its binding agreement to arbitrate. According to the tribunal, due to such breach, the respondent made "itself liable for damages" that the claimant might suffer provided that such damages were "in direct causation with the breach."²⁴⁶

In similar cases, an arbitral tribunal, in addition to costs of arbitration, may award compensation to cover damages arising from the infringement.²⁴⁷

4.4.3.2 Damages Arising From Judicial Provisional Measures Compatible With Arbitration Agreement

Where a measure obtained from a court was compatible with the applicable rules, the damages²⁴⁸ arising from such measure should still, in principle, be recoverable, upon a party request, provided that the measure is the result of abusing the right to apply to a court for interim protection and/or is eventually proved to be wrong.²⁴⁹ An abusive applicant runs the risk of paying damages. However, there needs to be causation between the damages and the measure, which proved to be wrong.

For instance, in an AAA case, the arbitral tribunal held that the application to a court for a provisional measure was itself a breach of the agreement to arbitrate and ordered the payment of expenses.²⁵⁰ In

²⁴⁵ ICC Final Award 8887 of 1997, extracts published in 11(1) ICC Int'l Ct Arb Bull 91 (2000).

²⁴⁶ The tribunal, as a result, ordered the payment of the claimant's all estimated costs, which was not challenged by the respondent regarding local court proceedings.

²⁴⁷ In this respect see cases cited by Schwartz, Provisional Measures, 53-54, note 29.

²⁴⁸ The scope of damages should be wide and should cover costs of court proceedings concerning the measure.

²⁴⁹ See Schwartz, Provisional Measures, 53-54.

²⁵⁰ Award of 2000 in AAA Case No. 50 T 114 00321 99 (unpublished). See also ICC Final Award 7589 of 1994, extracts published in 11(1) ICC Int'l Ct Arb Bull 69

this case, a dispute arose concerning the termination of the Development Agent Agreement and, mainly, related to the payment of royalties. The respondent, prior to the request for arbitration, applied to a local court and obtained a pre-judgment attachment for guaranteeing the payment of his claimed salaries. The claimant sought in his request the payment of all costs it made in association with the pre-judgment attachment. The tribunal awarded the claimant's request concerning such costs.

4.4.4 Exclusion Agreements

Due to the contractual nature of arbitration, contracting parties can exclude jurisdiction of an arbitral tribunal.²⁵¹ Whether or not arbitrating parties can agree to limit or exclude the jurisdiction of courts concerning interim measures is not clear-cut. Save for the ICSID Convention, international arbitration conventions do not deal with exclusion of national court's jurisdiction.²⁵² The number of countries that do not allow parties to oust courts' jurisdiction²⁵³ seems to be lower than those that do permit²⁵⁴. The arbitration rules rarely deal with the issue of

(2000) (implying that had there been abuse, it could have ordered compensation for damages.).

²⁵¹ See Chapter II, *supra* Part 1.3.

²⁵² In ICSID arbitration, jurisdiction of courts is, unless otherwise agreed, excluded for provisional measures irrespective of whether or not an arbitral tribunal is formed. See Chapter II, *supra* Part 2.

²⁵³ Brazil (Bösch (ed.), 123-124); Denmark (*id.*, 187-188); Hong Kong (Schaefer, Part 4.3.2.1); Italy (Bösch (ed.), 382 for *arbitrato irrituale*); Liechtenstein (*id.*, 418); the Netherlands (*id.*, 495-496. However, in accordance with Article 1022(2) of the AA, a judge may refuse to give its assistance to parties in regard of interim measure application. *Id.*); Norway (*id.*, 514); Philippines (*id.*, 553-54); and South Africa (*id.*, 643).

²⁵⁴ Australia (Bösch (ed.), 38); Belgium (*id.*, 98); Canada (*id.*, 148-49); England (Section 107 of the EAA 1996 specifies mandatory principles of the Act and Section 44 on courts' jurisdiction in regard of interim relief is not contained therein. Consequently it seems that it is valid to exclude courts jurisdiction by an agreement. See also Sections 4 and 44(1) of the Act. See further Adam Johnson, "Interim Measures of Protection in Arbitration Proceedings" 14, Speech Given at the International Bar Association Conference in Barcelona on September 1999 (unpublished.). Johnson indicates that such exclusion agreements should be in express terms and a traditional *Scott v. Avery* clause does not prevent parties to request interim relief from a court. *Id.*); Finland (Bösch (ed.), 243-44. However,

exclusion agreements in express terms. The rarity is related to the delicacy of dealing with jurisdiction of courts that is undoubtedly within sole discretion of legislatures. One example of the rarity is the ICC Arbitration Rules, which limit the courts' jurisdiction on provisional measures to appropriate circumstances.²⁵⁵

any exclusion agreement should be related to a specific right but not "a general unlimited waiver." Id., 243); France (id., 269); Italy (id., 382 in regard of *arbitrato irrituale*); Korea (id., 397); Luxembourg (id., 434); Mexico (id., 448-49); Morocco (id., 464-65); Sweden (id., 686); Switzerland (id., 713. See also Wirth, 40-41. However, Wirth states that, in cases where arbitrating parties also exclude court assistance for enforcement of arbitral provisional measures, the answer would be different. This is due to the argument that such exclusion, in fact, waives the effect of any interim protection of rights; consequently, it may constitute an excessive self-restriction of a legal right. Such self-restriction may be denial of justice and may be prohibited under Swiss law. Id., 41); and the U.S. (see id., 754. See also William P. Mills, III, "State International Arbitration Statutes and the U.S. Arbitration Act: Unifying the Availability of Interim Relief", 13 Fordham Int'l LJ 604-648 (1989-1990). But see *Anaconda v. American Sugar Refining Co.*, 322 U.S. 42 (1944) (holding that jurisdiction of courts could not be excluded as regards seizure of a vessel.)). The German law is also suggested to allow restrictions on courts' jurisdiction. Schaefer, Part 4.2.3. In this regard, it is noteworthy that the Model Law itself does not contain any provision on the issue of exclusion agreements. Indeed, the issue is left open in the Model Law. See, e.g., UN Doc A/CN.9/SR.312, paras. 43 and 46, reprinted in Holtzmann / Neuhaus, 344-45. The French delegate indicated that "[s]uch a course was also in the interests of the parties themselves who could not foresee every eventuality in advance." Id., para. 46. But see the view of the Chartered Institute of Arbitrators' observer (indicating that an exclusion agreement contained in the LCIA Arbitration Rules "had been found valuable and acceptable."). Id., para. 42. It should be noted that none of the Model Law jurisdictions does expressly deal with the issue of exclusion agreements. See Binder, 69. It is, however, interesting to observe that in two Model Law jurisdictions, Canada, and Mexico those agreements are held valid. It was indicated that Article 9 of the Model Law should neither "preclude" nor "positively give effect to" exclusion agreements. See, e.g., UN Doc A/40/17, para. 97, reprinted in Holtzmann / Neuhaus, 345-46. It should be further noted that a general exclusion of courts jurisdiction in favour of arbitration is not "sufficient to exclude courts jurisdictions to grant provisional measures." Lew / Mistelis / Kröll, para. 23-117. See also *In Re Q's Estate*, [1999] 1 Lloyd's Rep 931, 935.

²⁵⁵ Article 26 of the ICC Arbitration Rules. Two cases, *inter alia*, deal with such limitation. In ICC case 7895, the tribunal held that the "parties may, subject to requirements of *ordre public*, by contract agree not to present requests for provisional measures to court of competent jurisdiction" ICC Final Award 7895 of 1994, extracts published in 11(1) ICC Int'l Ct Arb Bull 81 (2000). Moreover, in ICC case 7915, the tribunal upheld the parties' agreement not to seek any remedy, including provisional measures, from a municipal court for a period of 30 days commencing from the termination of the agreement. ICC Final Award 7915 of 1994, extracts published in 11(1) ICC Int'l Ct Arb Bull 64 (2000). The place of arbitration, in this case, was Florida, the U.S. The other examples for arbitration rules that contain rules for exclusion agreements are Clause 27 & 28 of the CANE Arbitration Rules; Article 25(3) of the LCIA Arbitration Rules; and Article 39(5) of the ICSID Arbitration Rules.

There are arguments both against and for exclusion agreements. Against the validity of exclusion agreements, it is argued that such agreements should not be held valid due to the fact “that the provisional remedies may be necessary to secure a party’s legal position and that they are applied in situations the importance of which cannot be assessed in advance.”²⁵⁶

It was further argued that “effective and quick interim relief” as provided for by a court could not be derogated.²⁵⁷ This is because the derogation may result in a circumstance where “effective interim relief is eliminated completely because interim proceedings before an arbitrator will not be as time efficient or as enforceable as proceedings in the state court.”²⁵⁸ Accordingly, the derogation may cause denial of justice for a party. To this end, for instance, in France, a court’s jurisdiction could not be completely excluded in regard of interim protection of rights as the complete exclusion disregards “conflictual situation that has been irremediably jeopardised culminating in a genuine ‘denial of justice’, provided there is a sufficient link giving it [a French court] jurisdiction to take measures justified by urgency or risk.”²⁵⁹

Arguments in favour of upholding exclusion agreements are mainly based on the principle of party autonomy, in other words upholding party agreement. Indeed, contracting parties should, in this author’s view, be able to freely “take the risk” of empowering their arbitral

²⁵⁶ E.g., Bösch (ed.), 187-188.

²⁵⁷ E.g, id., 295. See also Berger, *International*, 351.

²⁵⁸ Bösch (ed.), 295.

²⁵⁹ Pluyette, 75. See also Jean-Pierre Ancel, Comments in: ICC (ed.) *Conservatory Measures*, 110, 113; and Gaillard / Savage (eds.), para. 1322 (arguing that measures for facilitating the enforcement of final award fall within the exclusive domain of courts).

tribunal to solely deal with interim relief.²⁶⁰ The parties, in international commerce, are in a position to weigh the risks they are taking and are able to take counter measures, e.g. expedited arbitration procedures for minimizing the risk of unavailability of interim protection. In addition, like agreements excluding appeals (setting aside) from awards are valid, exclusion agreements concerning interim protection of rights should, by analogy, be held valid.²⁶¹

The arbitration rules, such as the ICC Arbitration Rules, and the LCIA Arbitration Rules do not rightly envisage total exclusion. They merely accept the principles of complementarity and subsidiarity. Consequently, court assistance is permitted in “appropriate circumstances.”²⁶² For this reason, such restrictions should, in this author’s view, not be barred but complied with for partial exclusion should not be considered as denial of justice. That is due to the fact that effective protection of parties’ rights would always be available even if a court’s jurisdiction is restricted where the principles of complementarity and subsidiarity are adopted. As to total exclusion, it should be kept in mind that, in some legal systems, such exclusion may be considered a breach of the principle of due process (denial of justice) and thus is held invalid.

Where contracting parties agree for complementary mechanisms, they waive their rights to request from a court measure that falls within the

²⁶⁰ Bösch (ed.), 294. See also Wirth, 41 (indicating that international merchants are “sophisticated enough to comprehend” the legal consequences of an exclusion agreement; therefore, there is no need to extend, whatever the basis might be, a special protection to them.) also *Guinea and Soguipeche v. Atlantic Triton*, 26 ILM 373-376 (1987) (Cour de Cassation, 18 November 1986) (the court hold that “the power of a State court to order conservatory measures, which power is not expressly excluded by the Washington [ICSID] Convention, can be excluded only by means of an express agreement of the parties or by an implicit agreement resulting from the adoption of arbitration rules which contain such renunciation.”).

²⁶¹ See, e.g., Bösch (ed.), 324, and 397.

domain of an emergency arbitrator.²⁶³ Still, no total exclusion is provided for under such mechanisms. Opting for expedited arbitration rules should not itself be considered an exclusion agreement as no such intention is contained in mere reference to these rules.²⁶⁴ However, the fact that arbitration takes place under the expedited arbitration rules should be taken into account in deciding whether there is urgency or not for the grant of provisional measures.

An exclusion agreement is better to be made in writing with very clear terms indicating express exclusion of courts' jurisdiction in regard of provisional remedies.²⁶⁵

4.5 Conflict of Jurisdictions

In cases where concurrent jurisdiction is adopted, the possibility of positive and negative conflicts between jurisdiction of arbitrators and of courts cannot be avoided.²⁶⁶ A negative conflict of jurisdiction occurs where both arbitrators and courts deny jurisdiction by asserting that the jurisdiction belongs to the other one.²⁶⁷ There is a positive conflict of jurisdiction where both arbitrators and courts assert jurisdiction in regard of provisional measures. In such a case, arbitrators and courts may issue different and occasionally conflicting decisions.²⁶⁸

²⁶² On what constitute appropriate circumstances, see Chapter II, *supra* Part 4.4.2.2.2.

²⁶³ Gaillard / Savage (eds.), para. 1321 (indicating that such agreement is "perfectly valid and can be inferred from parties intention to resort to" an emergency arbitrator for provisional measures.).

²⁶⁴ See *id.*, para. 1321.

²⁶⁵ See, e.g., *id.* 1319.

²⁶⁶ Rubino-Sammartano, 651.

²⁶⁷ In fact, in cases where arbitrators have no jurisdiction to grant an interim measure, such negative conflict of jurisdiction could potentially occur in the U.S. where some courts refuse to grant provisional measures where a case falls under the New York Convention. See Chapter II, *supra* Part 4.2.

²⁶⁸ Rubino-Sammartano, 651.

International arbitration conventions do not regulate the issue of conflict of jurisdictions. Nor do most national laws.²⁶⁹

Some national laws²⁷⁰ provide for and commentators²⁷¹ argue that, perhaps as a matter of convenience and speed, the forum first seized of has in principle priority to decide a provisional measure request. However, if party autonomy is extensively upheld, a court should refrain from interfering with arbitration unless the intervention is necessary for support. The court should play its complementary and subsidiary role and; consequently, it should give priority to arbitration, agreed method of settlement, and the arbitral tribunal is the natural adjudicator of the dispute in question. Thus any potential conflict should in principle be resolved in favour of arbitrators, and arbitration.²⁷² The exception to this principle is circumstances where the tribunal is incompetent to act or unable to act effectively.²⁷³

There could be some variations of potential or actual conflicts between jurisdiction of an arbitral tribunal and of a court. If the tribunal issues a measure, the court should not intervene to modify or revoke it so long as the tribunal is able to act effectively. Where the court plays its complementary or subsidiary role no or little conflict would arise. In this regard, the court, where necessary, should give preclusive effect to the tribunal's findings of facts.²⁷⁴

²⁶⁹ For instance, although the drafters of the Model Law accepted the possibility of a conflict of jurisdictions, they, nonetheless, refrained from dealing with this issue. See UN Doc, A/CN.9/264, para. 5, reprinted in Holtzmann / Neuhaus, 343-44; and UN Doc, A/CN.9/SR.312, paras. 49-50, reprinted in Holtzmann / Neuhaus, 344-45.

²⁷⁰ See, e.g., Art. 1041(2) of the German CCP (providing that a court should refuse to enforce an arbitral provisional measure if an application for the measure has already been made to a court.).

²⁷¹ See, e.g., Hausmaninger, Pre-Arbitral Referee, 98 (arguing that "the forum first called upon has [generally] *prima facie* jurisdiction.").

²⁷² Rubino-Sammartano, 651.

²⁷³ See Chapter II, *supra* Part 4.5.

²⁷⁴ See, e.g., Section 1297.94 of the California CCP; Section 1-567.39 (d) and (e) of the North Carolina International Commercial AA; Section 2712.16 of the Ohio

In cases where a court orders an interim measure, a tribunal could be faced with a request to modify or terminate (asking a party to withdraw) it. The tribunal should, in principle,²⁷⁵ be able to issue, as the case may be, an independent and conflicting decision with the court order either directly, where permitted, or effectively amending or terminating it.²⁷⁶

Revised Code Annotated; Section 36.470(4) and (5) of the Oregon International Commercial and Conciliation Act; Article 249.9, Section 4 of the Texas Act Relating to Arbitration or Conciliation of International Commercial Disputes; and Section 9(1) of the First Schedule to the New Zealand AA. Under these provisions, the preclusive effect is generally given where the arbitral decision on the facts is not contrary to public policy and the tribunal has jurisdiction. It should be noted, in this regard, that the Model Law left the determination of the issue of conflict of arbitral jurisdiction with competence of courts to national laws. UN Doc A/40/17, para. 169, extracts published in Holtzmann / Neuhaus, 547.

²⁷⁵ Subject, apparently, to the applicable laws.

²⁷⁶ See, e.g., Section 44(6) of the EAA 1996:

If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.

This “novel provision” is, in fact, in line with the underlying principle in regard of court assistance in England: arbitrators should, in principle, exercise jurisdiction over issues regarding interim measures of protection. The DAC Report 1996, para. 216. See also Mustill / Boyd, 324. Accordingly, whilst a court makes an order in regard of a request for an interim relief, it can hand over to an arbitral tribunal “the task of deciding whether or not that order should cease to have effect.” *Id.* See also *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 910 F 2d 1049 (2d Cir. 1990) (arguing that arbitral tribunal may order the relevant party to refrain from enforcing the court order it obtained rather than directly vacating such order). The *Amco* tribunal, in this regard, indicated that

an international Tribunal is not bound to follow the result of a national court. One of the reasons for instituting an international arbitration procedure is precisely that parties – rightly or wrongly – feel often more confident with a legal institution which is not entirely related to one of the parties. If a national judgment was binding on an international Tribunal such a procedure could be rendered meaningless.

Accordingly, no matter how the legal position of a party is described in a national judgement, an International Arbitral Tribunal enjoys the right to evaluate and examine this position without accepting any *res judicata* effect of a national Court. In its evaluation, therefore, the judgements of a national court can be accepted as one of the many factors which have to be considered by the arbitral tribunal.

Amco Asia Corp. v. Republic of Indonesia, ICSID Case No.ARB/81/1, Award of 20 November 1984, 1 ICSID Rep 413 (1993). See also *Bucher / Tschanz*, para. 178, 91 (arguing that a tribunal could vary or terminate, under the SPIL, a previous court order); *Rubino-Sammartano*, 651; *Gaillard / John Savage* (eds.), para. 1330; and *Lew / Mistelis / Kröll*, para. 23-130. But see *Berger, International*, 347 (arguing that such review goes “beyond the authority of the tribunal and constitute an

That is because the court order is temporary in nature and does not deprive the tribunal of its jurisdiction to render a further interim or, indeed, a final remedy.²⁷⁷ It is also because the tribunal could apply its own requirements and could take into account the facts and circumstances of the case in question. A change in circumstances also justifies the review. The principle of comity should not be a bar to the tribunal's review.²⁷⁸ That is due to the principle of party autonomy. Giving priority to the arbitral decision is upholding the agreed means of settlement.

In cases where the request to a court is denied, the tribunal should still, in principle, grant a similar or an identical measure.²⁷⁹ The reasons explained in the preceding paragraph, including the change in circumstances justify that. The obstructionist requests for aiming to delay arbitration proceedings, however, should not be allowed.

In this context, it should be noted that tribunals may be hesitant "to take action contrary to, or inconsistent with, provisional measures already

impermissible interference in the competence of the municipal courts."); and ICC Case No. 4998 of 1985, extracts published in (1986) *Clunet* 1139.

²⁷⁷ See Emmanuel Gaillard, "Arbitrage Commercial International-Intervention du Juge Etatique", *Jurisclasseur Droit International*, Fascicule 586-8-2, No.142 (1991); Schwartz, *Provisional Measures*, 54 (arguing that a tribunal may "direct the parties to take certain actions in respect of such [judicial] measures or require that they be replaced with others under the control of the ICC arbitral tribunal."); and Gaillard / Savage (eds.), para. 1330 (indicating that a tribunal's order should prevail over a court order due to the fact that "the only justification for applying to the courts lies in the presumption that they are equipped to take the protective measures required in the circumstances more rapidly.").

²⁷⁸ However, it does not mean that the tribunal should make direct orders to courts. The tribunal has jurisdiction only over the parties to arbitration. See also Chapter II, *supra* note 96 and accompanying text.

²⁷⁹ But see ICC Award 4126 of 1984, extracts published in (1984) *Clunet* 934 (denying a request to a tribunal for an interim measure identical to the one previously submitted to a court and finding that although the principle of *ne bis in idem* is not applicable, for the sake of good procedural order, such re-submission would be prevented unless new circumstances arise.).

ordered by a court.”²⁸⁰ The hesitance could be associated with the arbitrators’ reluctance of interfering with court’s jurisdiction.

Conclusion

Arbitration is the natural forum for interim measures of protection.²⁸¹ The jurisdiction of a tribunal to grant provisional measures almost always derives from arbitration agreement, e.g. arbitration rules.²⁸² National laws may also provide for default powers for the grant of arbitral provisional measures. In rare circumstances, where none of the above does deal with such measures, the power to grant them may arise from the tribunal’s inherent, or implicit power or its power to conduct arbitration proceedings.

However, the exercise of arbitral jurisdiction for provisional measures is, in some cases, impossible or ineffective, which is related to nature and operation of arbitration.²⁸³ This is because arbitral jurisdiction has three salient problems and certain other shortcomings in regard of interim protection of rights.²⁸⁴ For this reason, the concurrent jurisdiction approach is generally accepted.

A logical conclusion of the concurrent jurisdiction approach is that a request for a provisional measure either before the formation of an

²⁸⁰ Schwartz, *Provisional Measures*, 57. See, e.g., ICC Award 4998 of 1985, extracts published in (1986) *Clunet* 1139 (finding very serious to modify a judicial measure where it found itself out of jurisdiction under Article 26 of the Concordat to grant an interim measure.). But see ICC First Interim Award 5835 of 1988, extracts published in 8(1) *ICC Int’l Ct Arb Bull* 67 (1997) (holding that the waiver of attachments (for security) may be directed to a party provided that a replacement security is submitted by the other party.).

²⁸¹ For reasons supporting this view, see Chapter II, *supra* Part 1.1.

²⁸² On the sources of a tribunal’s jurisdiction, see, generally, Chapter II, *supra* Part 1.2.

²⁸³ See Chapter II, *supra* Part 4.

²⁸⁴ See Chapter II, *supra* Part 4.1.

arbitral tribunal or during arbitration proceedings is compatible with agreement to arbitrate.²⁸⁵ The principle of compatibility has two facets:

- The request is not a waiver of the right to arbitrate.
- Further, the existence of the arbitration agreement does not prevent a court to issue an interim measure.

The convenience and efficiency require, although it is not yet fully accepted by all national laws, the grant of provisional measures in aid of foreign arbitration.²⁸⁶ Since the seat of an arbitration is often determined as a geographically convenient and neutral place, a judicial provisional measure available from the courts at the seat would in most cases be meaningless. That is because the parties, their assets and, most importantly, the subject matter of arbitration would be foreign to such seat. Thus, the measure obtained at the seat would be ineffective. In granting a measure, the court of a foreign country should examine whether it is the most appropriate / convenient forum even if it has jurisdiction. Having established that it is, it then, in principle, applies the standards available under its own national law to grant the measure.

In establishing the degree of judicial involvement into arbitral process, party autonomy should be taken into account and given utmost significance.²⁸⁷ However, the party autonomy should not extend to total autonomy due to the above salient problems and shortcomings of arbitration. This is for ensuring that arbitration is effective. That is also for effectiveness and good administration of justice, which reconciles the tension between court involvement into arbitration and parties' will to keep courts out of arbitration process. That reconciliation satisfies the needs of international commerce: balancing security with flexibility

²⁸⁵ See Chapter II, *supra* Part 4.2.

²⁸⁶ See Chapter II, *supra* Part 4.3.

in arbitration by avoiding any abuse of court involvement. The reconciliation requires and results in collaboration or cooperation of arbitrators and of courts. The concept of cooperation necessitates, in regard of interim protection of rights, court assistance to arbitration, which is accepted by many national laws and arbitration rules. Such cooperation needs to be co-ordinated. On the method of coordination most national laws and arbitration rules are silent. The examination of the remaining (a small number of) laws demonstrate that there are two methods of co-ordination: freedom of choice approach and restricted-access approach. The latter approach should, in this author's view, be adopted.

Under the freedom of choice approach, the choice to make application to any forum is completely open regardless of the stage of arbitration.²⁸⁸ However, such freedom is an invitation for abuse of court involvement. Indeed, that freedom is, in some cases, abused.²⁸⁹ Courts should be aware of the possibility of abuse and deny a request made for tactical purposes. The full freedom also intervenes with the principle of party autonomy. Where arbitration is chosen for resolution of disputes, such choice should normally be respected. In case of abuse, the moving party may be held responsible for damages. Thus, for not being held liable, the moving party is advised to follow the common sense in choosing the forum to make an application.

Under the restricted-access approach, the principles of complementarity and subsidiarity are accepted by taking into account two different stages of arbitration.²⁹⁰ At the stage prior to formation of an arbitral tribunal, the role of court is complementary to arbitral

²⁸⁷ See Chapter II, *supra* Part 4.4.

²⁸⁸ See Chapter II, *supra* Part 4.4.1.

²⁸⁹ See Chapter II, *supra* notes 187-188 and accompanying text.

²⁹⁰ See Chapter II, *supra* Part 4.4.2.

jurisdiction in regard of interim protection of rights. After that stage, the role of the court is subsidiary. The court should only act where the tribunal or another party-determined authority is unable to act or its act would be ineffective. In order to avoid abuses, an access to a court should be subject to the tribunal's permission.

The principles of complementarity and subsidiarity are reflected in a small number of arbitration rules.²⁹¹ The ICC Arbitration Rules are the prominent example to those rules. Under the ICC Arbitration Rules, court assistance is permitted at the pre-formation stage. Following the formation of the tribunal, the Rules indicate that arbitrators should have *priority* in regard of interim protection of rights and that a court should assist where the circumstances are *appropriate*. In light of the ICC practice and scholarly opinions, which this author concurs with, the circumstances are appropriate where, again, the tribunal is unable to act or, for the time being, its act is ineffective; namely,

- where there is urgency for interim protection of rights,
- where the tribunal's power is limited, e.g. for attachments or measures against third parties to arbitration, or
- where the tribunal is paralysed or otherwise unable to act.

The restriction or exclusion of a court's jurisdiction under arbitration rules is subject to applicable laws. In this regard, it should be noted that, by adoption of the principles of complementarity and subsidiarity (and by accepting court assistance under appropriate circumstances within the concept of subsidiarity), parties only restrict court assistance to arbitration but not fully exclude it.²⁹² Such restriction should, in this author's view, be upheld due to the fact that partial exclusion should not be considered as denial of justice since, under the restrictive approach,

²⁹¹ See Chapter II, *supra* Part 4.4.2.2.

²⁹² See Chapter II, *supra* Part 4.4.4.

effective protection for interim protection of rights would always be available. Even total exclusion of court assistance, though it may not, under some laws, be permitted, should be upheld due to the principle of party autonomy.

In all cases, deciding whether or not to assist arbitration, a judge should exercise utmost caution. He should only act where the circumstances of the case plainly favour assistance.²⁹³

Where a request for a judicial measure is incompatible with the agreement to arbitrate or such measure proves to be wrong or abusive, damages arising from it should be recoverable from an arbitral tribunal as this choice of forum (arbitral tribunal) mainly enhances effectiveness of arbitration and is more in line with the principle of party autonomy.²⁹⁴

For effectiveness of arbitration and good distribution of justice, unless there is a reason for court assistance in accordance with the principles of complementarity and subsidiarity, an arbitral tribunal should be preferred over a court in case of conflict between these two *fora*.²⁹⁵ To this end, where the arbitral tribunal issues a provisional measure, no court should, in principle, intervene to modify or revoke such measure. Further, where the court orders a provisional measure, the tribunal should, in principle, be able to issue conflicting decision, in effect, amending or terminating (asking a party not to comply with it) such measure. This is mainly because judicial measure is temporary in nature and does not deprive the tribunal of its jurisdiction to render an interim relief.

²⁹³ See Chapter II, *supra* note 149 and accompanying text.

²⁹⁴ See Chapter II, *supra* Part 4.4.3.

²⁹⁵ See Chapter II, *supra* Part 4.5.

CHAPTER III

EMERGENCY ARBITRAL PROVISIONAL MEASURES: COMPLEMENTARY MECHANISMS

Arbitration is the natural forum to seek provisional measures.¹ However, there are three salient problems and certain shortcomings concerning the tribunal's jurisdiction to grant provisional measures.² One of those problems is that, at the pre-formation stage, prior to the appointment of a tribunal, provisional measures are not available from the tribunal as, at this stage, no tribunal is in existence. There exists a *lacunae*. The unavailability of arbitral provisional measures at the pre-formation stage, is detrimental. Unfortunately, it takes certain period of time to appoint an arbitral tribunal. This is related to the fact that due to the globalisation, complexity, bureaucratisation or institutionalisation of arbitration over the last 85 years, "[i]nstitutional arbitration can now be painfully slow in forming the arbitration tribunal in all but 'fast-track' arbitrations"³ The period between the appearance of a dispute and the formation of an arbitral tribunal "is now often measured in weeks or even months."⁴ If a party awaits for constitution of the tribunal for interim protection of rights, in some cases, "the dispute would surely be academic (ie the damage done)"⁵ That period constitutes a very

¹ See supra Chapter II, Part. 1.1.

² See supra Chapter II, Part 4.1.

³ Johnny Veeder, "The View From London: The New 1996 Act and the New LCIA Rules", ("The View") in: Wymbo P. Heere (ed.), *Contemporary International Law Issues: New Forms, New Applications*, Proceedings of the ASIL/NVIR Fourth Hague Joint Conference, (The Hague: TMC Asser Instituut 1998), 206, 207.

⁴ Id. See also supra Chapter II, Part 4.1.

⁵ Jan Paulsson, *A Better Mousetrap*, 215. In addition, for instance, the respondent's money needed to pay an award may flee, so that a claimant who is eventually awarded damages finds that there is no gold at the end of rainbow. Or evidence needed to prove a party's case may have been destroyed; or bananas in dispute may have rotted on a tropical wharf so that there is no possibility of knowing whether they had met the quality specifications when they first delivered. Or the respondent may engage in acts that are

important phase of arbitration: “[w]hat happens in that relatively short period in the early days of a case may have a crucial effect on the entire arbitration.”⁶ Indeed, a survey conducted in the U.S. demonstrates that a majority of disputes settle prior to a trial.⁷ It is this author’s experience that, in majority of cases, a party either uses or considers using a request for provisional measure as a tool for settlement.⁸ Where the party request is successful, then such party will generally be in a commending position to force the respondent party to a settlement under terms favourable to it.⁹

Where no arbitral provisional measures are available, a court is the only forum to seek provisional measures. However, channelling a party to a court is, *inter alia*, against the party’s original intention of referring their disputes to arbitration; namely, resolution of the disputes by a neutral / party-determined authority.¹⁰ In other words, a provisional measure from a court infringes the parties’ initial will of neutrality.¹¹ To refer

destroying the claimant’s business so that an eventually favourable award in the arbitration would be, at best, a Pyrrhic victory.

See Howard Holtzmann, “Remarks” in: Heere (ed.), 202 (“Remarks”).

⁶ Holtzmann, Remarks, 202.

⁷ Over 60 percent in the U.S. See Herbert M. Kritzer, “Adjudication to Settlement: Shading in the Gray”, 70(3) *Judicature* 161, 163 (1986). Before the U.S. District Courts, more than 75 percent of the cases are settled prior to trial during the twelve-month period ended 30 September 1997. Heather Russell Koenig, “The Eastern District of Virginia: A Working Solution For Civil Justice Reform”, 32 U Rich LR 799, 829 (1998). See also *Hubbard v. Vosper* [1972] 2 QB 84, 96. Further, many international disputes settle right after exchanges of statement of claim and defence. See, in this respect, Schwartz Provisional Measures, 45, 55.

⁸ On the issue of abuse, see *supra* Chapter II, Part 1.1.

⁹ *Id.* It should, however, be noted that not all provisional measures could be subject to abuse. For instance, measures aimed at preserving evidence may hardly be a subject for abuse.

¹⁰ Indeed, the reasons for preference of such mechanisms over litigation are generally similar to the reasons in support of arbitral jurisdiction to grant provisional measures. See *supra* Chapter II, Part 1.1. Apparently, regardless of those reasons, parties may choose to refer their requests for provisional measures to a judicial authority. There is nothing wrong with such choice. In fact, in such cases as freezing of assets or provisional measures against third parties to arbitration, a request to a court may be the only effective means to pursue. These cases constitute justification for concurrent jurisdiction approach. See generally *supra* Chapter II, Part 4.1.

¹¹ Paulsson, 215.

parties to a court for an interim measure means asking them to go back to the forum they just opted out. Experience demonstrates that this forum, if available, may perhaps be the home court of the requesting party or any other *fora* but the home court of the respondent. Regardless of the place of the forum, a party to an arbitration agreement expressed its will to resolve its dispute in a neutral party-determined forum. In addition, a request for a provisional measure from a court is an open invitation for abuse.¹² Also, such request may also infringe possibly intended confidential nature of arbitration proceedings.¹³ Further, the request may be, though less frequently, considered as a waiver of the right to arbitrate.¹⁴ This is “a relic of the outdated view that ordinary litigation is to be preferred over arbitration.”¹⁵ Moreover, assistance of judicial authorities in respect of provisional measures, in some cases, may not be effectively available, or not available at all.¹⁶ To this end, it is submitted that it may take up to twelve months in some countries to obtain a provisional measure.¹⁷ The unavailability of a measure from a court may be due to the fact that some courts consider the existence of arbitration agreement as a bar to their jurisdiction. Certain U.S. courts interpret, as explained above, that agreement to arbitrate a dispute precludes their intervention even for providing assistance to international commercial arbitration.¹⁸

In order to overcome the above problems and after having considered the importance of the problem, the drafters of a small number of institutional arbitration rules offered complementary mechanisms to

¹² See *supra* Chapter I, Part 1.1.

¹³ Benjamin Davis, “The ICC Pre-arbitral Referee Procedure in Context with Technical Expertise, Conciliation and Arbitration”, 9(2) ICLR 218, 230 (1992).

¹⁴ See, e.g., Hans Smit, “Provisional Relief in International Arbitration: The ICC and Other Proposed Rules”, 1(3) Am Rev Int’l Arb 388, 389-390 (1990).

¹⁵ *Id.*, 390.

¹⁶ For circumstances where judicial assistance to arbitration may not be available, see *supra* Chapter II, Part 4.2.

¹⁷ Gurry, 2.

arbitration for making available interim protection of rights from a party-determined authority at the pre-formation stage. In addition to their importance, the availability of complementary mechanisms is also supported by the principle of party autonomy. Further, the availability of such mechanisms may, at least in some cases, deter any unnecessary (unreasonable) request for a provisional measure.¹⁹ In other words, such availability may avoid the use of provisional measures as a tactical tool. To this end, these mechanisms assist greatly to the effectiveness of arbitration.

The need²⁰ for a neutral but party determined authority, other than an arbitrator himself, offering interim protection of rights in an urgent manner is not novel. In fact, as early as 1915, the necessity was recognised and a neutral (party-determined) arbitral mechanism for granting provisional measures was proposed.²¹ The mechanism created was taken as guidance by several arbitration institutions, most notably by the ICC. Interim measures were available from the president of the Court of Arbitration under the 1931 and 1939 editions of the ICC Arbitration Rules but the power of the president was abandoned in the 1955 edition of the Rules.²²

Today, in order to meet the need for a party-appointed neutral authority to grant provisional measures, parties who choose arbitration as their

¹⁸ See supra Chapter II, Part 4.2.

¹⁹ Humphrey Lloyd, "What is Pre-Arbitral Expertise and How Does it Differ from the Pre-Arbitral Referee Procedure?", Institute of Business Law and Practice, Conference on Arbitration and Expertise (Paris, 12 April 1991), 18-19 (unpublished); and Davis, 229.

²⁰ The need is expressed as "to more fully implement the parties' intent to arbitrate any future disputes". The AAA Commercial Arbitration Rules Revision Committee, ADR Currents, 6 (December 1998).

²¹ See supra Chapter I, Part 1.1.

²² See supra Chapter I, Part 1.1.3.

dispute resolution mechanism have two options:²³ They can expressly provide for a mechanism in their arbitration agreement to obtain an emergency provisional measure. Alternatively, the parties may agree to use the complementary mechanisms available from a few arbitration institutions.

The parties are free to contractually create their own emergency arbitral provisional measure rules.²⁴ In practice, parties appoint one or three-member standing panel for duration of a contract to grant provisional measures if necessary.²⁵ This can be done in theory at any time - prior to or after - a dispute has arisen. The practical experience demonstrates that it is highly unlikely to have such agreement where a dispute has already arisen.²⁶ The major difficulty with the standing panel approach is the expense to retain the members of the panel.²⁷ In order to overcome this difficulty, parties may themselves create a mechanism under which an emergency arbitrator may be appointed by an appointing authority when a dispute emerges. Alternatively, the

²³ It should be noted that there are other mechanisms under which a certain type of provisional measures may be obtained. The best example to this is perhaps preservation of evidence by a pre-arbitral technical expert. This Chapter does not, however, deal with those mechanisms since the main objective of technical expertise is not of interim protection of rights. On the pre-arbitral technical expert, see, e.g., Yves Derains, "Technical Expertise and Refere Arbitral" in: Pieter Sanders (ed.), *New Trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other Institutions*, ICCA Congress Series No. 1 (Kluwer: Hamburg 1982), 183-184 ("New Trends"); and Schwartz, *Provisional Measures*, 64. On the expertise procedure see, e.g., the ICC Rules of Expertise. For the text, see ICC Publication No. 520. For more information on the ICC Rules for Expertise, see Hervé Charrin, "The ICC International Centre for Expertise-Realities and Prospects", 6(2) *ICC Int'l Ct Arb Bull* 33-46 (1995); Lloyd, 1; Michael Bühler, "Technical Expertise", 6(1) *J Int'l Arb* 135 (1989); and Derains, *Refere Arbitral*, 183.

²⁴ In fact, they can adopt the emergency arbitral relief procedures offered by certain arbitration institutions to their specific needs. For these procedures, see Chapter III, *supra* Part 2.

²⁵ Derains, *Refere Arbitral*, 190.

²⁶ Lloyd, 14; and Smit, 391. At this stage, generally, one of the parties has certain incentives to delay or obstruct final or temporary resolution of any of the disputes. To this end, one should keep in mind that the general tendency in litigation or, perhaps less, in arbitration proceedings is that parties hardly ever agree on anything once a dispute is taken before a judicial or arbitral authority.

parties may adopt a complementary mechanism procedure available from some arbitration institutions.

The complementary mechanisms mainly take two forms. Some arbitration institutions, following the ICC example,²⁸ empower the president, the head or an organ of the relevant arbitration association or institution to grant provisional measures. This power generally ceases to have an effect as soon as an arbitral tribunal is formed.

Some other institutions have created special rules that can be called as emergency provisional relief procedures. These procedures envisage for a mechanism under which a neutral person is empowered to grant certain provisional measures. This person is called a pre-arbitral referee, emergency arbitrator, or simply arbitrator, who is appointed either by parties or the relevant institution. The concept of providing emergency arbitral provisional relief procedure was resurrected and developed by the ICC. After 10 years of study, the ICC introduced the Rules for a Pre-Arbitral Referee Procedure in 1990.²⁹ These innovative Rules are inspired from *référé* procedure of French law.³⁰

The ICC Pre-Arbitral Referee Procedure, in turn, inspired certain other arbitration institutions. In 1997, the European Court of Arbitration (the “ECA”) included the Pre-Arbitral Referee Rules in its Arbitration Rules

²⁷ Smith, 391.

²⁸ See *supra* Chapter II, Part 1.1.3.

²⁹ For the text of the Rules, see ICC Publication No. 482, reprinted in 1 ICC Ct Arb Bull 18-23 (1990). For more information on the ICC Pre-Arbitral Referee Procedure, see, e.g., Davis, 218; Hausmaninger, Pre-Arbitral Referee, 82; Smit, 388; Christine Lécuyer-Thieffry, “Examination of ICC’s Pre-Arbitral Referee Procedure: An Innovation in Dispute Resolution”, 1 WAMR 13 (1991); and Paulsson, 214.

³⁰ On the *référé* procedure, see, e.g., Wallace R. Baker / Patrick de Fontbressin, “The French *Référé* Procedure – A Legal Miracle?”, II U Miami Y B Int’l L 1 (1992-1993); Jean de Hauteclocque, “French Judicial Expertise Procedure and International Arbitration”, 4(2) J Int’l Arb 77-101 (1987); and Gaillard / Savage (ed.), 728-734.

as an optional mechanism.³¹ The Summary Arbitral Proceedings of the NAI Arbitration Rules in 1998, the Optional Rules for Emergency Measures of Protection of the AAA in 1999³² and the Draft Emergency Relief Rules of the WIPO³³ followed the ICC's initiative.³⁴ The last Rules were never adopted. The Rules will, nevertheless, be examined in this Chapter as they constitute a complete and well-thought set of rules.

The need for use of those mechanisms "may arise in any type of dispute."³⁵ Certain disputes, e.g. the disputes concerning trade secrets or intellectual property generally demand, however, speedier and more confidential resolution than other types of disputes.³⁶

³¹ For the text of the ECA Pre-Arbitral Referee Rules, see 10 WTAM 237-243 (1998).

³² Although these Rules were designed for the AAA Commercial Dispute Resolution Procedures 2003, parties can opt to use them where arbitration is taken place under the International Arbitration Rules. It is interesting to note that one of the reasons for implementing these Rules was to remedy the deficiency that exists in the U.S. as regards interim protection of rights where parties agree to arbitrate. See *supra* Chapter II, Part 4.2. Indeed, the AAA Commercial Arbitration Rules Revision Committee indicated that "[t]hese optional rules ... respond to the preference of courts to limit their involvement in matters where the parties have expressed an intention to arbitrate." See The AAA Commercial Arbitration Rules Revision Committee, 6. See also *supra* Chapter II, Part 4.2.

³³ For more information on these Rules, see WIPO Documents ARB/AC/II/95/3; WIPO/ARB/DR/5; and ARB/AC/III/96/3. See also Gurry, 1; and Richard A. Horning, "Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules (*In Toto*)" in: *WIPO Arbitration Rules - Commentary and Analysis* (New York: Juris Publishing 2000), 155, 170-175, reprinted in 9 Am Rev Int'l Arb 155 (1998).

³⁴ It should be noted that the LCIA failed to adopt emergency relief procedure in 1997. For the developments at the LCIA and the text of the Discarded New LCIA Rule on Interim Measures, see Veeder, *The View*, 206-211. The main reason for the failure, according to Veeder, is the perception that the emergency arbitrator is in fact a non-arbitrator and that "the concept of any 'Provisional Order' by a non-arbitrator" would be unacceptable. *Id.*, 210-211.

³⁵ Gurry, 2.

³⁶ *Id.*

It is further noteworthy that complementary mechanisms are available to an extent the applicable law³⁷ upholds the exclusion agreements valid.³⁸

In order to provide alternative solutions for overcoming the effect of the *lacunae* or, in other words, the effect of the unavailability of arbitral provisional measures at the pre-formation stage, a fast-track mechanism for appointment of arbitral tribunal could be adopted or a party can seek certain “self-help” measures for eliminating the necessity for complementary mechanisms.

This Chapter examines (i) institutions’ direct proposition to the solution of the problem: the empowering institution’s head or organ with emergency powers to grant provisional measures; (ii) the emergency arbitral measure procedures; (iii) the effectiveness of the complementary mechanisms; and (iv) alternative solutions to the complementary mechanisms.

1 Emergency Provisional Measures Available from Head or Organ of Institution

It seems that four sets of arbitration rules currently provide for interim protection of rights from a head or an organ of the relevant institution prior to appointment of an arbitrator. These rules apparently resurrected the mechanism first employed in the 1915s and survived until the 1950s.³⁹

The examination of the above rules mainly demonstrates that provisional measures could generally take the form of an “order” and

³⁷ For instance, law of the place of arbitration, law applicable to procedure, and law applicable to arbitration agreement.

³⁸ See *supra* Chapter II, Part 4.4.4.

³⁹ See *supra* Chapter I, Part 1.1.

that two of those institutions provide for limited powers in respect of granting provisional measures whereas the other two have no restriction. The restrictions are mainly related to the types of measures that could be granted.

In accordance with Article 12(1) of the Arbitration Rules 2002 of the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic, the president of the court is empowered to take "in urgent cases, acting upon application of one party or both of them, ... measures to conserve evidence." This Article further states that, for conservation of evidence, the arbitrator "may appoint one or more expert witnesses or take other appropriate steps." The president's power exists for the period prior to the formation of an arbitral tribunal but after the claimant's statement is filed. Under the Rules, a party has a choice to make its application to a court so the president's power is not exclusive.⁴⁰

Similarly, Section 1(6) of the Arbitration Rules 1995 of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation seems to empower, upon a request from a party, the chairman of the International Commercial Arbitration Court (the "ICAC") to determine "the amount and the form of the security for a claim."

Article R37 of the Procedural Rules 1994 of the Court of Arbitration for Sport⁴¹ contains no restriction concerning the types of emergency provisional measures:

The President of the relevant Division, prior to the transfer of the file to the [arbitral] Panel, or thereafter the Panel may,

⁴⁰ Section 12(2).

⁴¹ The Rules for the Resolution of Disputes Arising During the Olympic Games of the Court of Arbitration for Sport provide for a similar provision (Article 14).

upon application by one of the parties, make an order for provisional or conservatory measures. ...

This Article further requires that the opponent shall be heard. However, in cases of utmost urgency, that requirement is waived provided that the opponent is heard subsequently.⁴² In accordance with Article R37(4), the grant of a measure may be conditioned upon posting of a security. It is noteworthy that, under the Rules, a right to apply to judicial authorities for provisional measures is expressly waived.⁴³

Likewise, broad powers are given to a three-member permanent committee established to deal with provisional measures at the pre-formation stage under the Rules for International Arbitration 1994 of the Italian Association for Arbitration.⁴⁴ The Association appoints members of the committee for a period of three years. Its chairman or one of its members on behalf of the chairman can carry out the committee's functions where the member is authorised by the Committee. A party to arbitration may apply for a provisional measure to the permanent committee before the formation of arbitral tribunal.⁴⁵ The application shall contain supportive arguments and documents.⁴⁶ The Committee has the same powers as an arbitral tribunal established under the Rules in respect of provisional measures and the Committee's decision can take the form of an order.⁴⁷

There are two issues that could be dealt with in regard of the power exercised by the head / organ of an arbitration institution for interim protection of rights. The decision given by the head / organ of the

⁴² Article R37(3).

⁴³ Article R37(2).

⁴⁴ Article 2.

⁴⁵ Article 8. By virtue of Article 8(2), where the tribunal is formed, the application is to be made to it.

⁴⁶ Article 8(1), para. 2.

⁴⁷ Article 19(1).

institution seems to be morally binding on the parties. The failure to abide by the decision may lead to the non-complying parties' responsibility for damages and costs of those interim measure proceedings as a matter of breach of contract. In addition, where the measure issued is likely to cause damages to the opposing party, the head / organ may request security for damages from the moving party despite the fact that the power to issue such security is not expressly envisaged under the relevant rules. That is due to the fact that such security intrinsically related to and should be inseparable from the power to grant a provisional measure.

2 Emergency Arbitral Provisional Measure Procedures

The emergency arbitral provisional measure rules offer mechanisms complementary to arbitration for interim protection of rights. The NAI Summary Arbitral Proceedings⁴⁸ and the WIPO Draft Emergency Relief Rules⁴⁹ are the most comprehensive sets of rules.

All emergency arbitral relief rules aim at providing a speedy mechanism for obtaining arbitral provisional measures. The jurisdiction of an emergency arbitrator is merely limited to grant of provisional measures and; consequently, the emergency arbitrator does not have jurisdiction over substance of a case. Each of the rules, apart from the ICC Pre-Arbitral Referee Procedure and the ECA Pre-Arbitral Referee Rules,

⁴⁸ The rules on the Summary Arbitral Proceedings contain 15 articles. In addition, in accordance with Article 42a(3) of the NAI Summary Arbitral Proceedings, Section One (General Provisions), and Section Five through Seven (Award, Costs, and Final Provisions) of the NAI Arbitration Rules are applicable along with certain other provisions to the Summary Arbitral Proceedings. The pre-requisite for the application of the Summary Arbitral Proceedings is that the place of arbitration was determined to be in the Netherlands in accordance with Article 42a(4) of the NAI Summary Arbitral Proceedings. If the place of arbitration was not determined by the parties, Rotterdam is the place of arbitration for the purpose of application of the Section Four (the Summary Arbitral Proceedings) of the NAI Arbitration Rules. In this regard, it is noteworthy that the Netherlands' Code of Civil Procedure is permissive of summary arbitral proceedings. See Article 1051.

has a different approach in creating such mechanism. In other words, almost every one of them has more or less a different way of handling 'legal' and 'mechanical' difficulties⁵⁰ in creating a speedy complementary procedure. It should be noted at the outset that the rules contain certain similarities in handling those difficulties and that the ICC Pre-Arbitral Referee Procedure seems to be an inspiration to all.⁵¹

The legal and mechanical difficulties are mainly related to the speedy nature of emergency relief procedure. In handling those difficulties, there has been undoubtedly constant tension with aim to create a speedy procedure and two important principles of international commercial arbitration: *party autonomy* and *due process*.⁵² The extent of one of these principles' acceptance over the others shapes the formation of various stages of emergency measure proceedings. Three main examples to those stages are appointment of emergency arbitrator, determination of time limits (for answer, hearing etc.), and opportunity to present one's case.

To that end, one of the most important characteristics of the emergency relief procedures is that all but the WIPO Draft Emergency Relief Rules requires *inter partes* proceedings.

This Part deals with the issue of (i) terminology, (ii) integration of arbitral relief procedure with arbitration rules of a given institution, (iii) jurisdictional relationship to arbitral and judicial proceedings, (iv)

⁴⁹ The Rules contain 16 articles and the WIPO Arbitration Rules were, as a whole, with a few exceptions, applicable to emergency relief proceedings. Article 1.

⁵⁰ See WIPO Document ARB/AC/II/95/3, para. 9.

⁵¹ A further inspiration seems to stem from the Proposed Rules for Provisional Relief in Arbitration prepared by Professor Hans Smith and a group of his law students at the Columbia University in 1991. For the text of these Rules, see Smit, 409-410.

⁵² See, in this respect, WIPO Document WIPO/ARB/DR/5, paras. 16-19.

request for measure and answer, (v) appointment and challenge of emergency arbitrator, (vi) emergency measure proceedings, (vii) powers of an emergency arbitrator, (viii) requirements to grant emergency measures, (ix) form of emergency arbitrator's decision, (x) modification and revocation of decision, (xi) effect of decision, (xii) appeal, (xiii) compliance with decision and effect of non-compliance, (xiv) confidentiality, (xv) costs of emergency measure proceedings, and (xvi) *ex parte* requests for emergency measures.

2.1 Terminology

The emergency rules examined employ different terms in referring to the procedure they propose. The ICC and the ECA refer to the procedure they propose as the “Pre-arbitral Referee⁵³ Procedure.” The AAA prefers the “Optional Rules for Emergency Measures of Protection”. The NAI refers to its rules as the “Summary Arbitral Proceedings.” The WIPO uses the term “Emergency Relief Rules.” It seems that the term “emergency provisional (or interim) arbitral relief (or remedy or measure) procedure (or rules)” reflects main characteristics of the mechanism in question.

The decision-maker under the ICC Pre-Arbitral Referee Procedure and the ECA Pre-Arbitral Referee Rules is called as “pre-arbitral referee.” The other rules refer to the same person as “arbitrator” (the NAI Summary Arbitral Proceedings) or “emergency arbitrator” (the AAA Optional Rules for Emergency Measures of Protection and the WIPO Draft Emergency Relief Rules). The last term seems to be preferable. This is because an emergency arbitrator not only makes a decision judicially but also is different to an arbitrator since it does not finally resolve substance of a dispute. An emergency arbitrator, as a neutral

⁵³ This name was inspired from the French original *référé arbitral*. It was used because no other satisfactory English translation was found.

party-determined authority, merely complements, in urgent cases, to an arbitrator prior to his appointment for providing interim protection of arbitrating parties' rights. In regard of resolving issues on an interim basis the emergency arbitrator is, in one sense, an arbitrator as he resolves the request for an interim remedy in a judicial manner.⁵⁴

2.2 Integration with Arbitration Rules

There are mainly two means of handling the relationship between emergency relief procedure and arbitration rules. The emergency relief procedure can have its own separate existence and can only apply where there is a specific reference, either in arbitration clause or through a special agreement, to them. In other words, if arbitrating parties wish to make the procedure applicable they ought to opt for it. This approach demonstrates optional character of certain rules and can be referred to as "opt-in approach". Alternatively, the emergency measure rules may have automatic application where the parties made a reference to arbitration rules of a given institution. This is the "automatic inclusion approach".

Save for the NAI Summary Arbitral Proceedings, the emergency arbitral measure procedures do not become a part of an arbitration agreement by a mere reference to the arbitration rules of the arbitration institutions examined. There must be a specific agreement for the application of those procedures. That agreement may be made before the dispute is arisen or there can be a submission agreement. It should also be indicated that, like an agreement to arbitrate, an agreement to submit disputes to emergency provisional relief procedures is subject to the mandatory rules of place of arbitration.⁵⁵ That is to say that the

⁵⁴ It should be noted that one of the drafters of the Pre-Arbitral Referee Procedure refers the *référé arbitral* as "arbitrator". See also Chapter III, *infra* notes 164-167 and accompanying text.

⁵⁵ See, para. 3 of the preamble to the ECA Pre-Arbitral Referee Rules.

mandatory rules of applicable laws may restrict or prohibit grant of emergency arbitral provisional measures. In this regard, the law of place of arbitration, law applicable to arbitration, and law of place of enforcement, if known, should generally be taken into account.

The NAI Summary Arbitral Proceedings constitutes a part of the NAI Arbitration Rules and by a mere reference they become a part of an arbitration agreement. Apparently, arbitrating parties could refrain from employing the NAI Summary Arbitral Proceedings by express agreement.

Making opt-in approach acceptable to arbitration community is perhaps the most difficult hurdle to tackle in process of success of emergency arbitral provisional relief procedures. It would be a lot easier to market the emergency measure rules as part of the overall institutional arbitration package. However, it is tenable that most arbitration institutions do not want to fully commit themselves by adopting the automatic inclusion approach to procedures that have not been tested. The concern is simple no arbitration institution wants to risk losing the confidence of arbitrating parties. Perhaps because of this reason, the WIPO Draft Emergency Relief Rules rightly took a compromise solution between the opt-in and the automatic inclusion approaches.⁵⁶ The standard recommended WIPO arbitration clause was envisaged to include a specific reference to the Draft Emergency Relief Rules.⁵⁷ If this reference was not stroke out at drafting stage then the Draft Emergency Relief Rules would become part of a contract. The use of

⁵⁶ See WIPO Document WIPO/ARB/AC/III/96/3, para. 5.

⁵⁷ In this regard, Article 46 of the WIPO Arbitration Rules was envisaged to be amended for further achieving the incorporation of the Draft Emergency Relief Rules to the Arbitration Rules.

inclusive language was aimed at facilitating greater use of the Draft Emergency Relief Rules.⁵⁸

2.3 Jurisdictional Relationship with Arbitral and Judicial Proceedings

There are logically two variations to examine in respect of the jurisdictional relationship between emergency arbitral relief procedures and judicial or other arbitral proceedings: (i) the relationship to other arbitral or judicial proceedings, and (ii) the relationship to arbitral proceedings initiated under the rules of the same arbitration institution.

2.3.1 Relationship to Judicial or Other Arbitral Proceedings

The emergency measure procedures examined generally accept the possibility of concurrent jurisdiction of emergency measure proceedings with judicial and other arbitral proceedings.⁵⁹ The other arbitral proceedings are the ones that are held under arbitration institutions different to the arbitration institution, which administers relevant emergency arbitral relief procedure.

2.3.1.1 Relationship with Judicial Proceedings

None of the complementary mechanisms does provide for exclusive jurisdiction for emergency arbitral provisional relief.⁶⁰

The regulation of the relationship between the complementary mechanisms and court proceedings varies. The approaches of the ICC Pre-Arbitral Referee Procedure, the ECA Pre-Arbitral Referee Rules, and the WIPO Draft Emergency Relief Rules seem to differ depending

⁵⁸ Horning, 170.

⁵⁹ See, in this respect, Hausmaninger, Pre-Arbitral Referee, 100.

⁶⁰ The drafters of these mechanisms seem to find the access to courts for interim protection at the pre-constitution stage too important to be set aside. In this regard, see Sigvard Jarvin, "Alternative Solutions to the Intervention of the

upon the timing of a request for a provisional measure to a judicial authority. If the request to a court is made prior to an application for an emergency provisional measure to the relevant arbitration institution, the court seizes the case. Under such circumstance, emergency arbitral proceedings cannot commence as, an emergency arbitrator does not have jurisdiction to deal with emergency relief requests.⁶¹ This approach seems to aim at giving freedom to a party prior to its decision to make its choice. Once a party exercises that freedom then its liberty to make a request in accordance with the emergency arbitral relief procedure ceases.⁶² The logic is to avoid duplication of *fora* and unwanted contradiction between the decisions of arbitral and judicial *fora*. This approach is criticised as the emergency arbitral provisional relief proceedings can be circumvented by simply launching an application for a provisional relief to a court.⁶³

The compromise position is that when a request to a court is made after the commencement of emergency measure proceedings, an emergency arbitrator can, in principle, retain his emergency powers and render a decision.⁶⁴ This position is generally subject to a parties' agreement to contrary and mandatory rules of the applicable law.⁶⁵

Article 42o of the NAI Summary Arbitral Proceedings and Article O-7 of the AAA Optional Rules for Emergency Measures of Protection provide

Engineer" ("Alternative Solutions") in: van den Berg (ed.), Preventing Delay, 402-403.

⁶¹ Article 1(1) of the ICC Pre-Arbitral Referee Procedure. It seems that this interpretation is implicitly accepted in Article 12(3) of the ECA Pre-Arbitral Referee Rules and Article III(a) of the WIPO Draft Emergency Relief Rules.

⁶² It seems that this approach is adopted initially by the ICC Pre-Arbitral Referee Procedure and followed by the other Rules.

⁶³ Horning, 171.

⁶⁴ See Article 2(4) of the ICC Pre-Arbitral Referee Procedure; Article 12(3) of the ECA Pre-Arbitral Referee Rules; and Article III(a) of the WIPO Draft Emergency Relief Rules.

⁶⁵ See Article 2(4) of the ICC Pre-Arbitral Referee Procedure; and Article 12(3) of the ECA Pre-Arbitral Referee Rules.

that a request to a judicial authority is not incompatible with agreement to arbitrate nor is it a waiver of the right to arbitrate. The NAI Summary Arbitral Proceedings and the AAA Optional Rules for Emergency Measures of Protection do not deal with any other aspect of their relationship with judicial proceedings on provisional measures. This approach is tenable as the relationship of emergency or summary arbitral proceedings with judicial proceedings is a delicate issue. The failure to regulate this issue enhances acceptability of the rules in question by judicial authorities though lessens their acceptability by users of arbitration.

It seems necessary to deal with two further questions: First, what is the effect of the emergency arbitral provisional relief procedure's existence on the availability of judicial provisional measures? In such countries as England, the court assistance to arbitral process in respect of provisional measures is available under limited circumstances. According to Section 44(5) of the EAA 1996, a court shall grant interim relief "only if or to the extent that the arbitral tribunal and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively." This provision and a reference to a complementary mechanism should be read as a change to courts' role at the pre-formation stage from subsidiary to complementary.⁶⁶ To this end, the availability of emergency arbitral relief procedure does not fully obstruct court assistance to arbitration; it only further restricts such access.⁶⁷

⁶⁶ On these roles, see generally *supra* Chapter II, Part 4.4.

⁶⁷ However, it was thought that Section 44(5) may be considered as obstructive of court assistance to arbitration. See, in this respect, Holtzmann, Remarks, 205; and Veeder, The View, 209-211. Even if that is the case, that Section is not one of mandatory provisions of the EAA 1996 and parties may make agreements to contrary. In fact, Rule 4(5) of the Discarded New LCIA Rule on Interim Measures contains such agreement. See *id.*, 211.

Second, what is the effect of the emergency procedures on jurisdiction of courts where the existence of arbitration agreement results in exclusion of courts' jurisdiction as to interim protection of rights? Certain U.S. courts refrain from granting provisional measures since they consider arbitration agreements preclude courts' assistance on interim measures of protection.⁶⁸ Smit suggests that, except for granting of the measures against third parties, the courts should "step back" and should not grant any measure.⁶⁹ It is right that an emergency arbitrator should benefit from the prejudice towards confining all disputes within arbitration once parties agree to arbitrate. However, such prejudice should not be so extensive to prevent courts' constructive assistance from which arbitration could only benefit.⁷⁰ In any case, to the extent permitted, parties can regulate the role of courts in such circumstances as such regulation is done by various emergency relief rules.⁷¹

2.3.1.2 Relationship with Other Arbitral Proceedings

It seems that only the WIPO Draft Emergency Relief Rules deal with this issue. Pursuant to Article III(a) of the Rules, where a request to the WIPO is made for an emergency provisional measure prior to initiating another arbitration, the emergency arbitrator retains his powers "to make an award and to modify it." That is probably for ensuring that the emergency arbitrator remains in power until, at least, the arbitrator decides on his jurisdiction.

⁶⁸ See *supra* Chapter II, Part 4.2.

⁶⁹ Smith, 394.

⁷⁰ On the issue of court assistance to arbitration, see generally Chapter II, Part 4.

⁷¹ See Chapter III, *supra* note 64 and accompanying text.

2.3.2 Relationship with Arbitral Proceedings Initiated under Arbitration Rules of the same Arbitration Institution

The relationship between an emergency arbitral provisional relief procedure administered by an arbitration institution and arbitration to be commenced under the same institution is generally dealt with under the emergency arbitral relief rules themselves. There can be two distinct circumstances. First, an application for an emergency measure may be made prior to filing a request for arbitration or constitution of arbitral tribunal. Indeed, this is the case, which the emergency relief rules are generally designed for. An emergency arbitrator shall under such circumstances have the power to rule on the measure requested.⁷² What does it happen where an arbitral tribunal is seized of the case after the appointment of the emergency arbitrator? The solution offered to this question differs. Under the WIPO Draft Emergency Relief Rules⁷³ and the NAI Summary Arbitral Proceedings,⁷⁴ emergency arbitrators' powers apparently cease upon the appointment of a tribunal. This is obviously for avoiding duplication of *fora*. However, the ICC Pre-Arbitral Referee Procedure⁷⁵ and the ECA Pre-Arbitral Referee Rules⁷⁶ provide that, unless the parties agreed otherwise, the emergency arbitrator retains his emergency powers even after the tribunal is formed. A related question is the effect of a decision of the emergency arbitrator on the jurisdiction of an arbitral tribunal formed. Under the ICC Pre-Arbitral Referee Procedure, the decision (which takes the form of an order) of the emergency arbitrator "does not pre-judge the substance of the case nor shall it bind any competent jurisdiction which may hear any question, issue or dispute in respect of

⁷² See Article 1(1) of the ICC Pre-Arbitral Referee Procedure; Article 12(1) of the ECA Pre-Arbitral Referee Rules; Article O-1 of the AAA Optional Rules for Emergency Measures of Protection; Article 42a (2) of the NAI Summary Arbitral Proceedings; and Article III(b)(i) of the WIPO Draft Emergency Relief Rules.

⁷³ Article III(b)(1).

⁷⁴ Article 42a(2).

⁷⁵ Article 2(4).

which the order has been made.”⁷⁷ In fact, the decision remains in force until the emergency arbitrator or the arbitral tribunal modifies it.⁷⁸ Under the ECA Pre-Arbitral Referee Rules, the arbitral tribunal is empowered to review the decision of the emergency arbitrator.⁷⁹

Second, where a request for arbitration is filed and an arbitral tribunal is formed prior to making an application for an emergency measure, the moving party should not be allowed to use emergency measure rules from the date of formation of the tribunal. Under the WIPO Draft Emergency Relief Rules, once a party made a request for arbitration that party is deemed to waive his right to emergency provisional measures.⁸⁰ The reason for this is obviously related to the complementary nature of the emergency measure rules. Once an arbitral tribunal is seized of a case, it alone should have, in principle, the competence to rule on provisional measures. The complementary role is, in fact, recognised by all five sets of rules for emergency arbitral measures. Under these rules, a request may only be made prior to the appointment of an arbitral tribunal or seizure of the case by it.⁸¹

2.4 Request for Measure and Answer

2.4.1 Request

In order to commence emergency arbitral relief proceedings, a request for a provisional measure has to be made to the secretariat of the

⁷⁶ Article 12(1).

⁷⁷ Article 6(3) of the ICC Pre-Arbitral Referee Procedure.

⁷⁸ Article 6(3). Under these Rules, an arbitral tribunal has, in principal, the same powers as a pre-arbitral referee (Article 2). Apparently, these powers are additional to those provided under the ICC Arbitration Rules (Article 23). It is interesting to note that the powers provided under the ICC Pre-Arbitral Referee Procedure is far more detailed than the ones provided under Article 23.

⁷⁹ Article 12(1).

⁸⁰ See Article III(b)(ii).

⁸¹ See Article 1(1) of the ICC Pre-Arbitral Referee Procedure; Article 12(2) of the ECA Pre-Arbitral Referee Rules; Article 42a(2) of the NAI Summary Arbitral

relevant institution and, under some rules, directly to the respondent. The request for the measure under all of the rules shall contain certain elements. Perhaps the most detailed list is provided under the WIPO Draft Emergency Relief Rules. Article IV(c) of these Rules provides that the request shall contain:⁸²

- (i) the names, addresses and telephone, telefax or other communication references of the parties and of the representative, if any of the Claimant;
- (ii) a copy of the Arbitration Agreement and of the relevant facts of any contract of which it forms part;
- (iii) a concise statement of relevant facts and a statement of the rights to be preserved;
- (iv) a statement of the interim relief sought;
- (v) a concise statement of the harm expected to the Claimant if the interim relief is not granted and an explanation of why such relief is required urgently;
- (vi) evidence justifying the grant of the interim relief sought, including copies of documents and statements;
- (vii) any observations that the Claimant may wish to make on whether it wishes a hearing to be held, and, if so, the date, time and place thereof.

The request may also include, where the parties have an option to choose their emergency arbitrator, the name of the arbitrator upon which the parties have reached agreement, or any other information in respect of such arbitrator, including “technical or professional qualifications, nationality and language requirements”.⁸³

Proceedings; Article O-5 of the AAA Optional Rules for Emergency Measures of Protection; and Article III(b)(i)-(ii) of the WIPO Draft Emergency Relief Rules.

⁸² See also Article 3(2)(2)(a)-(f) of the ICC Pre-Arbitral Referee Procedure; Article 3 of the ECA Pre-Arbitral Referee Rules; Article 42c of the NAI Summary Arbitral Proceedings; and Article O-1 of the AAA Optional Rules for Emergency Measures of Protection.

⁸³ Article 3(2)(2)(e) and (d) of the ICC Pre-Arbitral Referee Procedure.

As the time is of essence in emergency measure applications, it is advisable to accompany the request with confirmation that it has sent to the respondent.⁸⁴

Further, for the same reason, the request may contain any such relevant information as the name of attorney(s) who will represent the claimant, and experts and witnesses, if any.⁸⁵

The request must be made in the language agreed upon by the parties. If there is no agreement, it is advisable that the request is made as some of the rules provide for, in the same language as the agreement referring to emergency measure rules.⁸⁶ If that language is different to the operating languages of the relevant institution, it is prudent to include a translation of the request into one of the operating languages.

In all cases, the claimant should act in good faith and should disclose all facts, circumstances or documents that are either known to it or within its possession in respect of the request for a measure.⁸⁷ This is by far the most important duty imposed upon the claimant in respect of the request. The duty obviously resembles to a duty imposed on a person who wish to obtain a temporary restraining order from a court in the U.S.⁸⁸ A breach of this duty may cause damages, which might be remedied by compensation. The basis for compensation would be a contractual duty to co-operate or breach of the principle of good faith.

⁸⁴ See, e.g., Article 3(2)(2)(f) of the ICC Pre-Arbitral Referee Procedure; and Articles 42d and 42e of the NAI Summary Arbitral Proceedings.

⁸⁵ Article 3 of the ECA Pre-Arbitral Referee Rules.

⁸⁶ See Article 3(2)(2) of the ICC Pre-Arbitral Referee Procedure; and Articles 3 and 10 of the ECA Pre-Arbitral Referee Rules.

⁸⁷ See Article IV(d) of the WIPO Draft Emergency Relief Rules.

⁸⁸ Horning, 173.

2.4.2 Answer

In line with the urgent character of emergency provisional measures, response time to the request in emergency measure proceedings is also shorter than that commonly required in arbitration proceedings. The answer should be given within eight days under the ICC Pre-Arbitral Referee Procedure⁸⁹ and 10 days under the ECA Pre-Arbitral Referee Rules⁹⁰. The AAA Optional Rules for Emergency Measures of Protection do not provide expressly for a specific time for response. It seems that the answer will be provided within a period to be determined by the emergency arbitrator.⁹¹ Under the WIPO Draft Emergency Relief Rules, the answer shall normally be given within 60 hours from the respondent's receipt of the claim.⁹²

The answer, as usual, replies in writing to the particulars of the request.⁹³ Any evidence, e.g. documents or statements, the respondent relies on shall accompany it. The answer shall also contain any counterclaim, which is logically subject to the requirements of making a claim.⁹⁴

2.5 Appointment and Challenge of Emergency Arbitrator

It seems that all of the rules envisage for appointment of a single emergency arbitrator. This is again self-explanatory and dictated by the urgent nature of the emergency measure procedure.

⁸⁹ Article 3(4).

⁹⁰ Article 5.

⁹¹ Article O-3 of the AAA Optional Rules for Emergency Measures of Protection.

⁹² Article V.

⁹³ See Article 3(4) of the ICC Pre-Arbitral Referee Procedure; Article 5 of the ECA Pre-Arbitral Referee Rules; and Article V(b)(i) of the WIPO Draft Emergency Relief Rules.

⁹⁴ See, e.g., Article 42i of the NAI Summary Arbitral Proceedings.

All but one of the rules further opts for party autonomy and envisages for two-tier mechanism for the appointment of the tribunal.⁹⁵ The parties may agree on the identity of the emergency arbitrator. In such case, the agreed person will be appointed as the arbitrator.⁹⁶ Otherwise, a default appointment procedure is available.

Under the ICC Pre-Arbitral Referee Procedure, where the parties have not chosen or agreed on their pre-arbitral referee, the chairman of the ICC International Court of Arbitration or, in his absence, one of vice-chairmen as soon as possible appoints the referee. In the appointment process, he takes into consideration, *inter alia*, parties' submissions, technical and professional requirements of the case, the referee's nationality and residence.⁹⁷

Similarly, the ECA Pre-Arbitral Referee Rules provide that parties can nominate their pre-arbitral referee who then will be appointed by the executive committee of the court. Otherwise, the executive committee appoints a referee

after having verified his independence and impartiality and after having taken into account any criteria proposed by the parties as a requirement for appointment, his possession of the experience required to deal [with] this matter, the possible proposals made by the parties and his time [of] availability.⁹⁸

⁹⁵ See Article 4(1) of the ICC Pre-Arbitral Referee Procedure; Article 7 of the ECA Pre-Arbitral Referee Rules; Article 42f of the NAI Summary Arbitral Proceedings; and Article VII of the WIPO Draft Emergency Relief Rules.

⁹⁶ After the confirmation of the *prima facie* existence of arbitration agreement, the appointment is to be approved by the chairman (Article 4(1) of the ICC Pre-Arbitral Referee Procedure) or the executive committee of the court (Article 7(2) of the ECA Pre-Arbitral Referee Rules).

⁹⁷ Article 4(2).

⁹⁸ Article 7(3).

Under the NAI Summary Arbitral Proceedings, unless parties specifically agreed otherwise,⁹⁹ the Administrator appoints an emergency arbitrator.¹⁰⁰ According to these Rules, nationality of the emergency arbitrator does not bar him from appointment.¹⁰¹ The Administrator confirms in writing the appointment of the emergency arbitrator.¹⁰²

Article VII(b) of the WIPO Draft Emergency Relief Rules provides for appointment of an emergency arbitrator from a standby panel established where there is no agreement on the identity of the referee.¹⁰³

Unlike the other institutional procedures in which the appointment by institution is envisaged as a default procedure, the AAA Optional Rules for Emergency Measures of Protection provide for appointment of the emergency arbitrator only by the AAA.¹⁰⁴ This appointment is made from a standby panel that could be referred to as “visiting firemen.”¹⁰⁵ The AAA’s approach seems to avoid a party’s “dragging its feet to give itself sufficient time to render the relief requested moot or less effective.”¹⁰⁶

Whether expressly indicated in the applicable rules or not, the relevant appointing body determines the most suitable candidate for the appointment of an emergency arbitrator. By doing so, that body probably considers the technical requirements of the case, skills and

⁹⁹ An agreement on the appointment of an arbitral tribunal is not sufficient. The parties specifically agree on the appointment of an emergency arbitrator. Article 42f(1).

¹⁰⁰ Article 42f(1).

¹⁰¹ Article 42f(1).

¹⁰² Article 42f(2).

¹⁰³ See also Article VI of the WIPO Draft Emergency Relief Rules.

¹⁰⁴ Article O-2.

¹⁰⁵ Lloyd, 15.

experience of the arbitrator and, above all, other reasonable requirements indicated by the parties.¹⁰⁷ It is needless to say that, in any case, the arbitrator should be asked if he accepts the office.¹⁰⁸

The emergency arbitrator may be challenged and, if necessary, replaced by the appointing authority within a certain period of time¹⁰⁹ in cases where there are certain circumstances that prevent a person from acting as an arbitrator.¹¹⁰ The appointing authority has, in cases of challenge, sole discretion without disclosing reasons¹¹¹ and its decision needs to be final (without an appeal) in order for facilitating speedy proceedings.¹¹²

Except for the AAA Optional Rules for Emergency Measures of Protection¹¹³ and the NAI Summary Arbitral Proceedings¹¹⁴ an emergency arbitrator is prevented from acting as a member of arbitral tribunal unless otherwise agreed by the parties or required by a

¹⁰⁶ See Smit, 395.

¹⁰⁷ See Article 4(2) of the ICC Pre-Arbitral Referee Procedure.

¹⁰⁸ See, e.g., Article 42f(3) of the NAI Summary Arbitral Proceedings; and Article 15(2) of the NAI Arbitration Rules.

¹⁰⁹ For instance, seven days from the receipt of the notice of appointment under Article 8 of the ECA Pre-Arbitral Referee Rules, whereas 24 hours from the receipt under Article VIII of the WIPO Draft Emergency Relief Rules.

¹¹⁰ Those are probably events that affect independence and impartiality of arbitrators. See Article 4(4) of the ICC Pre-Arbitral Referee Procedure; Article 8 of the ECA Pre-Arbitral Referee Rules; Article O-2 of the AAA Optional Rules for Emergency Measures of Protection; and Article VIII of the WIPO Draft Emergency Relief Rules. The replacement of an emergency arbitrator could be necessary, for instance, where he dies or becomes unable to act. See, in this respect, Article 4(5) of the ICC Pre-Arbitral Referee Procedure. The replacement could also be necessary where the emergency arbitrator resigns from his duties.

¹¹¹ See, e.g., Article 4(6) of the ICC Pre-Arbitral Referee Procedure. This is probably for avoiding any further aggravation, which will preclude moving further in the emergency measure proceedings.

¹¹² See Article 6 of the ICC Pre-Arbitral Referee Procedure; and Article 8 of the ECA Pre-Arbitral Referee Rules.

¹¹³ Article O-5.

¹¹⁴ Article 42l(3). An emergency arbitrator can act as arbitrator where a request for such role comes from both parties.

court.¹¹⁵ The policy behind this prohibition is that the proceedings taken, the information obtained, and the decision rendered under emergency measure rules should remain confidential and hence should not affect the decision concerning the substance of the case where different fact finding and evidentiary procedures exist.¹¹⁶ The counter-argument, which this author agrees with, perhaps is that the emergency arbitrator has already gotten acquainted with the case and if he to become an arbitrator it is likely that the case will resolve in a short period of time.¹¹⁷ Further, it is highly unlikely that an experienced arbitrator let himself affected with emergency measure proceedings.

2.6 Proceedings

An emergency arbitrator is normally given broad powers in conducting proceedings in order to facilitate smooth and rapid resolution of a case.¹¹⁸ This is because time is of the essence.¹¹⁹ The WIPO Draft Emergency Relief Rules can be taken as a good example in order to demonstrate how various rules deal with the conduct of emergency provisional relief proceedings. Article X of the Rules provides:¹²⁰

- a) The Emergency Arbitrator shall conduct the Procedure in such manner as the Emergency Arbitrator considers appropriate.
- b) In particular, the Emergency Arbitrator may
 - (i) proceed without a hearing and make an award where the Emergency Arbitrator considers that each party has had an opportunity to present its case;¹²¹

¹¹⁵ See Article 2(3) of the ICC Pre-Arbitral Referee Procedure; Article 19 of the ECA Pre-Arbitral Referee Rules; and Article IX of the WIPO Draft Emergency Relief Rules.

¹¹⁶ See Jarvin, *Alternative Solutions*, 402; Smit, 392, Lécuyer-Thieffry, 14, and Konstantin D. Magliveras, "The Arbitral Referee Procedure – A New Initiative of the International Chamber of Commerce", 35 *J Law Soc Scotland* 322-325 (1990).

¹¹⁷ Smith, 392.

¹¹⁸ See Article 5(3) of the ICC Pre-Arbitral Referee Procedure; Article 9(2) of the ECA Pre-Arbitral Referee Rules; Article O-3 of the AAA Optional Rules for Emergency Measures of Protection; and Article X(a) of the WIPO Draft Emergency Relief Rules.

¹¹⁹ Derains, *Refere Arbitral*, 188.

¹²⁰ See also, generally, Articles 42j and 42g of the NAI Summary Arbitral Proceedings.

¹²¹ This is the due process requirement observation of which is a basic requirement in any kind of proceedings, arbitral or else. On this requirement, see Article 5(3) of

- (ii) convene, on the shortest possible notice, the parties for the purpose of a hearing, whether in person, by telephone or by teleconference, at a time, date and place fixed by the Emergency Arbitrator;¹²² [and]
- (iii) hear one party, and proceed to make an award in the absence of the other party, if the Emergency Arbitrator is satisfied that the other party has been given notice of time, date and place of the hearing that was adequate, in view of the emergency nature of the Procedure, to enable that other party to be present; modify, in the event that a hearing is conducted and an award is made in the absence of a party, the time limit for the delivery or transmission of the Answer to the Request by that party, or convene a further hearing for the purpose of receiving further submissions.¹²³ (Citations added.)

These broad powers are restricted mainly by the requirement of giving each party a fair opportunity to present its case.¹²⁴

Under the ICC Pre-Arbitral Referee Procedure, parties undertake, by acceding to the Rules, to assist in implementing the referee's term of reference particularly, "to make available to him [the referee] all documents which he may consider necessary and also to grant free access to any place for the purpose of any investigation or inquiry."¹²⁵

The theory of competence/competence¹²⁶ is a universally accepted principle of arbitration law adopted by all modern arbitration law and rules. Indeed, the ICC Pre-Arbitral Referee Procedure¹²⁷ and the ECA

the ICC Pre-Arbitral Referee Procedure; Article 9(2) of the ECA Pre-Arbitral Referee Rules; and Article O-3 of the AAA Optional Rules for Emergency Measures of Protection.

¹²² See also Article 5(5) of the ICC Pre-Arbitral Referee Procedure; and Article O-3 of the AAA Optional Rules for Emergency Measures of Protection.

¹²³ See also Articles 5(1), 5(3), and 5(6) of the ICC Pre-Arbitral Referee Procedure; and Article 9(4) of the ECA Pre-Arbitral Referee Rules.

¹²⁴ See, in this respect, Lloyd, 15.

¹²⁵ Article 5(4).

¹²⁶ See, e.g., Gaillard / Savage (ed.), para. 650.

¹²⁷ Article 5(2).

Pre-Arbitral Referee Rules¹²⁸ expressly provide that the referee deals with challenges to its own jurisdiction. In addition, by agreeing to emergency arbitral relief procedure, parties undertake the duty to assist the emergency arbitrator in successfully resolving the dispute in question. This duty and the principle of competence/competence should be applicable to emergency relief procedures even if they are not expressly referred to.¹²⁹ The speedy nature of emergency provisional measure proceedings also justifies that suggestion.

2.7 Requirements to Grant Emergency Measures

It seems that the determination of requirements for the grant of emergency measures generally remains within an emergency arbitrator's discretion.¹³⁰ This is tenable. It is very difficult to pinpoint exactly what the requirements are for granting provisional measures. The requirements may usually change depending upon the circumstances of each case, nationality of the parties and the nature of the dispute. Similar discretion is afforded to arbitrators.¹³¹ They generally tend to use this discretion quite successfully. There seems to be no reason to believe that emergency arbitrators will be less successful in using the discretion entrusted upon them.

The examination of various rules demonstrates that grant of an emergency measure requires first and foremost urgency or emergency.¹³² After all a request is being made to obtain a measure

¹²⁸ Article 9(1).

¹²⁹ For an express stipulation, see Article 42h of the NAI Summary Arbitral Proceedings.

¹³⁰ See Articles 14 and, particularly, 15 of the ECA Pre-Arbitral Referee Rules; and Article XI (a) of the WIPO Draft Emergency Relief Rules.

¹³¹ See *infra* Chapter IV, Part 3.

¹³² See Article 2(1)(a) of the ICC Pre-Arbitral Referee Procedure; Articles 14 and, particularly, 15 of the ECA Pre-Arbitral Referee Rules; Article O-1 of the AAA Optional Rules for Emergency Measures of Protection; Article 42k of the NAI Summary Arbitral Proceedings; and Article XI (a) of the WIPO Draft Emergency Relief Rules.

grant of which cannot await the appointment of an arbitral tribunal. A further requirement is the existence of “immediate damage or irreparable loss”¹³³ or “irreparable loss or damage”¹³⁴ that will be caused where the request for emergency measure is not granted.

Under certain rules, the emergency arbitrator, solely within his discretion, determines the conditions that may restrict or prevent the grant of emergency measures.¹³⁵ The arbitrator may:¹³⁶

- require, having regard to any agreement between the parties, that a party commence arbitration proceedings on the merits of the dispute within a designated period of time;¹³⁷ or
- require that a party in whose favor an award is made provide adequate security.¹³⁸ (Citations added.)

It is interesting to note that, under the NAI Summary Arbitral Proceedings, where “the case is not sufficiently urgent or is too complicated to be decided by a provisional decision” an emergency arbitrator may deny the request for a provisional measure.¹³⁹

¹³³ Article 2(1)(a) of the ICC Pre-Arbitral Referee Procedure.

¹³⁴ Article O-4 of the AAA Optional Rules for Emergency Measures of Protection. The irreparable loss means a loss that cannot be adequately compensated with money. See, in this respect, Lloyd, 13; and *infra* Chapter IV, Part 3.1.4.

¹³⁵ Article 6(4) of the ICC Pre-Arbitral Referee Procedure; Article 15 of the ECA Pre-Arbitral Referee Rules; and Article XI(c) of the WIPO Draft Emergency Relief Rules.

¹³⁶ Article XI(c) of the WIPO Draft Emergency Relief Rules. See also Article 6(4) of the ICC Pre-Arbitral Referee Procedure.

¹³⁷ See, in this respect, Principle 12 of the ILA Principles.

¹³⁸ See Article 6(4) of the ICC Pre-Arbitral Referee Procedure; Article 42l (2) of the NAI Summary Arbitral Proceedings; and Rule O-6 of the AAA Optional Rules for Emergency Measures of Protection.

¹³⁹ Article 42k of the NAI Summary Arbitral Proceedings. The sole arbitrator applying the NAI Summary Arbitral Proceedings in a dispute arising from termination of a joint venture agreement issued an interim payment as an interim measure by applying the standards set forth under the Dutch law. The tribunal based its decision on the express choice of parties as regards substantive law in their agreement and Article 46 of the NAI Arbitration Rules. The standards applied by the arbitrator were urgency and balancing of the interests in this case. See Award in Summary Arbitral Proceedings in Case No. 2212 (28 July 1999), extracts published in XXVI YCA 198, 204 (2001).

Where the relevant set of rules contain no explicit or insufficient legal procedures or standards that would justify the grant of a provisional measure or the establishment of those standards or procedures are left to an arbitral tribunal without indicating any further guidance, the tribunal has two options. Although, each case should be / is treated differently, the tribunal can either take the *guidance* of standards and procedures applied by fellow arbitral tribunals in various other international cases or can apply the standards or procedures set forth under the applicable law. In any case, in making its decision, the tribunal should take into consideration particularities of dispute in question and nationality of disputing parties.

Neither of the above approaches is wrong but both of them lead to certain problems. The first approach necessitates the existence of arbitral case law or other authoritative materials to rely on. The case law are difficult to obtain but is emerging.¹⁴⁰ The main trouble with the second approach is the difficulty to determine applicable law. Is it the law applicable to substance or the one applicable to procedure, or is it the law of the place of arbitration?¹⁴¹ In addition, the role of the law of place of enforcement, if known, is to be considered.

2.8 Form of Emergency Arbitrator's Decision

The decision of an emergency arbitrator in *inter partes* proceedings can take two forms: an award or an order.¹⁴² Under two of the Rules, the

¹⁴⁰ See *infra* Chapter IV, Part 3.

¹⁴¹ See Holtzmann, Remarks, 205.

¹⁴² In this regard, it is noteworthy that there is usually an extendable time limit within which an emergency arbitrator renders a decision. This limit reflects parties' will and design to put pressure on the emergency arbitrator to render his decision within that period. An emergency arbitrator gives his decision as soon as possible. For instance, under the WIPO Draft Emergency Relief Rules, an emergency arbitrator is required to make its decision "within 24 hours of the termination of any hearing." Article XII. In addition, Article 6(2) of the ICC Pre-Arbitral Referee Procedure provides that the emergency arbitrator renders his decision within 30 days from the transmittal of file to him. This time limit is extendable either upon the

ICC Pre-Arbitral Referee Procedure and the ECA Pre-Arbitral Referee Rules, a pre-arbitral referee may only take its decision in a form of an order.¹⁴³ Under Article O-4 of the AAA Optional Rules for Emergency Measures of Protection, however, an emergency arbitrator has a power to grant an interim award.¹⁴⁴ Similarly, Article XI of the WIPO Draft Emergency Relief Rules empowers the emergency arbitrator to grant its decision in a form of an award, though it does not indicate the type of the award. Under the last two Rules, it is not expressed whether the decision could also normally be given in a form of an order. It is safe to assume that, if it is requested, the emergency arbitrator who is equipped with the power to grant an award can also grant an order, a less stringent form of a decision than an award.

Article 42I(1) of the NAI Summary Arbitral Proceedings expressly states that a decision of an emergency arbitrator is an award and the provisions applicable to award in the NAI Arbitration Rules are also applicable to this decision.

emergency arbitrator's request or the chairman's (of the ICC International Court of Arbitration) initiative. See also Article 13 of the ECA Pre-Arbitral Referee Rules; Article 42I(1) of the NAI Summary Arbitral Proceedings; and Article 49(2)(e) of the NAI Arbitration Rules. The decision is in most cases required to contain reasons. Article 6(1) of the ICC Pre-Arbitral Referee Procedure; Article 14 of the ECA Pre-Arbitral Referee Rules; and Article O-4 of the AAA Optional Rules for Emergency Measures of Protection. The reasons may enhance acceptability of the decision and provide for guidance in avoiding a similar situation in the future. Lloyd, 17. It is interesting to note here that Article 11 of the ECA Pre-Arbitral Referee Rules deals with seat of arbitration (in Article 14) and provides that the decision is to be rendered at the seat of the proceedings. It is not clear, however, that whether or not Article 11 infers power for emergency arbitrator to render an award. In this respect, it should be noted that the AAA Optional Rules for Emergency Measures of Protection does not contain a provision on the seat of arbitration although a decision rendered under these rules is an award. This uncertainty may be overcome by simply making the AAA International Arbitration Rules also applicable where there is a reference to the Optional Rules for Emergency Measures of Protection to the extent possible and desirable.

¹⁴³ Articles 6 and 14, respectively.

¹⁴⁴ It is noteworthy that an interim award is enforceable in the U.S. See *infra* Chapter V, Part 3.2.2.

The legal nature of a decision of the emergency arbitrator is important as it determines whether or not the decision is enforceable as an award under the New York Convention.¹⁴⁵ Apparently, if an emergency arbitrator is not considered as an arbitrator under a national law¹⁴⁶ then his decision cannot be considered as award.

2.9 Modification or Revocation of Decision

Where the circumstances under which a decision is given by an emergency arbitrator are changed, it is logical that the changed circumstances should be re-evaluated and, if necessary, the decision should be modified or revoked. As a result, any application for modification or revocation of a decision of an emergency arbitrator should be based on changed circumstances and can be made until the end of the emergency arbitrator's term, generally until the constitution of an arbitral tribunal.¹⁴⁷

2.10 Types of Emergency Measures

The powers of an emergency arbitrator are generally specified in the relevant rules. To a large extent, the emergency arbitrator is empowered with wide discretion / authority subject to generally parties' agreement to contrary.¹⁴⁸ That is to say the parties are generally empowered to widen or restrict the powers provided for under emergency measure rules.¹⁴⁹ This approach is, in fact, supported by the paramount principle of party autonomy. The WIPO Draft Emergency Relief Rules provide that, an emergency arbitrator is empowered to grant any measure he "considers urgently necessary to

¹⁴⁵ On this issue, see Chapter III, *infra* Part 2.13.

¹⁴⁶ See Chapter III, *infra* notes 164-167 and accompanying text.

¹⁴⁷ See Article O-5 of the AAA Optional Rules for Emergency Measures of Protection. Having said that one should note that there will be no objection to revision or revocation of an order. However, revision or revocation of an award may pose difficulty. On which see *infra* Chapter IV, Part 6.

¹⁴⁸ Apparently, the powers are also subject to mandatory rules of applicable laws.

preserve the rights of the parties.”¹⁵⁰ However, in each case, it is wise to examine the applicable rules with great care as to whether or not the application falls within the ambit of the relevant rules. In accordance with the ICC Pre-Arbitral Referee Procedure an emergency arbitrator is empowered¹⁵¹

- “[t]o order any conservatory measures or any measures of restoration that are urgently necessary either to prevent immediate damage or irreparable loss and so to safeguard any of the rights or property of one of the parties;”¹⁵²
- “[t]o order a party to make any other party or to another person any payment which ought to be made;”
- “[t]o order a party to take any step which ought to be taken according to the contract between the parties, including the signing or delivery of any document or the procuring by a party of the signature or delivery of a document;”
- “[t]o order any measures necessary to preserve or establish evidence.”

An emergency arbitrator, unless otherwise agreed, does not generally have power to grant any measure other than the one requested due

¹⁴⁹ See, e.g., Article 2(1)(1) of the ICC Pre-Arbitral Referee Procedure; and Article 42j of the NAI Summary Arbitral Proceedings. See also Lloyd, 14.

¹⁵⁰ Article XI(a).

¹⁵¹ Article 2(1). See also Article 14 of the ECA Pre-Arbitral Referee Rules; and Article XI of the WIPO Draft Emergency Relief Rules. The subsection (b) of Article XI contains a detailed exemplary / non-exhaustive list of powers according to which an emergency arbitrator may

(i) issue an interim injunction or restraining order prohibiting the commission or continued commission of an act or course of conduct by a party; (ii) order the performance of a legal obligation by a party; (iii) order the payment of an amount by one party to the other party or to another person; (iv) order any measure necessary to establish or preserve evidence or to ascertain the performance of a legal obligation by a party; (v) order any measure necessary for the conservation of any property; (vi) fix an amount of damages to be paid by a party for breach of the award under such conditions as the Emergency Arbitrator considers appropriate.

¹⁵² The language of this sub-paragraph covers conservatory measures aim at preserving a party's rights. This language seems to be inclusive of any provisional measure. But see Smit, 397.

probably to party autonomy.¹⁵³ He might, however, “suggest that the original order sought was inappropriate and by agreement make an order other than the one sought.”¹⁵⁴

2.11 Effect of Decision

It is clear that a decision of an emergency arbitrator does not aim at pre-judging the substance of the case.¹⁵⁵ The decision is provisional. It is logical to assume that the decision stands until either an arbitral tribunal or a competent judicial body confirms, modifies, or terminates it.

2.12 Appeal

Permission to appeal or any other recourse against a decision of an emergency arbitrator does not suit the urgent nature of the emergency measure proceedings.¹⁵⁶ To this end, under the ICC Pre-Arbitral Referee Procedure, a “right to all means of appeal or recourse or opposition to” a judicial authority or any other authority against decision of the referee is waived “insofar as such waiver can validly be made.”¹⁵⁷

2.13 Compliance with Decision and Consequences of Non-compliance

Under the ICC Pre-Arbitral Referee Procedure and the ECA Pre-Arbitral Referee Rules, parties expressly undertake to carry out without delay a decision of an emergency arbitrator.¹⁵⁸ Thus, the decision has by

¹⁵³ See Article 2(2) of the ICC Pre-Arbitral Referee Procedure; and Article 14 of the ECA Pre-Arbitral Referee Rules. The other rules are silent on this issue. For the contrary view, see Smit, 397.

¹⁵⁴ Lloyd, 15.

¹⁵⁵ Article 6(4) of the ICC Pre-Arbitral Referee Procedure; Article 16 of the ECA Pre-Arbitral Referee Rules; and Article 42m of the NAI Summary Arbitral Proceedings.

¹⁵⁶ Apparently, modification of a decision under certain circumstances is an exception to that rule. On the modification issue, see Chapter III, *supra* Part 2.10.

¹⁵⁷ Article 6(6). Hausmaninger indicates that several legal systems accept such waiver valid where it is made after the decision is rendered. Hausmaninger, *Pre-Arbitral Referee*, 104.

¹⁵⁸ Article 6(6) and Article 21, respectively.

contract a binding effect.¹⁵⁹ This effect, as well as the fact that an arbitration institution “lends its standing” to any emergency measure granted may enhance voluntary compliance.¹⁶⁰ In order to enhance the compliance, an order may be, where available, “backed by a sanction of liquidated damages in the event of its breach.”¹⁶¹ A failure to carry out the decision may further be remedied. In case of failure, an emergency arbitrator, an arbitral tribunal or the competent court can, where permitted, compensate any damage caused by that failure.¹⁶² In regard of the issue of damages, it should also be noted that where the decision of an emergency arbitrator is proved to be wrong or otherwise caused damages, arbitral tribunal or the competent court might hold the applicant liable for such damage.¹⁶³

In addition to contractual mechanisms for liability, where possible, the parties can obtain assistance from a judicial authority for enforcement of the emergency arbitral decision.¹⁶⁴ In this respect, there are a few issues to consider. The question as to whether or not the emergency arbitrator is considered an arbitrator has a crucial importance. This is because only then the decision may be categorised as an order and may be enforced. This author believes that the emergency arbitrator,

¹⁵⁹ Lloyd, 16; and Gurry, 3 (indicating that “only the most audacious, if not reckless, lawyer would counsel a client not to abide by the order, even if it has merely a contractual status ...”).

¹⁶⁰ See, in this respect, Hausmaninger, Pre-Arbitral Referee, 103-104.

¹⁶¹ Id.; and Smit, 399. The availability of liquidated damages, fines, or penalties is subject to applicable law. See *infra* Chapter IV, Part 7.2.

¹⁶² See Article 6(8)(1) of the ICC Pre-Arbitral Referee Procedure. The emergency arbitrator himself can also provide for penalties for failure to comply with his decision. See Article XI(b)(vi) of the WIPO Draft Emergency Relief Rules.

¹⁶³ See Article 6(8)(2) of the ICC Pre-Arbitral Referee Procedure.

¹⁶⁴ See Article 21 of the ECA Pre-Arbitral Referee Rules. As we noted above, Derains, one of the drafters of the ICC Pre-Arbitral Referee Procedure, refers to the “*référé*” *arbitral* as an “arbitrator.” Derains in: Sanders (ed.), *New Trends*, 186-87. But see *Societe Nationale des Petroles du Congo v. Republique du Congo*, Arret of 29 April 2003 (Cour D’Appel de Paris) (holding that a pre-arbitral referee is not an *arbitrator*); and Jarvin, *Procedural Decisions*, 369. It should further be noted that, at the end, it is the competent law that would qualify a referee as an arbitrator.

whether it is referred to as referee or else is an arbitrator.¹⁶⁵ The emergency arbitrator who is a neutral person determines, in a judicial manner, the issues before him in a binding decision, which by agreement may be an order or an award. This approach is also in conformity with the principle of party autonomy.

Further, the similarities between the concept of arbitral provisional measures and that of emergency arbitral provisional measures are expected to cause the acceptance of the latter by legal systems “to the same extent that arbitral relief is recognized today as an alternative to provisional court relief.”¹⁶⁶ Indeed, if an emergency arbitrator is accepted as an arbitrator by a given legal system, his decision could be enforceable like a decision of an arbitrator.¹⁶⁷

Also, decisions of an emergency arbitrator, like one of an arbitrator,¹⁶⁸ may arguably be enforceable under the New York Convention. Gurry rightly states that

“[w]hile it is not a question that is free from doubt, the better view seems to be that an award given by an emergency arbitrator in such a [emergency relief] procedure be enforceable under the New York Convention if the award is considered to be enforceable award in the jurisdiction in which it is granted.”¹⁶⁹

Hausmaninger, Pre-Arbitral Referee, 104. It is also for the competent law to qualify the decision as order or an award.

¹⁶⁵ In this respect, see, generally, Chapter III, *supra* Part 2.1. But see *Societe Nationale des Petroles du Congo v. Republique du Congo*, Arret of 29 April 2003 (Cour D’Appel de Paris).

¹⁶⁶ Hausmaninger, Pre-Arbitral Referee, 110.

¹⁶⁷ For the enforcement of an arbitral decision, see *infra* Chapter V, Part 3.1. To support this view, it should be noted that Article 1051(3) of the Netherlands’ CCP provides that an award rendered in summary arbitral proceedings is enforceable in accordance with the provisions of the Code applicable to enforcement of arbitral awards.

¹⁶⁸ For the enforcement of an arbitral award under the New York Convention, see *infra* Chapter V, Part 3.2.

¹⁶⁹ Gurry, 4. However, Jarvin states, in regard of the ICC Pre-Arbitral Referee Procedure, (which is generally applicable to other emergency measure rules) that the arbitral referee’s “order is not an ‘award’ in all legal systems, because it is not final, and the New York Convention only applies to final awards.” Jarvin, *Alternative Solutions*, 403.

The law of such jurisdiction may require that a decision is to be final and binding to be considered as an award. The decision is binding so long as parties agreed in advance to accept it as binding.¹⁷⁰ Is the decision final? It can be argued that the decision is final in respect of the issues it deals with.¹⁷¹ The enforcement regime of the decision could, in any case, be improved on both national and international level.¹⁷² Apparently, the latter provides for a harmonised and more effective means than the former.

However, there is a great danger that a given legal system would not accept an emergency arbitrator as an “arbitrator” and, as a result, the decision rendered in accordance with emergency relief procedure would be neither an award nor an order. Accordingly, that legal system might not lend its assistance for enforcement of that decision. However, this non-enforceability should not be exaggerated. This is because (i) “[t]he parties have agreed to the arbitral referee procedure: it may be supposed that they thereby have confidence in it”, and (ii) “[t]he very existence of such a procedure is likely to instil discipline in both parties.”¹⁷³

¹⁷⁰ Derains, *Refere Arbitral*, 189.

¹⁷¹ See, in this respect, *infra* Chapter V, Part 3.2. Derains argues that a decision of an arbitral referee is final in the context of “the appropriateness to take interim measures at a certain moment on the basis of a *prima facie* appraisal of a factual situation.” Derains, *Refere Arbitral*, 189.

¹⁷² Indeed, the UNCITRAL should take enforcement of emergency arbitrators’ decisions into its calendar in considering the enforcement of arbitral provisional measures. On this issue, see *infra* Chapter V, Part 3.3.

¹⁷³ Lloyd, 18. Further, he rightly indicates:

Contrary to the view of some lawyers, businessmen do not go out of their way to seek disputes. If disputes occur resulting in arbitration, experience shows that awards are generally honoured without the need for enforcement by state courts.

Id., 19.

2.14 Confidentiality

Some of the rules indicate in express terms that the emergency arbitral measure proceedings are confidential.¹⁷⁴ The ICC Pre-Arbitral Referee Procedure, for instance, requires confidentiality of “any submissions, communications or documents (other than the order [a decision of an emergency arbitrator]) established or made solely for the purposes” of emergency arbitral measure proceedings.¹⁷⁵

The confidentiality is subject to parties’ agreement to contrary or a decision of an arbitral tribunal or a judicial authority that later seizes of the case. The aim of confidentiality is to protect the integrity of emergency measure proceedings and to avoid pre-judgment of the substance of a case.

2.15 Liability

Emergency arbitrators and arbitration institutions, which administer emergency arbitral relief procedure should be excluded from liability to the extent possible under relevant law.¹⁷⁶ The policy behind this approach is twofold. First, it aims at making sure that the emergency arbitrator conducts its duty and renders a decision without the fear of being held liable. Second, the relevant institution’s administration of emergency measure procedure should not be hindered due to fears of being held liable. The emergency arbitrator should, unless otherwise agreed by the parties and accepted by the arbitrator, logically be subject to liability regime applicable to arbitrators. Any private

¹⁷⁴ See Article 6(7) of the ICC Pre-Arbitral Referee Procedure; Article 5(4) of the ICC Pre-Arbitral Referee Procedure; and Article 17 of the ECA Pre-Arbitral Referee Rules. Where there is no such stipulation, the confidentiality is subject to the principles applicable to arbitration under the relevant law. On the issue of confidentiality, see *supra* Chapter II, Part 1.1.

¹⁷⁵ Article 6(7).

¹⁷⁶ Smit, 400. On the issue of liability, see Hausmaninger, Pre-Arbitral Referee, 105-108. See also *supra* Chapter II, Part 4.1.

agreement on the liability is also subject to mandatory requirements of the competent law.

It was argued that, due to its rapid and complex character, emergency arbitral relief procedure might result in “a greater number of wrongful decisions than other proceedings.”¹⁷⁷ Such result may also occur where an emergency arbitrator does not have necessary qualifications.¹⁷⁸ Consequently, emergency arbitrator and/or arbitral institution may be subject to liability claims.¹⁷⁹ The issue of liability is ultimately determined in accordance with the applicable law. Any fear that the emergency arbitrator or the relevant institution may be held responsible because of the emergency measures granted is simply unfounded. Any measure that proved to be wrong would be modified or revoked. Further, any damage that may occur due to a wrongful decision can be remedied from a security, posted by the moving party, that is, in most cases, a pre-condition for grant of emergency measure. Even in cases where no security was required, the emergency arbitrator or an arbitral tribunal formed later is generally capable of remedying any damage suffered due to the issuance of the emergency arbitral measure. In any case, experience shows that parties are hesitant to sue arbitrators or arbitration institutions for the above reasons.¹⁸⁰

It seems that out of all emergency relief rules only the ICC Pre-Arbitral Referee Procedure, the NAI Summary Arbitral Proceedings, and the WIPO Draft Emergency Relief Rules contain express provisions in respect of emergency arbitrator’s liability. In accordance with Article 6(8) of the ICC Pre-Arbitral Referee Procedure, both the ICC and the

¹⁷⁷ Hausmaninger, Pre-Arbitral Referee, 107.

¹⁷⁸ Id. However, it is logical to assume that the relevant arbitral institution examines thoroughly the qualifications of a candidate prior to his appointment.

¹⁷⁹ Id.; UN Doc A/CN.9/263, para. 31; and UN Doc A/CN.9/SR. 316, para. 39.

¹⁸⁰ See, e.g., Hausmaninger, Pre-Arbitral Referee, 105-108. See also *supra* Chapter II, Part 4.1.

pre-arbitral referee is, in principle, exempt from liability. The referee may be held liable, in accordance with that Article, “for the consequences of conscious and deliberate wrongdoing.”

Under Article 66 of the NAI Arbitration Rules, which contains the NAI Summary Arbitral Proceedings, no liability could be asserted on any of the Institution, the Administrator or an arbitrator for any act or omission so long as the arbitration is governed by the Rules.

In accordance with Article 77 of the WIPO Arbitration Rules, except for deliberate wrongdoing neither an emergency arbitrator nor the WIPO would be liable for any act or omission in respect of emergency arbitral proceedings.¹⁸¹

2.16 Costs of Emergency Measure Proceedings

The costs associated with emergency measure proceedings are generally apportioned between parties.¹⁸² What are the costs associated with the proceedings? The costs generally comprise of administrative charges of the relevant institution, fees and expenses of the emergency arbitrator,¹⁸³ and costs of any expert, if appointed.¹⁸⁴ In accordance with the NAI Summary Arbitral Proceedings, generally the losing party bears the costs and they may contain the ones mentioned

¹⁸¹ Article 77 to the WIPO Arbitration Rules envisaged to be applicable to the Draft Emergency Relief Rules, see Article 1 of the WIPO Draft Emergency Relief Rules.

¹⁸² See Article 7(1) of the ICC Pre-Arbitral Referee Procedure; and Article O-8 of the AAA Optional Rules for Emergency Measures of Protection. Under Article 18 of the ECA Pre-Arbitral Referee Rules, the executive committee deals with the costs.

¹⁸³ The fees and expenses of the arbitrator generally fixed by the relevant institution by taking into account mainly the time spent and complexity of the case, and urgency of the matter. See Appendix A.2 to the ICC Pre-Arbitral Referee Procedure; Article 18 of the ECA Pre-Arbitral Referee Rules; and Article XVI of the WIPO Draft Emergency Relief Rules.

¹⁸⁴ Article 7(1) of the ICC Pre-Arbitral Referee Procedure. See also Articles XV and XVI of the WIPO Draft Emergency Relief Rules.

above as well as expenses incurred in respect of legal representation.¹⁸⁵

2.17 *Ex Parte* Requests for Emergency Measures

Almost all of the emergency measure procedures anticipate for *inter partes* proceedings for the grant of an emergency measure.¹⁸⁶ The WIPO Draft Emergency Relief Rules, however, contain a provision dealing with *ex parte* requests in Article XIII. This Article provides that where notice to the respondent involves a “real risk” that the purpose of emergency relief proceedings would be defeated, a claimant may transmit its request only to the WIPO Dispute Resolution Centre but not to a respondent.

The emergency arbitrator appointed by the WIPO, in accordance with Article VII of the Rules, considers those requests. The emergency arbitrator may decide to hear only the claimant in the absence of the respondent where there is a real risk that the emergency relief proceedings would be defeated. The test of real risk may be defined as “evidence of bad faith on the part of the other party, or an indication that notice would entail the risk that vital evidence might be destroyed or other irreparable damage [is] done.”¹⁸⁷

The emergency arbitrator shall conduct the proceedings in accordance with the WIPO Draft Emergency Relief Rules and renders an order, which is contractually binding upon the parties.¹⁸⁸ The form of the

¹⁸⁵ Article 42n of the NAI Summary Arbitral Proceedings; and Articles 57-61 of the NAI Arbitration Rules. See also Award in Summary Arbitral Proceedings in Case No. 2212 (28 July 1999), extracts published in XXVI YCA 198, 207-208 (2001) (ruling that the losing party should bear the costs incurred in the arbitral proceedings.).

¹⁸⁶ However, under these proceedings, a party who was given proper notice to attend the proceedings fails to attend them, the proceedings can continue and a decision can be reached in its absence. See, e.g., Article 10(b)(iii) of the WIPO Draft Emergency Relief Rules.

¹⁸⁷ Gurry, 3.

¹⁸⁸ Article XIII(c)-(d).

decision is intentionally chosen as “order” rather than “award” as it was rightly thought that an award rendered *ex parte* is not enforceable under Article V(1)(b) of the New York Convention.¹⁸⁹ The failure to comply with an *ex parte* order is a breach of contract, and damages arising from such breach can be claimed in arbitration proceedings to be taken place later.

Article XIII(c) also provides a safeguard in order to give an opportunity to the respondent to be heard. That Article states that the order “shall be made subject to the condition that the order, and such further documentation as the Emergency Arbitrator considers appropriate, be served on the Respondent in the manner and within the time ordered by the Emergency Arbitrator”

The *ex parte* measure procedure is obviously derived from the concept of temporary restraining measures. The difficulty with this concept is that it is known in some legal systems but unfamiliar to many. Consequently, the application of that procedure may be considered a violation of public policy in some countries.¹⁹⁰

3 Complementary Mechanisms: Can They be Useful / Effective Anyway?

The objective of the complementary mechanisms is to lessen the need of courts’ involvement in arbitration. These mechanisms can potentially reach this aim and thus can certainly be effective. However, the drafters of the mechanisms accept courts’ constructive assistance that may be necessary in certain circumstances, e.g. for avoiding dissipation of assets. Thus save for the Procedural Rules 1994 of the Court of

¹⁸⁹ WIPO Document ARB/AC/III/96/3, para. 10. Article V(1)(b) provides that where a party is not given proper notice of appointment of arbitrators or proceedings or unable to present its case, enforcement of the award rendered may be denied.

¹⁹⁰ Holtzmann, Remarks, 204.

Arbitration for Sport,¹⁹¹ none of the mechanisms provide for exclusive jurisdiction concerning interim protection to either the head or organ of the arbitration institution or the emergency arbitrator at the pre-formation stage of arbitration.

The degree of effectiveness of emergency provisional measures is likely to depend on

- “the particular circumstances of a given case”,¹⁹²
- the reception of emergency measure procedures by a given legal system,¹⁹³ and
- usage by businessmen.¹⁹⁴

The discussion on usefulness of the complementary mechanisms is generally channelled to the emergency arbitral provisional measure procedures. Indeed, the reintroduction of the complementary mechanisms by the ICC in 1990 was welcomed with both cheer and suspicion.¹⁹⁵ It was, for instance, considered as an “innovative”¹⁹⁶ “mousetrap” that obviates, to a certain extent, the need of court involvement in regard of interim protection of rights.¹⁹⁷ However, the ICC Pre-Arbitral Referee Rules were referred to in only five cases following their inception.¹⁹⁸ Perhaps partly because of its initial failure

¹⁹¹ See Chapter III, *supra* Part 1.

¹⁹² Paulsson, *Better Mousetrap*, 216.

¹⁹³ Hausmaninger, *Pre-Arbitral Referee*, 105. On this aspect, see Chapter III, *supra* Part 2.13.

¹⁹⁴ On this see, Chapter III, *supra* Part 3.

¹⁹⁵ E.g., Lord Mustill, “Comment” in: ICC(ed.), *Conservatory Measures*, 118, 121 (stating that he would “be a little surprised if it [the pre-arbitral referee procedure] can react as quickly to an emergency as a court operating at its best.”).

¹⁹⁶ See “The ICC Pre-Arbitral Referee Procedure: An Innovation in Dispute Resolution”, 1(1) ICC Int’l Ct Arb Bull 18 (1990).

¹⁹⁷ See Paulsson, *Better Mousetrap*, 214.

¹⁹⁸ See ICC Doc No. 420/473, para. 13. In this regard, it is noteworthy that for a long period of time, there was only one dispute that referred to the ICC Pre-Arbitral Referee Procedure. See Eric A. Schwartz, “Comment” in: ICC (ed.), *The New 1998 ICC Rules of Arbitration*, ICC Publication No. 512 (ICC Publishing; Paris

to attract arbitrating parties' attention, it is indicated that the emergency measure procedures contain "too many basic uncertainties."¹⁹⁹ It is argued that the procedures must be "swift," the requirements to grant emergency measures need to be "predictable" and sanctions for non-compliance with the emergency measure must be "available".²⁰⁰ It is further stated in explaining why those procedures are not widely accepted:

The [arbitral] institutions knew that it is vital to fulfilling their public responsibilities and to maintaining their credibility that they not lead parties into a procedure unless the institution has a sound basis for confidence that doing so will not result in legal uncertainties and be a breeding ground for expensive litigation. Further there was the danger that a party might use the institutional procedure only to find, perhaps after it was too late, that it should have gone immediately to a national court.²⁰¹

However, on the contrary, it is thought that the availability of emergency arbitral measure procedure "from arbitration institutions offers the best way forward for arbitration."²⁰² This author agrees with this proposition. This is because the availability of such procedure "would work in the interests of the promotion and development of arbitration as an effective and comprehensive means of dispute resolution for international commercial disputes."²⁰³

It seems that several arbitration institutions find it useful to make the emergency arbitral provisional measure procedures available. These procedures, as explained above, generally provide for a swift resolution of a dispute at the pre-formation stage and give certain discretion to

1997), 70, 72. In this regard, see also Schwartz in: ICC (ed.) *Conservatory Measures*, 64.

¹⁹⁹ Holtzmann, Remarks, 206.

²⁰⁰ *Id.*, 204. In this regard, Jarvin questions the usefulness of the ICC Pre-Arbitral Referee Procedure since the order of a pre-arbitral referee is, according to his view, not enforceable. Jarvin, *Alternative Solutions*, 403.

²⁰¹ Holtzmann, Remarks, 206.

²⁰² Gurry, 4.

²⁰³ *Id.*

emergency arbitrators to handle the emergency measure requests.²⁰⁴ Certain sanctions are also available for those parties that do not abide with a decision of an emergency arbitrator.²⁰⁵ In this regard, it is noteworthy that the mere existence of such a dispute resolution procedure at the vital stage of arbitration (prior to the appointment of arbitrators) where concurrent jurisdiction approach is open for abuse may have deterrent effect on a bad-faith party.²⁰⁶ What can make the emergency arbitral provisional measure procedures more effective and hence more acceptable to arbitration community is perhaps their enforcement at the both national and cross-border level.

The availability of these complementary mechanisms and the test of their effectiveness bring into mind the question of their usage. The evidence demonstrates that there is a growing body of usage. Two references were made under the ICC Pre-Arbitral Referee Rules in 2001.²⁰⁷ The AAA Optional Rules for Emergency Measures of Protection were used once, through submission, and several arbitrating parties referred to these rules in both domestic and international cases.²⁰⁸ The NAI received 11 requests in 1999, 20 requests in 2000, and 10 requests within the first eleven months of 2001 for interim protection of rights under the Summary Arbitral Proceedings.²⁰⁹ There were eight submissions to the Court of Arbitration for Sport for interim measures until December 2000.²¹⁰

²⁰⁴ See Chapter III, *supra* Part 2.6.

²⁰⁵ See Chapter III, *supra* Part 2.13.

²⁰⁶ See Lloyd, 18-19.

²⁰⁷ See 13(1) ICC Int'l Ct Arb Bull 14 (2002).

²⁰⁸ As of 12 March 2001. The e-mail of Luis Fernandez, Vice President, AAA International Center for Dispute Resolution, to this author.

²⁰⁹ As of 14 December 2000. The letter of F. D. von Hombracht-Brinkman, Managing Director, Netherlands Arbitration Institute, to this author. See also NAI Award in Summary Arbitral Proceedings in Case No. 2212 (28 July 1999), extracts published in XXVI YCA 198 (2001).

²¹⁰ As of 11 December 2000. There were 59 cases registered with the Court as of that date according to the letter of Matthieu Reeb, Acting Secretary General, Court of Arbitration for Sport, to this author.

After all the complementary mechanisms are available and in use. Indeed, they are in the process of becoming trendy.

4 Alternative Solutions to Complementary Mechanisms

Holtzmann proposes two alternative methods to complementary mechanisms in filling up the *lacunae* where these mechanisms are unavailable.²¹¹ The first method is an obvious one: appointment of arbitral tribunal as soon as possible. This is possible in fast-track arbitration but parties may find, by agreement, other means for speedy appointment of their tribunal.

The other method is taking certain self-help measures for eliminating the necessity for complementary mechanisms. The example given by Holtzmann is on preservation of evidence:²¹²

[I]f a party fears that the other side might destroy evidence, the party that has such fears could, simultaneously with commencing arbitration write a letter to the other side warning it against destroying particular evidence and warning that if such evidence becomes unavailable the arbitral tribunal would be asked to draw adverse inferences from its absence. That could be as effective as seeking an emergency interim measure - and far quicker.

The above solutions are very creative and can be helpful in certain circumstances. However, these solutions could not always be as effective as the complementary mechanisms.

Conclusion

An arbitral tribunal, a party-determined authority is the natural judge for providing any relief even if the relief is sought on an interim basis. However, at the pre-formation stage, no relief can be obtained from the

²¹¹ Holtzmann, Discussion, 215.

²¹² Id. He continues by adding: "[t]hat is only one example; with little imagination, counsel could develop numerous other types of self-help measures along the same lines." Id.

tribunal as it is yet to be formed. That stage, however, constitutes a very important phase of arbitration and the fate of a dispute is generally determined at such stage.²¹³

In the absence of the availability of provisional measures from a party-determined authority, courts are the only option for such measures. At the pre-arbitral stage, in fact, at all stages of arbitration, judicial support for obtaining provisional measures is, for certain circumstances, unavoidable and helpful for interim protection of arbitrating parties' rights. Indeed, complementary mechanisms do not generally provide for or envisage to be exclusive means for the interim protection.²¹⁴ However, there are several objections to referring a party who choose to arbitrate to a court for provisional measures:

- A request to a court at the pre-formation stage is against parties' choice of forum for resolution of their dispute and neutrality of that forum.
- It is an open invitation for abuse of court assistance.
- Complementary mechanisms keep arbitration confidential.
- The request to a court may, in some cases, be considered as a waiver of the right to arbitrate.
- Finally, assistance of judicial authorities may not always be (effectively) available thus complementary mechanisms may be the parties' only option at the pre-formation stage for provisional measures.

By taking into account the above objections, the complementary mechanisms are proposed for remedying the lack of availability of provisional measures from a party determined authority. The complementary mechanisms envisage the grant of emergency

²¹³ See Chapter III, *supra* notes 6-9 and accompanying text.

²¹⁴ See Chapter III, *supra* note 40 and *supra* Part 2.3.1.1.

provisional measures by a neutral / party-determined authority (an arbitrator, emergency arbitrator, pre-arbitral referee) at the pre-formation stage. The principle of party autonomy too supports the basis of the complementary mechanisms. The availability of these mechanisms has potentially deterrent effect on unnecessary requests for provisional measures to courts and thus may avoid forum shopping.

The need for complementary mechanisms was recognised as early as 1915.²¹⁵ Nowadays, parties, in practice, can create a mechanism under which emergency provisional measures are available at the pre-formation stage.²¹⁶ Arbitration institutions are also attempted to cure the lack of availability of arbitral provisional measures from a neutral party-appointed authority at that stage. For this purpose, complementary mechanisms to arbitration are introduced for preserving rights on an interim basis. At the outset, it should be noted that these mechanisms empower a neutral party-determined authority to grant provisional measures generally until the arbitral tribunal becomes operative. Further, these mechanisms do not create exclusive means of recourse: judicial involvement is not fully obviated. These mechanisms are twofold. First, arbitration rules of some arbitration institutions empower a person generally the head/president or an organ of the institution to grant certain provisional measures.²¹⁷ The measure taken by the relevant person / organ is morally binding upon the arbitrating parties. Failure of such measure could, however, be taken into account in calculation of damages or costs by the arbitral tribunal to be formed. This mechanism is resurrection of the mechanism created in the 1915.

²¹⁵ See Chapter III, supra Part 1.

²¹⁶ See Chapter III, supra notes 24-27 and accompanying text.

²¹⁷ See Chapter III, supra Part 1.

Second, some other institutions, namely the ICC, the ECA, the NAI, and the AAA propose certain emergency arbitral provisional measure procedures under various names.²¹⁸ All of the above procedures aim at providing an effective mechanism for obtaining emergency arbitral relief. In order to reach that aim, an emergency arbitrator, under those procedures, is empowered, until the formation of arbitral tribunal to grant certain provisional measures. The emergency arbitrator should be considered as an arbitrator as it judicially resolves an issue on an interim basis.²¹⁹

In shaping the above procedures, their drafters took into account three main principles.²²⁰ The first principle is the observance of the need to create a mechanism under which interim protection is provided for in a speedy manner. This need is, indeed, the reason for the creation of the emergency arbitral measure procedures. However, these procedures also observe the principles of party autonomy and of due process.

The emergency arbitral provisional measure procedures are swift and effective. These procedures generally give wide discretion to the emergency arbitrator to deal with requests for emergency measure. A decision of the emergency arbitrator has certain weight and there are some remedies available against recalcitrant parties:²²¹

- An emergency arbitral measure has, by contract, binding effect.²²²
- Such measure has also the backing of the relevant arbitration institution.

²¹⁸ See Chapter III, *supra* Part 2.

²¹⁹ See Chapter III, *supra* Part 2.1.

²²⁰ *Id.*, Part 2.

²²¹ See Chapter III, *supra* Part 2.13.

²²² *Id.*

- Damages may be ordered in case of failure to comply with the measure.
- The measure may, depending upon the applicable law (where an emergency arbitrator is considered as arbitrator), potentially be enforceable at the place where it is issued or elsewhere under the New York Convention. However, the possible clarity as to enforcement under national laws and the New York Convention would enhance the effectiveness of those measures.

The emergency measure procedures assist facilitating effectiveness of arbitration in providing an effective means for interim protection of rights at the pre-formation stage. Indeed, there is a growing recognition and use of the emergency measure procedures.²²³ The existence and availability of these procedures 'offer best way forward for arbitration.' For these procedures' further promotion and use, they should be made known to potential users. This author is of the opinion that, within the next decade or so, the complementary mechanisms' acceptance and usage will be dramatically increased. This is because of the importance of interim protection of rights at the pre-formation stage.

²²³ Id.

CHAPTER IV

ARBITRAL PROVISIONAL MEASURES

Faced with a request for a provisional measure, an arbitral tribunal initially establishes whether it has the necessary power to grant such measure. Once the tribunal establishes its power, it then determines the standards of procedure and principles for the grant of such measure. The determination of these standards and principles is vital as it facilitates consistency and predictability of arbitration process, regardless of where arbitration takes place.¹ Thus, such determination makes arbitration process more efficient.

Arbitration rules and laws are generally silent concerning the standards and principles for the grant of an arbitral provisional measure. However, it should be noted, at the outset, that arbitrators are given broad powers and wide discretion in establishing such standards and principles.² In such establishment, it should be kept in mind that the

¹ Naimark / Keer, 23.

² Broad powers are generally given to arbitrators to supplement the applicable procedural rules at their discretion in order to avoid procedural particularities of national laws and local court procedure. See, e.g., Article 16 of the AAA-ICDR Arbitration Rules; Article 15(1) of the ICC Arbitration Rules; Article 14 of the LCIA Arbitration Rules; Article 20 of the Arbitration Rules 1999 of the Arbitration Institute of the SCC; Article 38 of the WIPO Arbitration Rules; Article 15(1) of the UNCITRAL Arbitration Rules; Article 25(2) of the Egyptian Law 1994; Sections 33(1) and 34 of the EAA 1996; Article 1494 of the French CCP; Article 19(2) of the Model Law; Article 1036 of the Netherlands AA; Article 16 of the Portuguese Arbitration Law; Article 816 of the Italian CCP; Article 182 of the SPIL. The arbitrators' discretion to supplement the applicable procedural rules was initially provided under the Article 11 of the ICC Arbitration Rules 1975. This Article was described as a "revolutionary innovation." Eisemann, 398. This innovation was designed "to separate the arbitration, to the extent possible, from local procedural law." Derains / Schwartz, 209. In this regard, see, e.g., Dominique Hascher, "The Law Governing Procedure: Express or Implied Choice by the Parties – Contractual Practice," ("Law Governing Procedure") in: van den Berg (ed.), *Planning Efficient Arbitration*, 322. On the powers of arbitrators, see also *supra* Chapter II, Part 1.2. It is noteworthy that UNCITRAL is currently undertaking a study on, *inter alia*,

standards and principles should be flexible for tailor-making the appropriate measure in accordance with circumstances of each individual case.³ In addition, the provisional nature of such measure and “the specific needs of international arbitral practice”⁴ should, *inter alia*, be taken into account.

In determining the standards of procedure and principles, arbitrators occasionally make reference to or inspire from various national laws, e.g. law of the place of arbitration or applicable substantive law, law of the place of enforcement. Nonetheless, where a national arbitration law is applicable as a default procedure or through a party agreement and such law makes reference to national procedural rules for the grant of provisional measures, these rules will apply to arbitral process. A reference to national procedural law is, however, *hardly ever* done in practice.⁵

In their establishment of the standards and principles, arbitration rules or arbitral case law may provide guidance to arbitrators.⁶

arbitral provisional measures indicating applicable standards and principles. See A/CN.9/WG.II/WP.123.

³ Berger, *International Economic Arbitration*, 338. See also, e.g., Redfern / Hunter, para. 1-129 (indicating that “adaptability” is a principal advantage of arbitration). To this end, it is noteworthy that an arbitral tribunal has a duty to “adopt procedures suitable to the circumstances of the particular case” under Article 33(1) of the EAA 1996.

⁴ Berger, *International Economic Arbitration*, 335.

⁵ See, e.g., Craig / Park / Paulsson, *ICC Arbitration 2000*, 299-300; and Marc Blessing, “The ICC Arbitral Procedure under the 1998 ICC Rules – What has Changed?”, 8(2) *ICC Int’l Ct Arb Bull* 16, 23 (1997) (stating that “the freeing of the international arbitral procedure from local procedural rules is one of the most significant milestones and achievements of international arbitration, and much of the worldwide success of arbitration and its recognition as the most reliable method for settling disputes”).

⁶ In this regard, it should be noted that arbitrators would take into account and, if required, apply, the mandatory principles of the law of the place of arbitration and/or, if known, the law of place of enforcement. See, e.g., Bösch, 7 (arguing that the arbitrator should take the law of the place of enforcement into account for serving the petitioner well by issuing enforceable interim measures.). Otherwise, the arbitrator’s decision would be set aside at the place of arbitration or refused to be enforced elsewhere.

Consequently, comparative appraisal of arbitration rules and in-debt analysis of arbitral case law are useful for providing guidelines to arbitrators for such determination. For the purpose of comparative analysis, seventy-two sets of arbitration rules⁷ are examined.⁸ At the outset, it should be indicated that some of the forty-four sets of arbitration rules containing a provision on provisional measures deal with certain aspects of the standards of procedure and principles.

Arbitral case law may provide guidance to arbitrators or “may be persuasive”⁹ of how an arbitral tribunal handles a request for an interim measure.¹⁰ Apparently, one should accept that “there is little precedent in international commercial arbitration” and that each arbitral case is and should be considered individually.¹¹ Nevertheless, arbitral practice has been witnessing emergence of transnational procedural rules regarding arbitral provisional measures.¹² Such practice and rules

⁷ See Annex. For text of the rules, see, generally, Eric Bergsten (ed.), *International Commercial Arbitration* (Kluwer); and Jan Paulsson (gen. ed.), *International Handbook*.

⁸ The rules are chosen by taking into consideration the geographical location of the institutions, the size of their caseload and the type of disputes administered e.g., maritime, and intellectual property.

⁹ Julian D.M. Lew, “Commentary on Interim Measures in ICC Arbitration Cases”, 11(1) ICC Int’l Ct Arb Bull 23 (“Commentary”).

¹⁰ Yesilirmak, *Interim Measures*, 36.

¹¹ Lew, *Commentary*, 23. On the issue of precedential effect of arbitral decisions” see, e.g., Julian D.M. Lew, “The Case for the Publication of Arbitration Awards” in: Jan C. Schultz / Albert J. van den Berg (eds.), *The Art of Arbitration* (Deventer: Kluwer 1982), 223-232; Horacio A. Grigera Naón, “Editorial”, 5(2) J Int’l Arb 5 (1988); Berger, *International International Economic Arbitration*, 509-525; R. A. Schutze, “The Precedential Effect of Arbitration Decisions”, 11(3) J Int’l Arb 69 (1994); and Craig / Park / Paulsson, *ICC Arbitration 2000*, 641, and Lew / Mistelis / Kröll, paras. 2-31, 2-43, 1-44, and 2-46.

¹² See, e.g., Craig / Park / Paulsson, *ICC Arbitration 2000*, 639-641; and Vratislav Pechota, “The Future of the Law Governing the International Arbitral Process: Unification and Beyond”, 3 *Am Rev Int’l Arb* 17-29 (1992). Such transnational procedural rules undoubtedly affected from procedural principles common to many nations, and such works as the ILA Principles (see 67 ILA Rep 185 (1996)); and the Draft European Model Law on Civil Procedure (see, e.g., Hakan Pekcanitez / Bilgehan Yeşilova, “Avrupa Medeni Usul Kanunu Tasarısı ve Değerlendirilmesi” (European Draft Model Law on Civil Procedure and Its Examination) in: Dokuz Eylül University (ed.), *Prof. Dr. Mahmut T. Bırsel’e Armağan* (İzmir 2001), 335. But see, e.g., Christoph W. O. Stoecker, “The Lex Mercatoria: To What Extent Does it

owes much to the freedom given to arbitrators in regard of granting provisional measures, in particular, and of establishing rules of procedure in general.¹³ In this regard, it is noteworthy that although most arbitral tribunals were very “cautious” about granting interim measures until the beginning of the 1990s,¹⁴ the trend is in the process of change.¹⁵ To this end, it should further be noted that the difficulty to shed a light to the practice is extreme. That difficulty is generally related to confidentiality in arbitration.¹⁶ However, there are a few

Exist?”, 7(1) J Int’l Arb 101-126 (1990) (arguing that there is no room in arbitration for *lex mercatoria arbitralis*).

¹³ See, Chapter IV, *supra* note 2. Further, this Chapter IV examines from the beginning to the end, the arbitrators’ freedom in regard of issuing provisional measures.

¹⁴ Indeed, for instance, Broches stated, during the preparation of the ICSID Convention, that “experience indicated that arbitral tribunals were extremely loath to order provisional or interim measures and one should have some confidence in the self-restraint which tribunals would impose upon themselves.” History, 516. See also Sanders, Procedures, 453-454 (indicating that in the mid 1970s, “[t]he question of interim measures only occasionally present[ed] itself in an arbitration.”). Even in the 1980s, an arbitral tribunal stated that it “has anguished over the wisdom of granting interim relief” See *Southern Seas Navigation Ltd v. Petroleos Mexicanos of Mexico City*, 606 F.Supp. 692, 693 (S.D.N.Y. 1985). The approach taken today towards that issue described by an arbitral tribunal: “[t]he imposition of provisional measures is an extraordinary measure which should not be granted lightly by the Arbitral Tribunal.” *Maffezini v. The Kingdom of Spain*, Procedural Order No. 2 (28 October 1999), extracts reprinted in XXVII YCA 13, 18 (2002).

¹⁵ The success rate of interim measure requests is reported to be fifty percent (twenty five out of fifty cases). See Naimark / Keer, 25. See also, in this regard, M.I.M. Aboul-Enein, “Issuing Interim Relief Measures in International Arbitration in the Arab States”, 3(1) J World Inv 77, 81 (2002) (indicating that forty percent of the requests concerning provisional measures are accepted under the practice of the Cairo Regional Centre for International Commercial Arbitration.). This is due mainly to arbitrators’ recognition of the importance of interim protection of arbitrating parties’ rights. See Introduction, notes 57-76 and accompanying text. But see Lew / Mistelis / Kröll, para. 23-4 (stating that “[i]nterim measures are granted only in limited circumstances as they can be determinative of the dispute and may be hard or even impossible to repair.”); and Born, International Arbitration, 933. The last author indicates that arbitrators’ hesitance for granting provisional measures is based on the fact that their power arose from a private agreement, that there are many uncertainties surrounding arbitral provisional measures and that such measures are not self-executing. *Id.* In addition, according to Born, arbitrators may be concerned that, by issuing the provisional measure requested, they would pre-judge the merits of the case in dispute or would appear impartial. *Id.* Further, the grant of arbitral provisional measures is, according to him, “time-consuming and distracting.” *Id.* But see *supra* Chapter II, Part 1.1.

¹⁶ On the issue of confidentiality and its effect concerning publication of arbitral decisions, see *supra* Chapter II, Part 1.1.

exceptions. The practice of the Iran-US Claims Tribunal,¹⁷ which operates under the UNCITRAL Arbitration Rules¹⁸ and of a number of ICSID tribunals are easily accessible.¹⁹ Likewise, some ICC and AAA

¹⁷ The Tribunal has established under serious of extraordinary events that took place in the Islamic Republic of Iran ("Iran") and their reflection in the U.S. A crisis occurred as a result of various reasons between Iran and the U.S. in 1979, and this crisis led to seizure of the U.S. Embassy in Iran as a result of which a number of Americans were held hostage, and to freeze of Iranian assets worth over 8 billion dollars in the U.S. See, e.g., Aldrich, 2-6; Aida Avanessian, *Iran-United States Claims Tribunal in Action* (London / Dordrecht / Boston: Graham & Trotman / Martinus Nijhoff 1993), 1-5; and, generally, W. Christopher / H. H. Saunders / G. Sick, R. Carswell / R. H. Davis / J. E. Hoffman, Jr. / R. B. Owen, *American Hostages in Iran – The Conduct of a Crisis* (London / New Haven: Yale University Press 1985). Iran and the U.S. eventually found a peaceful solution by agreement called the Algiers Accords. The Accords contain a number of declarations (Declaration of the Government of the Democratic and Popular Republic of Algeria, 19 January 1981 (the "General Declaration"), and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981 (the "Claims Settlement Declaration"), collectively reprinted in 1 Iran-US CTR 1-12), undertakings (Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, 19 January 1981, reprinted in 1 Iran-US CTR 13-15), and some technical documents (e.g., Escrow Agreement, 20 January 1981, and the other technical documents collectively reprinted in 1 Iran-US CTR 16-54). The Accords provide for the release of Iranian assets frozen in the U.S. and the transfer of those assets to an escrow account held by the Central Bank of Algeria. Upon realisation of the transfer, as envisaged by the Accords, the hostages were released. The Accords also provide for the settlement of claims between a government and a national of the other State in a "binding arbitration." See General Principle B of the General Declaration. See also, generally, Articles I and II of the Claims Settlement Declaration. For this purpose, the Iran-US Claims Tribunal was established. The Tribunal composes of three chambers and nine arbitrators. See Article III(1) of the Claims Settlement Declaration. "All decisions and the awards of the Tribunal shall be final and binding." Article IV(1) of the Claims Settlement Declaration.

¹⁸ The Rules have employed with slight modifications by the Iran-United States Claims Tribunal. See Article III(2) of the Claims Settlement Declaration. The modified version of the Rules does not contain any material change concerning Article 26 of the UNCITRAL Arbitration Rules. See Final Tribunal Rules of Procedure (3 May 1983), reprinted in 2 Iran-US CTR 405-442; and Provisionally Adopted Tribunal Rules (10 March 1982), reprinted in 1 Iran-US CTR 57-94.

¹⁹ Surely, the Iran-US Claims Tribunal's practice is the most important source of information on the interpretation of the UNCITRAL Arbitration Rules. There is an abundant amount of publications on the Tribunal's practice. See, e.g., Charles N. Brower / Jason D. Brueschke, *The Iran-U.S. Claims Tribunal* (The Hague / Boston / London: Martinus Nijhoff 1998); George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford: Clarendon Press 1996); and J. J. van Hof, *Commentary on the UNCITRAL Arbitration Rules – The Application by the Iran – U.S. Claims Tribunal*, (Deventer / Boston: Kluwer 1991). ("Interim Measures"). Indeed, the case law of the Tribunal has already "lead to a better understanding

cases concerning provisional measures are also accessible because either their extracts are published or certain articles / notes touched upon / examined them.²⁰ Similarly, a small number of arbitral decisions issued in accordance with various other arbitration rules have been published. Apart from the above publications, this author has had the benefit of researching through some of the decisions of arbitral tribunals on provisional measures at the AAA and the ICC. The outcome of that research will also be dealt with below.

The research at the AAA extends to a period between late 1997 and early 2000 but excludes then pending files. The research was done through 613 files in English of the AAA-ICDR.²¹ Out of the files examined, there were twenty-two cases where requests for provisional

and growing confidence in the smooth functioning of the Rules" Berger, *International Economic Arbitration*, 64. See also, e.g., Charles H. Brower, "The Iran-United States Claims Tribunal", 224 *RCADI* 123, 170-174 (1990-V); and Caron, *Interim Measures*, 468. The Tribunal "consistently filled the gaps in its procedural rules by reference to customary international arbitration practice and not, for example, by reference to Dutch law [as it is the law of the place of arbitration]." See Caron, *Interim Measures*, 472. See also, e.g., *E-Systems, Inc. v. Iran, Bank Melli Iran*, Case No. 388, Interim Award No. ITM 13-388-FT (4 February 1983), reprinted in 2 *Iran-US CTR* 51-57. The Tribunal's practice, due partly to many references to the customary rules, provides for guidance in regard of uniform interpretation of arbitration rules on interim protection. For ICSID tribunals' practice regarding provisional measures see, e.g., Parra, *The Practices in: ICC* (ed.), *Provisional Measures*, 37. Some decisions of ICSID tribunals are available in the ICSID's web page at <www.wb-icsid.org> and some others are published in ICSID Reports.

²⁰ For decisions of ICC tribunals on provisional measures, see, e.g., Schwartz, *Provisional Measures*, 45-69; and Yesilirmak, *Interim Measures*, 36. Further, various issues of the *Clunet*, *YCA*, and *Swiss Arbitration Association Bulletin* contain a quite number of decisions on the same issue of ICC tribunals and of some other tribunals. For decisions of AAA tribunals see, e.g., Michael F. Hoellering, "The Practices and Experience of the American Arbitration Association", in: ICC (ed.), *1998 ICC Rules*, 31-36. Aboul-Enein indicates in regard of the practice of the Cairo Regional Centre for International Commercial Arbitration that the Centre administered 50 cases in 2000. In the same year, ten requests were made for provisional measures. Six of those denied meanwhile four were granted. Aboul-Enein, 81.

²¹ The Center deals mainly with, where there is an international element, cases held under the AAA-ICDR Arbitration Rules, the AAA Commercial Dispute Resolution Procedures, and the Arbitration Rules of the Inter-American Arbitration Commission. The Center administers disputes regarding variety of areas of law

measures were made.²² In twelve of those cases, arbitral tribunals reached no decision because either the case was withdrawn or came to an end for another reason. In six cases, the requests were granted in the form of an order or a partial award. In the remaining four cases, the requests were denied.

The researches at the ICC cover two periods. The first period is between the mid-eighties and 1998. Nearly 75 awards dealing with provisional measures were found.²³ The second period covers a year commencing from January 1999. The research on the second period was done through awards in English and thirty awards were found concerning interim measures.²⁴ As compared to the previous research, there is a clear increase in the requests for provisional measures in ICC arbitration.

This Chapter examines the standards of procedure and principles for the grant of provisional measures. It deals with (i) initiation of arbitral

and administers cases under several other arbitration rules. In this regard, see <www.adr.org>.

²² The cases examined were dealing with such issues as sales, employment, joint marketing, service, manufacturing, distribution, development agent, consulting, capital contribution, mining and exploitation, franchising, option, driver, purchase, operating, resale of software, construction, software distribution, non-disclosure, and representation agreements. The parties to those cases were from such countries as Canada, Chile, Colombia, Dominican Republic, England, France, Germany, India, Singapore, Spain, Sudan, Sweden, and the U.S. Undoubtedly, the number of provisional measure requests made before AAA arbitral tribunals is a lot more than the number found by this author as the files of the cases then pending could not be examined.

²³ Twenty-three of those awards published in the Spring 2000 issue of the ICC Int'l Ct Arb Bull.

²⁴ The cases examined were dealing with such agreements as agency, construction, delivery, distribution, joint venture, mining, print and supply, power purchase, procurement and co-operation, purchase, sale of goods and service, intellectual property licence, share purchase, software, and supply and service. The parties to those cases were, *inter alia*, Argentina, Austria, Bangladesh, Bermuda, Brazil, the British Virgin Islands, China, Egypt, England, France, Germany, Hungary, Iran, Italy, Japan, Lithuania, Netherlands, Norway, Romania, Saudi Arabia, Slovakia, Sweden, Switzerland, Turkey, Turkmenistan, and the U.S. In this regard, see also Lew, Commentary, 23, note 3. It should be indicated that these are the decisions

proceedings for a provisional measure, (ii) priority of the proceedings, (iii) requirements for the grant of the measure, (iv) its form, (v) its duration, (vi) its reconsideration, modification or revocation, (vii) types of provisional measures, (viii) *ex parte* provisional measures, (ix) costs in regard of those measures, and (x) the issue of damages.

1 Initiation of Proceedings for Arbitral Provisional Measures

There are mainly two issues to tackle with: who initiates the proceedings and what should the request contain?

1.1 Who Initiates the Proceedings: A Party or the Tribunal

A proceeding for an arbitral provisional measure is generally initiated through a party request. Indeed, “[a] situation in which interim measures would be required but where no party makes a request is difficult to conceive.”²⁵ In conformity with this, the view that the request should be party-oriented is confirmed by twenty-seven sets of the rules surveyed.²⁶ However, arbitral tribunals are, occasionally, empowered, under some rules, to grant a provisional measure without a party request.²⁷ Many national laws too require a party request for interim protection of rights.²⁸

that the author was able to found and that there may be more decisions dealing with provisional measures than the cases found by this author.

²⁵ Caron, *Interim Measures*, 481. Indeed, a party request was essential under the ICC Arbitration Rules 1931. See *supra* Chapter I, Part 1.1.3. But see for a case where the tribunal is granted *sua sponte*, without a request from any party, Hoellering, *The Practices*, 33-34.

²⁶ Annex.

²⁷ Rule 7(9) of the Arbitration Rules 2000 of the Chartered Institute of Arbitrators; Rule 39 of the Arbitration Rules of the ICSID; Article 47 of the Arbitration Rules of the ICSID Additional Facility; Article 1134 of the North American Free Trade Area Agreement (“NAFTA”); Rule 25 of the Arbitration Rules 1997 of the SIAC. See also Article 41 of the Statute of the International Court of Justice, 15 *Documents of the United Nations Conference on International Organization* 355 (San Francisco, 1945) (“ICJ Statute”); and Article 66 (4) of the Rules of the International Court of Justice, *Acts and Documents concerning the Organization of the Court*, No. 2, 3 (1972) and No. 3, 93 (1977) (“ICJ Rules”).

²⁸ See, e.g., Article 17 of the Model Law; and Article 183(1) of the SPIL.

Giving arbitrating parties an initiative to seek a provisional measure, if they need it, is a matter of party autonomy.²⁹ In contrast, the main purpose of empowering an arbitral tribunal to grant a measure upon its own initiative in international commercial arbitration is for perhaps to avoid aggravation of a dispute and; thus, enabling the tribunal to proceed with arbitration smoothly.³⁰

Some of the rules surveyed do not deal with the issue of who makes the request at all. Nonetheless, it should be safe to assume that it is, in principle, a party who should apply for a measure since the principle of party autonomy is one of the paramount principles of international commercial arbitration. It should, in this regard, be noted that if both parties make a joint request for the same measure, then there is a strong incentive for a tribunal to comply with the request.

1.2 What Should a Request Contain?

A party request for a provisional measure should contain certain elements. Rule 39(1) of the ICSID Arbitration Rules, for instance, describes these elements and may, in this author's view, be used as guidance where the applicable arbitration rules are silent. In accordance with that Rule, the request should "specify the rights to be preserved, the measures the recommendation of which is requested

²⁹ See, e.g., Berger, *International Economic Arbitration*, 335.

³⁰ It should be noted that none of the ICSID tribunals seem to have practised, in light of the published decisions, the power to recommend a provisional measure upon its own initiative. In *Holiday Inns v. Morocco* (see Lalive, 133), *MINE v. Guinea* (see 4 ICSID Rep 41), *Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. Republic of Indonesia* (see 1 ICSID Rep 410), and *Vacuum Salt v. Ghana* (see 4 ICSID Rep 423), *Maffezini v. The Kingdom of Spain* (see Procedural Order No. 2 (28 October 1999), extracts published in XXVII YCA 17 (2002)) the requests for provisional measures were made by one of the parties whereas in *Atlantic Triton v. Guinea* (see Friedland, *Provisional Measures*, 344) both parties had requested certain provisional measures. To this end, it is noteworthy that, in *Vacuum Salt v. Ghana*, the tribunal reserved to act upon its own initiative to make a recommendation, should the need arise. See Decision 3 of the Tribunal, 14 June 1993, 4 ICSID Rep 328.

and the circumstances that necessitate such measures.”³¹ The last item is important as without a good cause no measure would probably be granted. The detailed analysis of the reasons further “enable comments by the other party and deliberations by the tribunal.”³²

Where the request does not contain any of the above elements, the tribunal may undoubtedly require the relevant party to supply further information concerning the above elements prior to rendering its decision.

It should further be noted that the request does not necessarily be in writing.³³ The request may also be made orally, for instance, during the hearings.³⁴

2 Priority of Proceedings on Request for Provisional Measures

Since the purpose of a provisional measure is interim protection of rights pending final award, priority should be given to a request for this measure. Also the request should be dealt with, as much as possible, in a short period of time.

Giving priority to and handling with in a speedy manner of requests for provisional measures are expressly required only in a small number of

³¹ See also Article 66(1) of the ICJ Rules. Apparently, the response to the request should too contain the same elements as the request. For example, Rule 23 of the Arbitration Rules of the CCIG states that “[t]he tribunal shall request the respondent party to state its position.” A list of elements that may be contained for a request for emergency arbitral measures may provide guidance for determining the list of elements for provisional measures. On what should a request contain for emergency arbitral measures, see *supra* Chapter III, Part 2.4.

³² Caron, *Interim Measures*, 480.

³³ But see *id.*

³⁴ See Pellonpää / Caron, 438. Further, Caron states in respect of the Iran-US Claims Tribunal’s practice that “the Tribunal accepted initially, in at least one instance, an oral request by a party for interim measures.” Caron, *Interim Measures*, 480-481, note 45.

rules.³⁵ For instance, under the ICSID arbitration system, there seems to be an “assumption that to preserve the rights of a party [a] speedy action may be required”.³⁶ By relying on this assumption, Rule 39(2) of the ICSID Arbitration Rules provides that the consideration on a request for provisional measures shall have priority. It is, indeed, this author’s experience that nearly all requests for interim measure are handled with a certain speed and generally priority is given to such requests.³⁷

Due to the priority given to a request for provisional measures, many commentators argue that the request tends to disrupt or delay arbitration proceedings.³⁸ It is difficult to agree with this argument³⁹ as it is very easy for an arbitral tribunal to distinguish whether or not the request is flagrant. Further, it should be kept in mind that “[t]he main rule will be that the arbitral process will continue undisturbed by the request.”⁴⁰ Furthermore, the request for an interim measure may have positive effect in resolution of the dispute.⁴¹

³⁵ See, e.g., Rule 23 of the CCI Arbitration Rules; Article R37 of the Court of Arbitration for Sport Arbitration Rules; and Rule 39 of the ICSID Arbitration Rules. Article 66(2) of the ECJ Rules is also noteworthy: “[a] request for the indication on interim measures of protection shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency.”

³⁶ Note C to the ICSID Arbitration Rules 1968, 1 ICSID Rep 99.

³⁷ ICSID arbitral tribunals, for example, not only gave priority to the requests for provisional measures but they also dealt with them in a “reasonable speed.” Schreuer, Article 47, 228, para. 43. In fact, the requests before the ICSID tribunals were generally responded approximately within two to five months. *Id.*, 229, para. 43. Similarly, the Iran-US Claims Tribunal too gives priority to such requests. Indeed, the Tribunal uses temporary restraining measures for dealing with very urgent applications. On temporary restraining measures, see Chapter IV, *infra* Part 4. For such applications, the Tribunal generally renders its decision upon hearing both parties within a reasonable time.

³⁸ See, e.g., History, 814; and Karrer, *Less Theory*, 110. See also Chapter IV, *supra* note 15.

³⁹ Karrer, *Less Theory*, 110.

⁴⁰ *Id.*

⁴¹ Karrer rightly states that

a request may have an overall speeding up effect. A motion for interim measures may be used to “load up” a terms of reference hearing with matters which will become important on the merits of a main claim anyway and whose discussion may be significantly furthered by early attention.

3 Requirements to Grant a Measure

For the grant of any provisional measure on an interim basis either by courts or arbitrators, there needs to be “a strong showing of an immediate and compelling need”.⁴² Apparently, such showing is sought for minimizing “the risk of making an order which may turn out to be premature and erroneous after the facts and law have been fully developed at the hearing on the merits of the dispute.”⁴³ Apart from the above need, national arbitration laws⁴⁴ and arbitration agreements, (by incorporation, arbitration rules⁴⁵) do not generally deal, *in detail*, with the requirements to grant arbitral provisional measures.⁴⁶ Arbitration rules generally contain a broad language, which leaves a quite-wide room for discretion. Twenty-seven out of forty-three sets of the rules (that permit arbitral provisional measures) surveyed deal with the

By asking for urgent preliminary relief, a party can dramatize its request on the main point. If an interim relief was requested, but denied, or if interim measures are in place that may turn out to be wrongly taken, then arbitral tribunal will tend to speed up proceedings on the main point so that the impact of the interim measures or their absence is minimized.

Id.

⁴² Wagoner, 73. Indeed, “the more the requested measure affects the rights of the party concerned the more diligence is required from the arbitral tribunal in ascertaining” and adjudging the need. See Berger, *International Economic Arbitration*, 336.

⁴³ Berger, *International Economic Arbitration*, 336.

⁴⁴ Karrer indicates that “[t]he *lex arbitri* says of course nothing about the matter.” Karrer, *Less Theory*, 104. It is needless to say that each legal system contains certain requirements for the grant judicial provisional measures. See Chapter IV, *infra* note 56 and accompanying text.

⁴⁵ It is interesting to note, in this regard, that, for instance, even the drafting history of the ICSID Convention does not shed much light to the circumstances under which the grant of provisional measures is appropriate. See *History*, 337, 422, and 515. Arbitrating parties may, nonetheless, set forth, in their arbitration agreement, the requirements to grant arbitral provisional measures, though such reference is, if ever, rarely made in practice.

⁴⁶ However, there are a few exceptions. For instance, Article 32 of the Rules of Procedure 1993 of the Permanent Court of Arbitration Attached to the Chamber of Economy of Slovenia provides for a well-detailed explanation of the requirements. Under these Rules, prior to granting a measure, the tribunal may require “demonstration of the probability of the existence of the claim and of the danger that obtaining of the relief or remedy sought would otherwise become impossible or considerably more difficult.” Further, it should be noted with interest that, in accordance with Note A to the ICSID Arbitration Rules, “the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of award.” See 1 ICSID Rep 99.

requirements to grant arbitral provisional measures.⁴⁷ Twenty-two sets of the rules refer the requirements as “where the tribunal deems necessary”⁴⁸ or under “appropriate circumstances.”⁴⁹ In addition, the survey demonstrates that a circumstance may be appropriate where the purpose of a measure is related to securing a claim, which is tried by the tribunal,⁵⁰ or the measure is aimed at preventing events, which could, otherwise, not be avoided.⁵¹ The requirement of “necessity” may also be, in many cases, paired with “urgency”.⁵²

The above explanations demonstrate that the texts of arbitration rules are not very clear and helpful as to the requirements for the grant of arbitral provisional measures. The clarity is obviously as important as the existence of the right for interim protection. That is because the lack of clarity may cause problems on the exercise of the right itself by arbitrating parties and thus may “affect the rights of the parties to a significant extent.”⁵³ The lack of clarity is mainly based on the following issues:

- “[i]n international practice authority to prescribe provisional measures was left to the appreciation of the tribunal, presumably because it was difficult to foresee [in advance] the types of situations that might arise”,⁵⁴

⁴⁷ Annex.

⁴⁸ See, e.g., Article 21 of the AAA-ICDR Arbitration Rules; and Article 26 of the UNCITRAL Arbitration Rules. In regard of the last Rules, Pellonpää & Caron suggest that “the Rules provide that [in order to be granted] interim measures should be *necessary* – not just “desirable” or “commendable.” (Emphasis in the original.). Pellonpää / Caron, 441.

⁴⁹ See, e.g., Article 23 of the ICC Arbitration Rules.

⁵⁰ Article 31 of the Arbitration Rules 1999 of the Arbitration Institute of the SCC.

⁵¹ See Article 14 of the International Arbitration Rules 1996 Chamber of National and International Arbitration of Milan.

⁵² See, in this respect, Article 21 of the Arbitration Rules 1997 of the ECA.

⁵³ Berger, *International Economic Arbitration*, 335. It should also be noted that “[i]t is in the interest of justice that certainty in the exercise of the arbitrators’ discretion” Peter Bowsher, “Security for Costs”, 63 *Arbitration* 36, 38 (1997).

⁵⁴ See History, 515.

- arbitral tribunals may apply procedural (or, rarely, substantive) laws on the determination of the requirements;⁵⁵ accordingly, there is no commonly agreed harmonised one set of principles that would provide guidance for parties and arbitrators,⁵⁶ and
- in cases where the tribunal uses his own discretion, if permitted, for determination of the requirements, there is relatively little information on the actual practice of arbitrators on interim protection for rights.

In establishing the requirements for the grant of provisional measures, an arbitral tribunal, in the absence of a party agreement, may, for instance, adopt the principles of the applicable procedural law.⁵⁷

⁵⁵ The parties or arbitrators are generally empowered to subject the arbitration proceedings to a national law. Apparently, that law is likely to be the law of the place of arbitration. Indeed, in the Interim Award 8786 of 1996 (extracts published in 11(1) ICC Int'l Ct Arb Bull 81-84 (2000)) the arbitral tribunal applied the local standards for the grant of an interim measure. In this respect, it should be noted that not for long ago, arbitrators usually applied the law of the place of arbitration to the procedural issues, including (at least certain) interim measures.

⁵⁶ That is because the applicable procedural laws may differ depending mainly upon the place of arbitration. Also there is another reason why those laws should not be chosen as the applicable law: the place of arbitration is generally determined as a geographically convenient neutral venue; thus, there is "no good reason to rely on the law of civil procedure of the seat of arbitration to fill the gap." Karrer, *Less Theory*, 104.

⁵⁷ E.g., law of the place of arbitration or any other law applicable to arbitration. See, e.g., Yesilirmak, *Interim Measures*, 34; Cremades, *The Need*, 228; NAI Interim Award 1694 of 1996, extracts published in XXIII YCA 97-112 (1998). See also Chapter IV, *supra* notes 2 and 55 and accompanying text. Indeed, to the extent provisional measures considered as procedural issues, until a few decades ago, the law of the place of arbitration was applicable in the absence of a party agreement to contrary. See, e.g., Article 16 of the ICC Arbitration Rules 1955; and Article 15 of the Draft Uniform Law on Inter-American Arbitration, *Inter-American Juridical Yearbook (1955-1957)* (Pan American Union, Washington, D.C. 1958), 219. Article 11 of the ICC Arbitration Rules 1975, for instance, changed the above practice. For the view that an arbitrator should disassociate himself from both the legal system to which he belongs and procedural law of the place of arbitration, see Rubino-Sammartano, 650. The requirements, under common law, for the grant of provisional measures generally are the existence of irreparable harm; likelihood of success on the merits or sufficiently serious question as regards the merits of the dispute in question, and a balance of hardship tipping towards the applicant. The requirements, in civil law countries, generally are *fumus boni juris* (summary finding that the claim is founded) and *periculum in mora* (danger that rights may be impaired by the lapse of time). Further, it is submitted that similar

Alternatively, the tribunal may either rely on the past experience of its individual members⁵⁸ or transnational arbitral procedural rules / customary rules for supplementing arbitration rules.⁵⁹ It is submitted, as an example to the former, that “arbitral tribunals should grant or deny interim measures on the basis of a comparative law approach.”⁶⁰ According to this suggestion arbitral tribunals should consider the following criteria: “*fumus boni iuris*, *periculum in mora*, and proportionality.”⁶¹ In addition, cases on interim protection of rights under public international law⁶² or growing number of arbitral decisions on provisional measures may provide guidance to the tribunal.⁶³

This author suggests that in granting a provisional measure, an arbitral tribunal, can, in principle take guidance from arbitral case law, comparative analysis of arbitration rules and scholarly opinions. The examination of arbitral case law, the texts of arbitration rules and scholarly opinions demonstrates that there are positive and negative requirements that arbitrators generally apply for the issuance of a provisional measure. In addition, the grant of a measure may be

requirements need to be satisfied for the grant of provisional measures by both courts and arbitrators in most of the Arab states. Aboul-Enein, 79.

⁵⁸ Caron, Interim Measures, 472

⁵⁹ In this regard, see Chapter IV, *supra* notes 2, 12 and 13 and accompanying text.

⁶⁰ Karrer, Less Theory, 104.

⁶¹ *Id.*, 104. See also Article 17 of the Joint American Law Institute / UNIDROIT Working Group on Principles and Rules of Transnational Civil Procedure, UNIDROIT 2002, Study LXXVI-Doc 7 (May 2002) (“UNIDROIT Principles”). Further, the condition “*periculum in mora*” may be applied by a tribunal operating under the SPIL. See Wirth, 37-38. *Fumus boni iuris* may be referred to *prima facie* establishment of a case or likelihood of success on the merits of the case whereas *periculum in mora* is similar to imminent danger, serious or substantial prejudice to a right if the measure sought is not granted. On which see Chapter IV, Parts 3.1.2 and 3.1.3, respectively.

⁶² For instance, the Iran-US Claims Tribunal referred, in many of its decisions, to the ICJ’s case law. The Tribunal chooses to follow the practice of that court perhaps because many of the members of it were/are lawyers practicing public international law. Such approach may also be attributable to the mixed nature of the Tribunal. On the mixed nature of the Tribunal, see, e.g., David D. Caron, “The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution”, 84 Am J Int’l L 104 (1990).

subject to a security for damages. Further, the request for a measure could be dismissed upon an undertaking of a party not to infringe the right that is subject of the interim protection.

In case the tribunal refrains from granting the request because, for instance, the balance of arbitrating parties' interests does not fully justify the measure or any of the above requirements are not met, it may nonetheless believe that rights of one or both parties may actually or potentially be infringed. In such cases, the tribunal can expedite the arbitration proceedings to mitigate the possible harm.⁶⁴

It is noteworthy for evidencing the satisfaction of the requirements that “the facts supporting the request for interim measures of protection

⁶³ Apparently, customary rules or case law has no binding effect on the tribunal. See Chapter IV, *supra* notes 9-11 and accompanying text.

⁶⁴ For instance, a dispute related to contracts regarding various infrastructure projects, the contractors brought a claim for, *inter alia*, termination of the contract and release of the performance guarantees given to the Employer. During the proceedings, the contractors requested from the tribunal, as an interim measure, to order the employer not to pursue the cashing of the guarantees. The respondent argued that the term of the guarantees would expire prior to the termination of arbitration proceedings therefore they should be encashed and put into an escrow account. The tribunal rejected this argument for, *inter alia*, that such solution “could potentially create considerable cash flow problems” to the claimants but suggested the claimants to extend the term of the guarantees to a certain period of time. The tribunal also considered [despite the possibility of having a lengthy arbitration proceedings] that, in its view, the best solution was to render an award as soon as possible” Indeed, the tribunal rendered its final award within a year from its decision on the interim measure request. ICC Final Award 9928 of 1999 (unpublished). A similar result reached in an AAA case. The dispute, in this case, arose from an exclusive distributorship agreement. The claimant requested a preliminary injunctive relief preventing the respondent, as its distributor, from selling any competitive products due to the distribution agreement. The respondent claimed that the agreement was invalid and unenforceable. The tribunal denied the preliminary relief request, adjudication of which, according to the tribunal went to the ‘very heart of the case.’ However, the tribunal noted that the final adjudication in the case should be “conducted as expeditiously as possible. Indeed, the tribunal rendered its final award within six months from its order on the request. Order of 1999 in AAA Case No. 50-T-133-00112-99 (unpublished).

have to be substantiated by *prima facie* evidence”.⁶⁵ Thus, an interim measure could be ordered where there is mere probability of “the relevant facts and rights.”⁶⁶ The probability requires a summary assessment of such facts and rights. This assessment is justified with the interim nature of provisional measures.⁶⁷

This Part examines those positive and negative requirements, security for damages and the effect of an undertaking by a party.

3.1 The Positive Requirements

Arbitration rules commonly refer to “necessity” as a positive requirement to grant a provisional measure.⁶⁸ This reference implies that, for the grant of a provisional measure, there needs to be an imminent danger of prejudice to a right of an applicant should an urgent action not taken. In other words, the imminent danger should necessitate an urgent action. Accordingly, two positive requirements arise from the requirement of “necessity”: urgency and prejudice.⁶⁹ In addition to the above two, in light of the arbitral case law, comparative analysis of arbitration rules and scholarly opinions, there are three more positive requirements. The requirements for the grant of a provisional measure collectively are:⁷⁰

- *prima facie* establishment of jurisdiction;

⁶⁵ Berger, International Economic Arbitration, 336. See also ICC Interlocutory Award 10596 of 2000 (unpublished) (the tribunal applied “a *prima facie* standard of review.”).

⁶⁶ Wirth, 38.

⁶⁷ Id. It is also noteworthy that the tribunal should give reasons where it grants the measure requested. If the reasons for interim protection of rights “are understood, there is a better chance that they will be obeyed in the right spirit.” Karrer, Less Theory, 109.

⁶⁸ See Chapter IV, *supra* notes 47-48 and accompanying text.

⁶⁹ Caron, Interim Measures, 491.

⁷⁰ A similar list of requirements was suggested by, e.g., Blessing, Introduction, para. 857. In this regard, this author agrees with Blessing that the availability of a concurrent power of a national judge to issue an interim measure has no relevance in the tribunals’ decision on whether or not to issue an interim measure. Id., para.

- *prima facie* establishment of case;
- urgency;
- Imminent danger, serious or substantial prejudice if the measure requested is not granted; and
- proportionality.

3.1.1 *Prima Facie* Establishment of Jurisdiction

It is not unusual in arbitration for an arbitral tribunal to face with a request for a provisional measure prior to submissions of arbitrating parties.⁷¹ It is equally usual that the tribunal has to deal with such requests despite the fact that its jurisdiction has not yet been definitively established or, perhaps, is under challenge. However, the establishment of full jurisdiction would usually take certain or in some cases a lengthy period of time. Time is of the essence for interim protection of rights. Accordingly, in order to remedy the necessity for urgency, the existence of *prima facie* jurisdiction is generally considered satisfactory for the grant of a provisional measure.⁷² For instance, the Iran-US Claims Tribunal consistently applied the *prima facie* jurisdiction test by closely following the decision of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*).⁷³ Judge Holtzmann, in his

862. It should be noted that the second, third and fourth requirements have applied in full or in part by ICC tribunals. See, Yesilirmak, Interim Measures, 34.

⁷¹ See, in this regard, supra Chapter III, note 7 and accompanying text.

⁷² See Bond, 18; Berger, International Economic Arbitration, 335; Lew / Mistelis / Kröll, para. 23-68; and Pyoung-Keun Kang, *The Relationship Between International Arbitration and National Courts with Specific Reference to Provisional Measures* (1996) (unpublished PhD thesis), 181-182.

⁷³ Provisional Measure Order (10 May 1984), 1984 ICJ Reports 169. It is noteworthy that the part of the Order on the *prima facie* jurisdiction test is adopted unanimously. See also *Ford Aerospace v. The Air Force of Iran*, Case No. 159, Interim Award No. ITM 39-159-3 (4 June 1984), reprinted in 6 Iran-US CTR 104, 108. The Tribunal, in this case, made a specific reference to the *Nicaragua* decision. Prior to the *Ford Aerospace* decision, the Tribunal generally did not deal with jurisdictional questions or mainly used such statements as “it would appear that the Tribunal has jurisdiction over ... [the] claim” See *Rockwell International Systems, Inc. v. Iran*, Case No. 430, Interim Award No. ITM 20-430-1 (6 June

concurrent opinion, further indicated in *Bendone-Derossi* that in deciding whether the tribunal has *prima facie* jurisdiction, “the benefit of doubt” should be given to the existence of jurisdiction.⁷⁴ Moreover, for instance, ICSID tribunals seem to adopt the *prima facie* test. In *Holiday Inns v. Morocco*, following the continuous challenge to its jurisdiction, the arbitral tribunal held that “it has jurisdiction to recommend provisional measures ..., [however] the Parties [have] ... the right to express, in the rest of the procedure, any exception relating to the jurisdiction of the Tribunal on any other aspects of the dispute.”⁷⁵

3.1.2 *Prima Facie* Establishment of Case

The *prima facie* establishment of a case in dispute may be necessary for the grant of a provisional measure.⁷⁶ This is apparently for the

1983), reprinted in 2 Iran-US CTR 369-371. See also RCA Global Communications v. Iran, Case No. 160, Interim Award No. ITM 29-160-1 (30 October 1983), reprinted in 4 Iran-US CTR 5-8. Following *Ford Aerospace*, the Tribunal consistently apply the *prima facie* jurisdiction test. See, e.g., *Bendone-Derossi International v. Iran*, Case No. 375, Interim Award No. ITM 40-375-1 (7 June 1984), reprinted in 6 Iran-US CTR 130, 131-132; *Iran v. United States*, Decision No. DEC 116-A15(IV) & A24-FT (18 May 1993), extracts published in Pellonpää / Caron, 462. The same line of practice followed by other tribunals acting under the UNCITRAL Arbitration Rules too.

⁷⁴ 6 Iran-US CTR 134.

⁷⁵ Decision (2 July 1972). See Lalive, 136. See also *Vacuum Salt v. Ghana* where the decision embodied an undertaking in which the party assured the tribunal to comply with the terms of the claimant's request for a provisional measure. In this case, the jurisdiction was successfully challenged by Ghana. This challenge, which was made in the beginning of the proceedings, did not prevent the tribunal from embodying the undertaking into its decision. It should, however, be noted that the decision was not a recommendation, though the tribunal implied that it had the power to make a recommendation. See Decision No. 3 of the Tribunal, 14 June 1993, 4 ICSID Rep 328. In regard of ICSID arbitration, it needs to be noted that some commentators argue that the registration of a request for arbitration by the ICSID's Secretary General after his screening power is exercised in accordance with Article 36(3) of the ICSID Convention provides a sufficient basis for a recommendation of a provisional measure. See Brower / Goodman, 451-456; G. R. Delaume, “ICSID Tribunals and Provisional Measures – A Review of the Cases”, 1 ICSID Rev - FILJ 392, 393 (1986); Friedland, Provisional Measures, 341; and Masood, 145. It is difficult to agree with such argument as, *inter alia*, “the determination by the Secretary General, ‘based only on the information contained in the request,’ should not exempt the tribunal from independently satisfying itself as to its authority to issue provisional measures.” Parra, The Practices, 42.

⁷⁶ The requirement for *prima facie* establishment of a case is similar to the requirement of *fumus boni juris* or likelihood of success on the merits. On the last

satisfaction of tribunal that the moving party has, with reasonable probability, a case⁷⁷ or, alternatively, for determination that the claim or the request is not frivolous or vexatious.⁷⁸ In this regard, Caron rightly argues that the likelihood of success on the merits is *sotto voce* an element for issuing provisional measures.⁷⁹ Caron continues:

It certainly is appropriate that when a case manifestly lacks merit, necessarily costly and disruptive interim measures to protect such dubious rights should not be granted. A tribunal must determine *prima facie* not only whether it possesses jurisdiction but also whether the question presented by the case is frivolous.⁸⁰

The examination of substance of a case for a *prima facie* test should be limited. An arbitral tribunal makes an “overall assessment of the merits of the case” in question in order to determine whether the moving party’s case is “sufficiently strong to merit protection.”⁸¹ However, the tribunal should refrain from prejudging the merits of the case.⁸²

The *prima facie* test is gained some recognition. For instance, in ICC case 9301, there was a request for an injunction prohibiting the

point, an ICC tribunal ruled that “the applicant [should] render plausible that it has a *prima facie* contractual or legal right to obtain the relief it seeks.” ICC Interlocutory Award 10596 of 2000 (unpublished). Apparently, the pre-requisite for such *prima facie* establishment of a case is the existing of a right whose protection is sought. *Maffezini v. The Kingdom of Spain*, Procedural Order No. 2 (28 October 1999), extracts reprinted in XXVII YCA 13, 18 (2002). It is noteworthy that such right should fall within the ambit of the case in dispute and within the coverage of the relevant arbitration agreement.

⁷⁷ It is not necessary to establish the whole case but it is sufficient to establish *prima facie* the right, which the measure requested is aimed to protect. See, Wirth, 37.

⁷⁸ Arbitrators should consider whether or not the applicant has a legitimate interest in its request by limited examination of the merits of the case in dispute. See ICC Second Interim Award 7544 of 1996, extracts published in 11(1) ICC Int’l Ct Arb Bull 56, 59 (2000). It should be noted that the assessment of legitimate interest carries weight for avoiding vexatious applications for a provisional measure.

⁷⁹ Caron, *Interim Measures*, 490. See also Pellonpää / Caron, 442. Berger, in this regard, states that “[d]epending upon the degree to which the requested measure infringes the rights of the other party, success on the merits of the underlying claim by the requesting party has to be likely.” Berger, *International Economic Arbitration*, 337. But see, van Hof, 190.

⁸⁰ Caron, *Interim Measures*, 491.

⁸¹ Redfern / Hunter, para. 7-26.

⁸² See Chapter IV, *infra* Part 3.2.1.

Respondent or any person under its authority to use no longer the Claimant's trademark logo. The arbitrator, after establishing its power to grant provisional measures, held:

[S]ince [the Claimant] establishes that *there is a prima facie right of action for illegitimate use of the letterhead in question*, the Arbitrator accepts the request seeking an injunction prohibiting the use of the [the Claimant's] trademark, tradename and logo⁸³ (Emphasis added.)

⁸³ ICC Interim Award 9301 of 1997 (unpublished). See also, e.g., ICC Final Award 5804 of 1989, extracts published in 4(2) ICC Int'l Ct Arb Bull 76 (1993) (denying a request for a provisional measure for, *inter alia*, the lack of *prima facie* establishment of the case); ICC Final Award 5804 of 1989, extracts published in 4(2) ICC Int'l Ct Arb Bull 76 (1993); ICC First Interim Award 8894 of 1997, extracts published in 11(1) ICC Int'l Ct Arb Bull 94 (2000) (the tribunal postponed its decision on the application for a provisional measure because of the fact that the evidence before the tribunal was confusing); ICC Second Interim Award 5835 of 1992 (unpublished) (holding that "the Claimant filed his request for provisional measure almost one year after the signature of the Terms of Reference, in the absence of any sudden or unforeseeable events justifying the grant of such measure.).

3.1.3 Urgency

Urgency is an essential requirement to grant a provisional measure.⁸⁴ Indeed, it is, in principle, the promise behind interim protection that there is urgency, which necessitates the grant of an interim measure.⁸⁵ In other words, grant of a measure is justified where there is a necessity to safeguard the right in question before the final award is rendered. Otherwise, if the making of decision could await the final determination of the parties' case there is inherently no basis of seeking interim protection of rights.⁸⁶

⁸⁴ It is stated, in this regard, that "[i]n respect of all categories of provisional measures ... urgency is a *sine qua non*" Brower / Goodman, 461. In ICC case 8113, the arbitral tribunal denied the request for a provisional payment on the ground that "the Tribunal, after having examined all the facts of the case, is not convinced of *the existence of urgency, the basic requirement for granting a provisional measure in the Claimant's favour.*" (Emphasis added.) ICC Second Partial Award 8113 of 1995, extracts published in 11(1) ICC Int'l Ct Arb Bull 65-69 (2000). See also ICC Interim Award 6632 of 1993 (unpublished) (holding *inter alia* that "the application lacks the urgency required to address the issue by way of an interim award."); Panacaviar, S.A. v. Iran, Case No. 498, Interim Award No. ITM 64-498-1 (4 December 1986), reprinted in 13 Iran-US CTR 193, 197 (observing, whilst denying the request for a stay of the parallel court proceedings, that no request was made within six years from the commencement of such proceedings); Atlantic Richfield Co. v. Iran, Case No. 396, Interim Award No. ITM 50-396-1 (8 May 1985), reprinted in 8 Iran-US CTR 179-182, on this case, see Pellonpää / Caron, 442, note 28; Concurring Opinion of Howard Holtzmann to Bendone-Derossi International v. Iran, reprinted in 6 Iran-US CTR 133, 140 (upon the respondents' application to stay parallel court proceedings initiated in Germany to obtain a provisional measure, Judge Holtzmann concurred with the Tribunal by arguing, *inter alia*, that the "Respondent has made no showing of urgency justifying the issuance of interim relief: the court order was entered in June 1983, ten months before Respondent sought a stay."); and Order of 1999 in AAA Case No. 507181-0014299 (unpublished) (denying the motion for interim relief in an order because of the fact that the tribunal would render the final award within three months.). However, in this last case, the tribunal reserved the parties' right to represent the motion should the issuance of the final award be delayed. The tribunal apparently considered that urgency would be remedied as the matter in question would finally be resolved within a short period of time.

⁸⁵ See Baker / Davis, 139. The urgency is not required for interim payment on account. See Chapter IV, *infra* Part 7.5.

⁸⁶ The requirement of urgency plays little role or, mostly, no role for the grant of security (for costs, payment, and damages) and provisional payment.

The establishment of urgency may vary from one tribunal to another.⁸⁷ For example, in ICC case 10596, the tribunal defined the requirement of urgency. The dispute in this case arose from termination of distribution agreements. As an interim measure, the respondent made a request for delivery of several documents. The tribunal required, *inter alia*, the existence of urgency to grant the relief sought. In regard of urgency, the tribunal held that

the request relates to a matter of urgency, it being understood that “urgency” is broadly interpreted; the fact that a party’s potential losses are likely to increase with the mere passing of time and that it would be unreasonable to expect that a party to wait for the final award suffices.⁸⁸

3.1.4 Imminent Danger, Serious or Substantial Prejudice

For the grant of a provisional measure, it needs to be an imminent danger of a prejudice to a right, if the measure requested is not granted before the final resolution of a dispute.⁸⁹ Interpretation of this

⁸⁷ The determination may vary “depending on the arbitral tribunal and the national procedural law, if any used by the tribunal as a reference.” Schwartz, *Provisional Measures*, 60.

⁸⁸ ICC Interlocutory Award 10596 of 2000 (unpublished). See also Schwartz, *Provisional Measures*, 60; and Bond, 18-19. Further, for instance, two tribunals whose seats were in Paris dealt with urgency. The first tribunal held that urgency arises when there is “a risk of serious and irreparable harm, present or future . . . that would render indispensable the taking of an immediate decision such as to eliminate, avoid or reduce such harm.” The second tribunal held that “[a] situation has an urgent character when it requires that measures be taken in order to avoid that the legitimate rights of a party are not placed in peril. See Schwartz, *Provisional Measures*, 60.

⁸⁹ This requirement seems to be similar to the requirement of “*periculum in mora*.” It should be noted that there is a clear and inherent link between the requirements of urgency and grave harm. See Caron, *Interim Measures*, 497; and Baker / Davis, 139. But see van Hof, 190. She argues that “[p]rejudice or preventing prejudice may be urgent and thus related to the concept, but this relationship need not necessarily exist.” *Id.* As regards the concept of “inherent link,” see, e.g., ICC Second Partial Award 8113 of 1995, extracts published 11(1) ICC Int’l Ct Arb Bull 65-69 (2000); and ICC Final Award 5804 of 1989, extracts published in 4(2) ICC Int’l Ct Arb Bull 76 (1993). It should also be noted that an imminent danger may occur where there is a risk of aggravation of a dispute. For example, in ICC case 3896, the arbitral tribunal held that

in order to prevent the aggravation of the dispute submitted to arbitration, it was justified in proposing that one of the parties not call bank guarantees issued by a third party bank in connection with the matter in dispute, although the guarantees were otherwise callable on demand.

requirement varies from one legal system to another. Under common law, a provisional measure is generally granted where there is a risk of irreparable prejudice or harm if the measure requested is not granted. An irreparable harm usually refers to harm “that cannot readily be compensated by an award of monetary damages.”⁹⁰ Under civil law, the principle of *periculum in mora* is generally considered satisfactory.

In arbitration, the requirement of imminent danger or serious or substantial harm should be satisfactory where “the delay in the adjudication of the main claim caused by the arbitral proceedings [or, in other words, the delay in the rendering of the final award] would lead to a ‘substantial’ (but not necessarily ‘irreparable’ ...) prejudice for the requesting party.”⁹¹

ICC Partial Award 3896 of 1982, extracts published in (1983) Clunet 914; X YCA 47 (1985); and Jarvin / Derains, 161. See also Second Interim Award 5835 of 1992 (unpublished); ICC Award 3896 of 1982, extracts published in (1983) Clunet 914, and X YCA 47 (1985); and ICC Interlocutory Award 10596 of 2000 (unpublished). The tribunal held, in this last case, that under longstanding practice in ICC arbitration, “the parties must refrain from taking any action which may aggravate the dispute.” The tribunal further ruled that “any non marginal risk of aggravation of the dispute is sufficient to warrant an order for interim relief. Indeed, it would be foolish for the Tribunal to wait for a foreseeable, or at least plausibly foreseeable, loss to occur, to then provide for its compensation in the form of damages ..., rather than to prevent the loss from occurring in the first place.”

⁹⁰ Schwartz, Provisional Measures, 61. However, “[w]hile the existence of mere financial harm is not usually the basis for exercising extraordinary power of granting interim relief, [it is clear from the case law that] the potential or a bankruptcy or extraordinary financial consequence [which could] not be repaired by a damage award is a valid reason for disturbing the status quo.” Southern Navigation Ltd v. Petroleos Mexicanos, Interim Award No. 2015 of 1985, extracts published in XI YCA 209, 210 (1989).

⁹¹ Berger, International Economic Arbitration, 336 (arguing that “an act prejudicial to the right of one of the parties should not be characterized as being acceptable simply because damages are available.”). He rightly argues for requiring a standard less than irreparable harm. He supports his argument with the example given under Article 26 of the UNCITRAL Arbitration Rules: the sale of perishable goods. *Id.* See also van Hof, 190; and Baker / Davis, 139-40. Further, “[f]rom a commercial point of view – which is the position that a tribunal in international economic arbitration has to take – the disruption to business relations and the waste resulting from such acts cannot be truly compensated by damages.” Berger, International Economic Arbitration, 336; and Caron, Interim Measures, 493-94. Moreover, according to Schwartz, “ICC tribunals have sometimes construed the risk of financial loss itself to constitute irreparable harm. Such loss may, of course, be truly ‘irreparable’ when its severity threatens the financial

3.1.5 Proportionality

An arbitral tribunal ought to take into account the effect of any interim measure, for granting it, on arbitrating parties' rights to a certain extent. This is to say that "the possible injury caused by the requested interim measure must not be out of proportion with the advantage which the claimant hopes to derive from it."⁹²

existence of the applicant for relief." Schwartz, Provisional Measures, 60. See also ICC Final Award 5804 of 1989, extracts published in 4(2) ICC Int'l Ct Arb Bull 76 (1993) (holding, in denial of the request for a provisional measure, that "[i]t has not been clearly shown that the damage, potential or actual, would be very serious for the applicant if the measure is not adopted."). But see, e.g., ICC Second Partial Award 8113 of 1995, extracts published in 11(1) ICC Int'l Ct Arb Bull 65-69 (2000) (holding that "the Claimant would not incur any *grave and irreparable harm* if not granted the sought measure before the Final Award expected to be issue in 1995."). (Emphasis added.) . Similarly, in more than one occasion, the Iran-US Claims Tribunal ruled that "injury that can be made whole by monetary relief does not constitute irreparable harm." See, e.g., Iran v. The United States of America, Decision No. Dec. 116-A 15(IV) & A24-FT (18 May 1993), extracts published in Pellonpää / Caron, 462-463. See also, e.g., Iran v. the United States of America, Case No. B 1 (Claim 4), Partial Award No. 382-B1-FT (31 Aug. 1988), reprinted in 19 Iran-US CTR 273; Iran v. the United States of America, Cases Nos. A-4 and A-15, Order (18 January 1984), reprinted in 5 Iran-US CTR 112-114 (holding that "the circumstances as presented to the Tribunal at the time were not such as to require the exercise of its power to order the requested interim measure of protection, as these circumstances did not appear to create a risk of an irreparable prejudice, *not capable of reparation by payment of damages*."). (Emphasis added.) Id., 114.

⁹² Berger, International Economic Arbitration, 336-37. See also, Karrer, Less Theory, 104; Cremades, The Need, 230; and Lew / Mistelis / Kröll, para. 23-65. The principle of proportionality may also be referred to as the principle of reasonableness. Berger, International Economic Arbitration, 337. On this principle, see also MAT Cie d'Électricité de Sofia et de Bulgarie (Belgium v. Bulgaria), (1922) 2 TAM 924, 926-27 (arguing that "the possible injury that may be caused by the proposed interim measures of protection must not be out of proportion with the advantage which the claimant hopes to derive from them."); and Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens 1953), 273. In applying this principle, the tribunal should carefully examine the allocation of the risks between the parties at the signing of the contract or, if the risk allocation is changed over the life of the contract, at the time when a dispute arises. For determination of such risk allocation, the tribunal need to look into the terms of the contract, if they are silent, it "is likely to make an overall **interpretation** of the contract" (Emphasis in the original.) Blessing, Introduction, para. 859. According to Blessing

such an overall interpretation may, for instance, show that the parties had assumed and accepted, in the underlying contract, very considerable and uncovered commercial risks – and if such were the conclusion, it would hardly be justified to direct far-reaching protective measures. By contrast, if the interpretation of the overall spirit of the contract shows that the parties had painstakingly endeavoured to confine the limits of their risks and had themselves

3.2 The Negative Requirements

The existing of any of the six negative requirements set out below may lead to the denial of an application for a provisional measure:

- the request should not necessitate examination of merits of the case in question,
- the tribunal may refrain from granting final relief in the form of a provisional measure,
- the request may be denied where the moving party does not have clean hands,
- the request may be denied where such measure is not capable of being carried out;
- when the measure requested is not capable of preventing the alleged harm; or
- the request may be denied where it is moot.⁹³

Arbitrators may observe these requirements either collectively or individually.

3.2.1 If an examination of the merits of the case is required, the tribunal may refrain from granting the measure requested

An arbitral tribunal may refrain from examining the merits of the case in dispute as “[t]he taking of interim measures is without prejudice to the outcome of the case.”⁹⁴ Further, the tribunal does not wish to prejudge

provided for numerous protective tools etc., a Tribunal will probably find it appropriate to issue a protective interim order, if the circumstances have driven the accepted risk-sphere way out of the contractually accepted range.

Id. In this regard, it is interesting to note that a tribunal refrained from restoring the *status quo* existed right before the dispute arose in an ICC case. The tribunal refrained from ordering, without posting a security, the party to lift attachments obtained from a local court. See ICC First Interim Award 5835 of 1988, extracts published in 8(1) ICC Int’l Ct Arb Bull 67 (1997).

⁹³ Some of these requirements resemble to the requirements to grant provisional measures under English law. See, e.g., L.A. Sheridan, *Injunctions and Similar Orders* (Barry Rose: Chichester 1999), 119, etc.

⁹⁴ Sanders, Commentary, 196. Apparently, the tribunal has to take the substance of a case in dispute for establishment of *prima facie* jurisdiction. See Chapter IV, supra Part 3.1.2.

the merits or to be accused of doing it. That is because the prejudgment may infringe or, at least, shadow the tribunal's impartiality.⁹⁵ The merits of a case should be examined in a full trial.

In many cases, arbitrators denied, in relation to a request for interim measures, to examine the merits of the case in dispute. For instance, in ICC case 6632, both parties applied for a security for costs, the arbitral tribunal denied the applications by holding:

The Arbitral Tribunal considers that, in the present stage of its information, it cannot, *without pre-judging the issues relating to the merits of the case*, determine whether the Contract was validly terminated or not and whether the property was legally or illegally seized by Respondent⁹⁶ (Emphasis added.)

⁹⁵ Any such pre-judgment may cause setting aside or refusal of enforcement of an award. See, in this regard, e.g., Articles 34(2)(a)(iv), 34(2)(b)(ii) of the Model Law; and Articles V(1)(d), V(2)(b) of the NY Convention. In any case, a provisional measure should not prejudice the decision on the substance. See Article 292 of the Netherlands AA.

⁹⁶ ICC Interim Award 6632 of 1993 (unpublished). In addition see, e.g., ICC Second Partial Award 8113 of 1995, extracts published in 11(1) ICC Int'l Ct Arb Bull 65-69 (2000) (the arbitral tribunal denied the request for an interim measure as "the grant of the measure requested by Claimant implies a *pre-judgement of the dispute*" (Emphasis added.); ICC First Partial Award 8540 of 1999 (unpublished) (the tribunal refrained from pre-judging the merits of the case in dispute concerning the request for certain injunctions.); *Holiday Inns v. Morocco* (where, with respect to the tribunal's recommendation, Lalive states that "[n]othing is said or implied could touch the merits in litigation." Lalive, 193); *Atlantic Triton v. Guinea* (denying the request on pre-judgment security on the ground, *inter alia*, that "the fact that both requests were *directly linked to, and dependent on*, resolution of the basic claims in the arbitration. This was particularly so with respect to Atlantic Triton's request, which virtually restated its principal claim." (Emphasis added.)); *Maffezini v. The Kingdom of Spain*, Procedural Order No. 2 (28 October 1999), extracts reprinted in XXVII YCA 13, 18 (2002) (indicating that "[i]t would be improper for the Tribunal to pre-judge the claimant's case"). Further, in an AAA case, a dispute arose from a distribution agreement and the claimant requested from the tribunal to enjoin, on an interim basis, the respondent from selling competitive products. The respondent's objection to the preliminary injunctive relief was that it had never been a party to the agreement. Because of the fact that this claim was also the essence of the respondent's defence, the tribunal refrained from dealing with the substance of the case. Accordingly, the tribunal denied to issue the relief sought. Order of 1999 in AAA Case No. 507181-0014299 (unpublished). See also Friedland, *Provisional Measures*, 348.

3.2.2 No Grant of Final Relief

An arbitral tribunal “will not (or, at any rate, should not) grant a decision on the merits under the guise of interim relief.”⁹⁷ An arbitral interim measure “may not operate to grant the final relief sought” for preserving “the provisional nature of the interim measures”.⁹⁸ Arbitral case law generally confirms this view. For instance, in *Behring International, Inc., v. Iranian Air Force*, the dispute arose mainly over the storage charges for warehousing the respondent’s property. The Iran-US Claims Tribunal held that

the granting of the full interim relief requested by Respondents, in particular, the transfer to Respondents of possession, custody and control of the warehoused goods ..., would be tantamount to awarding Respondents the final relief sought in their counterclaim.⁹⁹

However, as it could not convince the claimant to store the goods in a modern portion of its warehouse, in order to avoid further deterioration of the goods, the Tribunal later held:

⁹⁷ Bond, 18. Van Hof argues, on the contrary, that [t]he conclusion that a tribunal would not be able to order interim relief if this happened to constitute the principal relief sought appears unconvincing It is understandable that a certain safeguards might be required, for example, to prevent the Claimant from dismissing his suit, but it is hard to conceive of any fundamental objections apart from this.

Van Hof, 191.

⁹⁸ Berger, *International Economic Arbitration*, 337. See also Baker / Davis, 340. Perhaps another reason for not granting the final relief on an interim basis may be to avoid changing the *status quo*. For instance, in ICC case 9950, the arbitral tribunal denied changing the *status quo* that was existed at the date when the request for arbitration was filed on factual grounds. ICC Interim Award 9950 of 2000 (unpublished). But see Lew / Mistelis / Kröll, para. 23-64.

⁹⁹ Case No. 382, Interim Award No. ITM 46-382-3 (22 February 1985), reprinted in 8 Iran-US CTR 44, 46. See also, e.g., *United Technologies Int’l, Inc. v. Iran*, Case No. 114, Decision No. Dec 53-114-3 (10 December 1986), reprinted in 13 Iran-US CTR 254, 259. In this case, the dispute arose out of contracts “for servicing and overhaul of helicopter components owned by one of the respondents”. Upon the claimant’s request for reimbursement of the storage costs for preservation of the goods, the Iran-US Claims Tribunal, by taking into account the fact that one of the claims submitted by the claimant is for storage charges, denied the request by ruling that “it appears that the request for interim measures is, in this respect, identical to one of the Claimant’s claims on the merits. Under such circumstances, to grant this request would amount to a provisional judgment on one of the Claimant’s claims.”

Since a transfer within Claimant's own warehouse has not been made possible, the Tribunal sees no alternative to transferring the goods to a warehouse selected by Respondents. In the circumstances of this case, it would be impractical for this international Tribunal to maintain control of the goods through a warehouse selected by and subject to the discretion of the Tribunal. Certain of the goods may require repackaging, special maintenance or special handling, involving daily management decisions for which the Tribunal cannot assume responsibility. Moreover, the use of a third party conservator is unnecessary in this case as Respondents' title to the goods and eventual right to possession as between the Parties is undisputed.¹⁰⁰ (Citations omitted.)

3.2.3 The tribunal may not grant a provisional measure if the applicant does not have "clean hands"

This principle is self-explanatory and was observed, for instance, in ICC case 7972.¹⁰¹ In this case, the claimant concluded a distribution contract with the respondent, whereby the respondent was granted the exclusive right to sell touch-screen computers. The parties also signed a non-competition clause, in which the respondent undertook not to compete or develop similar products. The claimant alleged that the respondent breached their contract, and, as a consequence, terminated the contract. The claimant then filed a request for arbitration. The claimant also applied for an injunctive relief stopping the respondent to manufacture, to distribute and to sell the claimant's products. The arbitral tribunal rejected the application on the ground that the claim upon which the relief based is time-barred. The tribunal further, *inter alia*, held:

The decision whether or not to grant an injunction lies in the discretion of the Tribunal from which it is sought. *Generally, a*

¹⁰⁰ Case No. 382, Interim and Interlocutory Award No. ITM/ITL 52-382-3 (21 June 1985), reprinted in 8 Iran-US CTR 238, 278. In regard of this case, Caron rightly suggests that "[i]t may be possible by creative thinking on the part of the tribunal and parties to find measures that will not simultaneously grant the final relief requested." Caron, Interim Measures, 488.

¹⁰¹ ICC Partial Award 7972 of 1997 (unpublished).

tribunal will not issue an injunction where it is found that the petitioner does not have clean hands.

We have found that [the claimant] discovered ... manufacture and sale of [the products by the respondent] in 1991. [The claimant] “sat on this knowledge” for more than two years before, on 28 April 1993, it invoked [the respondent’s] breach and sent a notice of termination of the Distribution Agreement. In the meantime, [the claimant] actively sought and obtained, in May 1991, an additional investment of USD 5.000.000 by [the respondent] in [the claimant’s business].

In such circumstances, we determine that [the claimant] cannot now be heard to say that it is entitled to an injunction to enjoin [the respondent] henceforth from manufacturing, distributing and selling [the claimant’s] products. (Emphasis added.)

3.2.4 The tribunal may not grant a measure where such measure is not capable of being carried out

It is submitted that “arbitrators will ... normally be concerned to ensure that interim measures ordered by them are capable of being carried out.”¹⁰² This concern partly relates to arbitrators’ duty, according to certain arbitration rules, to take into account the enforceability of the award they render.¹⁰³ Further, arbitrators would not wish to waste valuable time and delay the arbitration proceedings where it is not likely that the measure they would grant is not capable of being carried out. For instance, in ICC case 7210,¹⁰⁴ upon the revocation of licenses concerning mineral rights by the State X, the claimant applied for an injunction. The aim of the application was to prevent the State X from making any disposition of the mineral rights in any part of the territory covered by the relevant licences. The tribunal did not rule on the issue until its final award. In its final award, the tribunal held that one of the

¹⁰² Schwartz, Provisional Measures, 62.

¹⁰³ See, e.g., Article 35 of the ICC Arbitration Rules.

¹⁰⁴ ICC Final Award 7210 of 1994, extracts published in 11(1) ICC Int’l Ct Arb Bull 49-52 (2000). In this case, the place of arbitration was Paris and the applicable law was the law of the Country X. See, for a similar case, Schwartz, Provisional Measures, 62.

reasons why it did not rule on the application was “*because* [had it granted the application] *it could not have monitored any order made.*”¹⁰⁵ (Emphasis added.). Similarly, in ICC case 5835, the tribunal, in denying the request for a provisional measure indicated that it took the enforceability of the provisional measure requested into account.¹⁰⁶

3.2.5 When the measure requested is not capable of preventing the alleged harm

Inasmuch as provisional measures are designed to safeguard, on an interim basis, the right in question or, in other words, avoid any harm to that right, they should, at least on their face, be capable of serving this purpose.¹⁰⁷

3.2.6 Request Must not be Moot

It is obvious that where the request is already moot, the measure requested would not be granted. For instance, in *Iran v. United States*, Case No. A/15, the claimant requested from the tribunal to prevent the public sale of nuclear fuel allegedly belonging to it. Due to the fact that the fuel was already sold before the tribunal was able to consider the issue, it was held that the request became moot. Accordingly, the tribunal refused to entertain it.¹⁰⁸

3.3 Security for Damages

The grant of some provisional measures, particularly those ones aiming to preserve the *status quo* may likely, potentially or actually prejudice

¹⁰⁵ ICC Final Award 7210 of 1994, extracts published in 11(1) ICC Int'l Ct Arb 49-52 (2000).

¹⁰⁶ ICC Second Interim Award 5835 of 1992 (unpublished). See also ICC Final Award 7489 of 1993, extracts published in (1993) Clunet 1078; 8(1) ICC Int'l Ct Arb Bull 68 (1997); and Hascher, Procedural Decisions, 48.

¹⁰⁷ Schwartz, Provisional Measures, 62.

¹⁰⁸ *Iran v. The United States of America*, Case A-15, Dec. No. Dec 52-A/15-FT (24 November 1986), reprinted in 13 Iran-US CTR 173-175.

the counter-party's rights.¹⁰⁹ In such cases, an arbitral tribunal should, in this author's view, request from the applicant a security for damages.¹¹⁰ Security for damages is an undertaking whereby the

¹⁰⁹ This is despite the fact that a request to a court for a provisional measure should not normally affect the outcome of arbitration proceedings. See, e.g., Article 37(1) of the Arbitration Rules 1993 of the Netherlands Arbitration Institute (the "NAI"); and Article 11 of the Arbitration Rules 1980 of the French Arbitration Association (the "FAA").

¹¹⁰ In fact, the ECJ ruled that interim payment would not be considered within the meaning of Article 24 of the Brussels Convention unless, *inter alia*, the repayment is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim. The repayment is guaranteed where a security for damages is obtained. See, e.g., *Van Uden Maritime BV, Trading as Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line and Another*, Case C-391/95, (1998) ECR I-7091, I-7131, para. 22; and *Hans Hermann Mietz v. Intership Yatching Sneek BV*, Case C-99/96, (1999) ECR I-2277, I-2314, para. 42. Not many arbitration laws do contain express provision on security for damages. For instance, the Model Law refrains from mentioning security for damages. See, in this regard, UN Doc A/40/17, para. 166, reprinted in Holtzmann / Neuhaus, 546-47. However, Article 17 does not exclude the possibility of a tribunal's granting of security for damages. See e.g., *id.* But see also, e.g., Article 28(3) of the Arbitration Law of the People's Republic of China (stating that damages may be recoverable in case the application proved to be faulty.); Article 9(1) of the Ecuadorian Law on Arbitration and Mediation 1997; Section 25(4) of the Swedish AA 1999; and Section 9-9-35 of the Arbitration Code of Georgia. Twenty-nine sets of the arbitration rules surveyed contain a provision on the security. See Annex. According to these rules, the tribunal is generally empowered to ask for appropriate security. Further, only three of the rules surveyed contain a provision, which expressly empowers the tribunal to grant security for damages. See Article 31 of the Arbitration Rules 1999 of the Arbitration Institute of the SCC; Article 28 of the Arbitration Rules 1993 of the Bulgarian Chamber of Commerce (providing for a submission of a counter-guarantee by the moving party for a provisional measure); and Article 14a of the Rules of Arbitration of the International Arbitration Centre of the Federal Economic Chamber of Vienna. However, in some cases, a tribunal's power is restricted in regard of the security for damages. See, e.g., Article 21(2) of the AAA-ICDR Arbitration Rules; and Article 26(2) of the UNCITRAL Arbitration Rules (empowering to grant security for the costs of provisional measures). Where there is no express power to grant security for damages, such power may derive from the broad interpretation of the arbitration agreement. Where a security is requested about an interim measure, it is apparent that the tribunal's jurisdiction extends to damages claims arising from such measure. See e.g., Wirth, 38; and Berger, *International Economic Arbitration*, 342 (stating that security for damages claim may be handled within the same arbitration since such claim arose "out of or in connection with the contract"). It is also submitted that the obligation "to mitigate damages or not to worsen the dispute" could also be the basis for security for damages. Buscher / Tschanz, 88. It is, in this regard, noteworthy that security for damages could be granted, without the need for a specific request, as the purpose of it is to avoid unjust suffering of a party. See, e.g. Article 23(1) of the ICC Arbitration Rules; and Article 46 of the WIPO Arbitration Rules. See also, e.g., Article 17 of the Model Law; and Article 183(3) of the SPIL. That should be, however, subject to the existence of any risk of loss, which may arise out of the interim relief granted.

successful moving party undertakes to indemnify the adversary, should the measure prove to be unjustified.¹¹¹ This is because a provisional measure is based on a summary review of the facts and law, which review would affect, *prima facie* establishment of jurisdiction and *prima facie* establishment of case.¹¹² It is likely that the outcome of such review would change during or at the end the adjudication. The amount of security should cover the actual costs and the potential damages to the adverse party.¹¹³ In determining the amount, financial capability of the moving party should be taken into account.¹¹⁴

There are a few arbitral cases where a security for damages were dealt with. For instance, in ICC case 7544, upon application of the Claimant for a provisional payment, the tribunal ruled:

The Arbitral Tribunal is ... faced with a delicate task of weighing up the probability as to whether, after the claims and counterclaims have been fully argued before it, the net result will be in favour of Claimant, as the latter alleges, or in favour of Defendant; having decided it can . . . [however,] *in order to cover the risk that the final decision might not be consistent with the decision reached in this award*, and not to prejudice the right of set-off, *the Tribunal considers that it is appropriate that the party in whose favour the decision on an interim payment is made provide a guarantee of like amount*. Consequently, the order to Defendant to pay the amount of . . . to Claimant is made subject to Claimant providing a guarantee of like amount in the form and subject to the conditions set forth in the decision section of this award.¹¹⁵ (Emphasis added.) (Citations omitted.)

¹¹¹ On the issue of damages as compensation, see Chapter IV, Part 10.

¹¹² See Chapter IV, *supra* Parts 3.1.1 and 3.1.2.

¹¹³ Berger, *International Economic Arbitration*, 342.

¹¹⁴ That is particularly important where the security for damages is a precondition for the grant of the measure requested.

¹¹⁵ ICC Second Interim Award 7544 of 1996, extracts published in 11(1) ICC Int'l Ct Arb Bull 56-60 (2000). See also, e.g., ICC First Interim Award 5835 of 1988, extracts published in 8(1) ICC Int'l Ct Arb Bull 67 (1997); and Order of 1999 in AAA Case No. 52 153 00116 87 (unpublished) (ordering, in a case concerning allegedly unjust termination of the Joint Marketing Service and Manufacturing Agreement, the respondent to comply with its injunction pending the final award and to subject the injunction's coming into effect posting of either cash or other kind of bond.) (unpublished). In ordering of any measure of security, a tribunal should consider whether the type of security that will be issued is available from a bank. For

3.4 An Undertaking

An arbitral tribunal may deny the request for a provisional measure if there is an undertaking or a declaration in good faith by the party against whom such measure is sought that it does not intend to infringe the right in question. Apparently, it is within the discretion of the tribunal to accept such undertaking or declaration.¹¹⁶ Where there is an undertaking, arbitrators may decide on the request with or without considering the other requirements for granting the measure requested. For instance, in ICC case 7692,¹¹⁷ a dispute arose from the agreement according to which the claimant is entitled to the use of the respondent's "computer programs and technology, which relate to predicting movements in financial instruments." The claimant requested, *inter alia*, an injunction to prevent the use or dissemination of its technology and data by the respondent, pending the final award. The respondent, contrary to the claimant's arguments, claimed that the claimant's technology is not in their possession. Furthermore, the respondent, in any case, "undertook not to use any of that technology during the course of arbitration." The arbitral tribunal held, basing on

instance, whether a bank is willing to provide a security until the tribunal renders its final award or whether it would be advisable to obtain a security in the form of blocking by a party of a certain amount of money in the bank account jointly held by the parties. See, generally, Karrer, *Less Theory*, 104.

¹¹⁶ In using such discretion, the circumstances of the case and previous actions of the arbitrating parties may be taken into account.

¹¹⁷ ICC Interim Award 7692 of 1995, extracts published in 11(1) ICC Ct Int'l Arb 62-63. There are several other published cases in which an undertaking given by a party, by itself or along with other causes, was held sufficient reason for denying interim measure applications. See, e.g., *Fluor Corporation v. Iran*, Case No. 333, Interim Award No. ITM 62-333-1 (6 August 1986), reprinted in 11 Iran-US CTR 292, 298; *Avco Corporation v. Iran Aircraft Industries, Iran Helicopter Support and Renewal Company, National Iranian Oil Company and Iran*, Case No. 261, Order of 27 January 1984, cited in Case 261, Partial Award No. 377-261-3 (18 July 1988), reprinted in 19 Iran-US CTR 200, 201-202; *United Technologies Int'l, Inc. v. Iran etc.*, reprinted in 13 Iran-US CTR 254, 258; and *Vacuum Salt v. Ghana*, Decision No. 3, 14 June 1993, reprinted in 4 ICSID Rep 323-324. In this last case, upon the undertaking of Ghana that it would not deny Vacuum Salt's access to records, the tribunal refrained from recommending the preservation of evidence as requested by the Respondent but instead it embodied this undertaking into its decision by way of noting its existence. Perhaps, that was because such indication would later justify taking actions against the recalcitrant party.

the undertaking, that “there is no sufficient likelihood or danger” that respondent would use the claimant’s technology.” Accordingly, the request was denied.

4 Form of a Measure

Arbitral provisional measures may generally take the form of an order.¹¹⁸ Such measures are also issued in the form of an award,¹¹⁹ decision, direction,¹²⁰ request, proposal, recommendation,¹²¹ or else.¹²²

¹¹⁸ Eighteen out of the seventy-two sets of rules surveyed provide for order as the form of a decision concerning provisional measures. See Annex. It is not clear from the text of those rules whether a tribunal may grant the measure in any other form, including an award. In regard of the Iran-US Claims Tribunal’s practice, Pellonpää / Caron indicates that the number of orders concerning interim measures “seems at least double the number of awards.” See Pellonpää / Caron, 448, note 62.

¹¹⁹ Fourteen of those rules expressly permit the tribunal to issue orders as well as awards in respect of interim measures. See Annex. The authority to grant provisional measures in the form of an award may also be found under the laws of some countries. See, e.g., England (Section 47(1) and 39 of the AA (permitting the grant of a “provisional award”); France (Pluyette in ICC (ed.), *Conservatory Measures*, 88); India (Bhasin, 95); Scotland (Article 17(2) of Schedule 7 to the Law Reform Act 1990 (Miscellaneous Provisions)); Switzerland (see Blessing, *Introduction*, para. 867); and the U.S. (see *infra* Chapter V, Part 3.2.2). It is argued, in this respect, that due to the scrutiny of an ICC award, the presumption in ICC arbitration is to issue provisional measures in the form of an “order.” Final Report on Awards, paras. 6 and 37.6; and Bernardini, 28. However, this Chapter IV cites several ICC decisions on interim measures rendered in the form of award. See also, e.g., C. H. Brower, “The Iran-United States Claims Tribunal”, 224 RCADI 123, 175 (1990-V).

¹²⁰ See, e.g., Section 17 of the Arbitration Rules 1995 of the Permanent Court of Arbitration of the Mauritius Chamber of Commerce and Industry.

¹²¹ See, e.g., Rule 39 of the ICSID Arbitration Rules; and Article 34 of the Rules of International Arbitration of the Croatian Chamber of Commerce. The term ‘recommendation’ under these Rules should be read as ‘order’. Indeed, an ICSID tribunal very recently held, in an order:

While there is a semantic difference between the word ‘recommend’ as used in Rule 39 and the word ‘order’ as used elsewhere in the [ICSID] Rules to describe the Tribunal’s ability to require a party to take a certain action, that difference is more apparent than real. It should be noted that the Spanish text of that Rule uses also the word ‘*dictacion*’. The Tribunal does not believe that the parties to the Convention meant to create a substantial difference in the effect of these two words. The Tribunal’s authority to rule on provisional measures is no less binding than that of a final award. Accordingly, for the purpose of this Order, the Tribunal deems the word ‘recommend’ to be of equivalent value as the word ‘order’.

Maffezini v. The Kingdom of Spain, Procedural Order No. 2 (28 October 1999), extracts reprinted in XXVII YCA 13, 18 (2002). But see Schreuer, Article 47, para. 28. The Maffezini tribunal’s view is more in line with the view taken by the ICJ and the European Court of Human Rights regarding provisional measures. In any

Provisional measures could further be granted in the form of temporary restraining orders. In this regard, it should be noted that the forms other than award and order (including temporary restraining order) generally have a moral force¹²³ although there may be some sanctions applicable where they are ignored.¹²⁴ It should also be noted that if the applicable national law prohibits the grant of provisional measures, such restriction is likely to prevent grant of an order or an award on interim measures.¹²⁵ However, the restriction should not, in any way, prevent the grant of, for instance, a proposal regarding the measure requested.¹²⁶

This Part initially examines the traditional forms under which a provisional measure may be granted: an order or an award. It then deals with decision on the form of the measure and interim protection of rights in cases of extreme urgency after the appointment of arbitrators.

case, possibility of an ICSID tribunal's drawing adverse inferences if its recommendation on an interim protection of rights is not complied with, and the backing of the World Bank of the ICSID and the potential economic pressure that may be exerted against a recalcitrant state may facilitate voluntary compliance with such recommendation. See, e.g., Lew / Mistelis / Kröll, para. 23-29.

¹²² See, e.g., Article 23 of the Arbitration Rules 1996 of the Commercial Arbitration and Mediation Centre for Americas (the "CAMCA"). This Article, however, does not define what the term "else" refers to. In this regard, it is noteworthy that the chairman, after consultation with its co -arbitrators may send a letter to the parties indicating its provisional views regarding protection of parties' rights. Such letter may facilitate interim protection of parties' rights. Craig / Park / Paulsson, ICC Arbitration, 2000, 463-64. In this regard, see also ICC Case No. 6445, extracts published in Hascher, Procedural Decisions, 80-92. For examples to all of the above categories of decisions, see generally Brower, 175, notes 178-181.

¹²³ The exception to this is a "recommendation" that may be granted under the ICSID Convention and the ICSID Arbitration Rules. See Chapter IV, *supra* note 121.

¹²⁴ See *infra* Chapter V, Part 1.

¹²⁵ Indeed, a similar reference to applicable local law was made under the ICC Arbitration Rules 1931. See *infra* Chapter I, Part 1.2.1. The reference to local law conformed with the Geneva Convention. In accordance with Article 1(1) of the Convention, law of the place of arbitration, in the absence of a party agreement, governed the procedure.

¹²⁶ See *supra* Chapter II, Part 3.

4.1 Award or Order?

Although there are difficulties in defining the terms “award” and “order”, it is nonetheless safe to accept that an award aims to finally resolve one or more of the issues in dispute and is binding whereas an order aims to deal with “technical and procedural matters” and is “rendered without any formality and reasoning.”¹²⁷ The advantages and disadvantages of one form to the other mainly are:

- An award is formal whereas an order is not. The preparation of an award takes longer than that of an order. To this end, in some cases, for instance, in ICC arbitration, an award, unlike an order, needs to be scrutinised by the ICC International Court of Arbitration.¹²⁸ The preparation time and, scrutiny of an award, as the case may be, naturally have a certain delaying effect in the issuance of the award.
- An order does not have a *res judicata* effect and revised at any time whereas an award, in principle, has a *res judicata* effect.
- Both an award and an order on provisional measures may be enforceable under a state law generally where the place of arbitration is in such state.¹²⁹
- An award may potentially be enforceable under the New York Convention whereas an order is generally considered to be not.¹³⁰ Indeed, the reason for requesting an award is to enhance the prospect of enforcement.¹³¹ However, it should be noted that it is not the tribunal’s duty to evaluate, in case it decides to grant an interim measure requested, whether the relief is actually enforceable under the applicable laws or the New York

¹²⁷ Lew / Mistelis / Kröll, para. 24-5. On the form “award” and “order”, see, e.g., id. paras. 24-3 - 24-34; Redfern / Hunter, paras. 8-01-8-03, 8-32-8-42.

¹²⁸ Article 27 of the ICC Arbitration Rules.

¹²⁹ See infra Chapter V, Part 3.

¹³⁰ On this issue, there are arguments both in favour and against. See infra Chapter V, Part 3.2.2.

¹³¹ On the issue of enforcement, see infra Chapter V, Part 3.2.2.

Convention.¹³² “It is thus the applicant’s ultimate responsibility and risk to seek and obtain enforcement of an award granting interim relief.”¹³³

- An order may be issued *ex parte*, whereas the grant of an *ex parte* award may be troublesome because of due process considerations on national and international levels, particularly under Article V(l)(b) of the New York Convention.

The approach of national laws to the form under which a provisional measure may be granted differs. Some laws are permissive for the grant of the measure in the form of award whereas others are not.¹³⁴ There are also conflicting views as to whether a provisional measure may be granted in the form of an award or an order.¹³⁵ One view is that interim measures are not intended to have *res judicata* effect and that they could be “revised at any time.” Thus, it is not appropriate to grant them in the form of an award.¹³⁶ This view may also be supported with the fact that, in some cases, the grant of an award takes some time due to, for instance, scrutiny of an award. Because of this delay, it is

¹³² In this regard, the issue as to whether finality is a characteristic of an award needs to be examined. See *infra* Chapter V, Part 3.2.2.

¹³³ ICC Interlocutory Award 10596 of 2000 (unpublished).

¹³⁴ American law (see, e.g., *Sperry International Trade, Inc. v. Government of Israel*, 532 F. Supp. 901 (S.D.N.Y.), *aff’d.*, 689 F.2d 301 (2 Cir. 1982)) is an example to permissive laws whereas Australian law is an example to non-permissive laws (see *Resort Condominiums International Inc. v. (1) Ray Bolwell and (2) Resort Condominiums (Australasia) Pty. Ltd.*, excerpts published in XX YCA, 628-650 (1995) (Supreme Court of Queensland, 29th October, 1993). Michael Pryles, “Interlocutory Orders and Convention Awards: the Case of *Resort Condominiums v. Bolwell*”, 10(4) Arb Int 385 (1994)). In this respect, see Chapter IV, *supra* note 115. It should also be noted that it may not be up to the arbitral tribunal to freely determine the form. See, e.g., *Braspetro Oil Services Company – Brasoil (Cayman Islands) v. The Management and Implementation Authority of the Great Man-Made River Project (Libya)*, extracts from the French original is published in XXIVa YCA 296 (1999) (1 July 1999, Court of Appeal, Paris); Final Report on Awards, para. 28.

¹³⁵ There is generally no objection for the grant of provisional measures in the other forms.

¹³⁶ See, e.g., Karrer, *Less Theory*, 109.

argued that decisions on provisional measures should normally take the form of an order.¹³⁷

The counter view, with which this author agrees, is that a tribunal should be able to grant provisional measures in the form of award, including partial or interim but not final award.¹³⁸ Experience confirms this view.¹³⁹ However, this view does not exactly fit into the traditional approach to awards. This is because finality of an award on provisional measures has a temporal element and is, strictly speaking, not intended to have a *res judicata* effect like a final award.¹⁴⁰ The temporal element is that an award is final and binding for a certain period of time: until it is amended, revoked or confirmed in the final award.¹⁴¹ The acceptability of this approach is an issue for national

¹³⁷ Final Report on Awards, para. 26.

¹³⁸ This Chapter IV contains several partial, interim or interlocutory awards dealing with provisional measures. The form of an award is generally considered as interim (occasionally partial, preliminary, interim, interlocutory etc.). It should be noted that "the terms 'interim' and 'partial' are virtually used interchangeably, without any particular meaning being attributed to either expression" Final Report on Awards, para. 5. The statement was used to refer to ICC practice, which, in this author's belief and experience, also reflects international commercial arbitration practice. Even if the measure takes the form of an order it is suggested that it should contain reasons. See, e.g., Article 23 of the ICC Arbitration Rules 1998. See Sigvard Jarvin, "Aspects of the Arbitral Proceedings" in: ICC (ed.), *The New 1998 ICC Rules of Arbitration*, (ICC Publication No. 586) (Paris: ICC Publishing 1997), 26, 28 ("1998 ICC Rules"). This is mainly because if the reasons "are understood, there is a better chance that they will be obeyed in the right spirit." Karrer, *Less Theory*, 109. Further, in some states, orders of an arbitrator may be enforceable. See *infra* Chapter V, Part 3.2.1. It may be useful to indicate the reasons for enhancing the enforceability in those states.

¹³⁹ See various awards cited in Chapter IV. This is despite the fact that most of arbitral decisions on interim protection of rights are rendered in the form of order in practice.

¹⁴⁰ See Karrer, *Less Theory*, 109. Otherwise, an award is "generally final and binding and has *res judicata* effect between the [arbitrating] parties, i.e., no claim can be brought in respect of the same matter." Lew / Mistelis / Kröll, para. 24-1. For more information on the concept of *res judicata* see, e.g., G. Richard Shell, "Res Judicata and Collateral Estoppel Effects of Commercial Arbitration", 35 *UCLA Law Rev* 623-675 (1988).

¹⁴¹ For this reason, certain U.S. courts take the view that an award on provisional measure deals with a separable issue (from the underlying issues) which is finally resolved for a certain period of time. Thus such courts find no illegality or impropriety regarding that award. See *infra* Chapter V, Part 3.2.2. This view is in

laws.¹⁴² A provisional measure in the form of an award is useful in making arbitration more effective dispute resolution mechanism as such form facilitates, to a great extent, enforcement of arbitral decisions concerning interim protection of rights. Thus, an award concerning interim protection of rights should, in this author's view, be permissible.¹⁴³

4.2 Decision on the Form

It should be noted that parties are generally free to choose the form of a measure. They may specifically exclude or exclusively include any form in their arbitration agreement. Arbitrators, unless otherwise agreed, or specifically or exclusively requested by the parties,¹⁴⁴ generally have discretion to determine the form of the measure requested.¹⁴⁵ Such discretion, for instance, seems to be given to ICC

line with the specific needs of arbitration world in regard of interim protection of rights. Indeed, according to Caron,

[t]he substantive effect of an interim award may be cancelled by rendering of a further interim award superceding the earlier interim relief. In such a case the earlier relief is not revoked *ab initio* but rather the temporary period for which it was to exist is drawn to a close. (Citations omitted.)

Caron, Interim Measures, 515. It should be noted that "supercession implicitly recognizes that the earlier measures were binding for some time and that a failure to observe those measures for that time would be a breach of the agreement to arbitrate." (Citations omitted). *Id.*

¹⁴² See Chapter IV, *supra* note 134.

¹⁴³ See, in this regard Chapter IV, *supra* note 119 and *infra* Chapter V, Part 3.2.2. But see, e.g., Karrer, *Less Theory*, 109.

¹⁴⁴ See, e.g., Final Report on Awards, paras. 33 and 37.2. Where only one of the parties requests an award on a provisional remedy, the Final Report on Awards recommended that

the arbitrator must exercise his discretion, but bearing in mind that the presumption is in favour of a single final award. Potential savings of time and costs for the parties, the effective and efficient conduct of the arbitration and the need to make every effort to ensure that an award is enforceable are the primary factors to be taken into consideration by the arbitrator.

Id., paras. 34 and 37.3.

¹⁴⁵ See Bernardini, 27; and Berger, *International Economic Arbitration*, 343 (arguing that for ensuring "the necessary procedural flexibility", the determination of the form should be left to the tribunal.). But see Lew, *Commentary*, 28 (arguing that "where the request is made for a specific form, then the tribunal should not use any discretion."). In order to avoid refusal of its request, a party may request both order and award as alternative forms. See, e.g., ICC Final Award No. 9154 of 1998, extracts published in 11(1) ICC Int'l Ct Arb Bull. 98-103 (2000). Rather than refusal of its request, if it is made for a specific form, a party may prefer to have

arbitrators.¹⁴⁶ In ICC arbitration practice, for example, in ICC case 5804, the Claimant sought a provisional measure in the form of an award.¹⁴⁷ However, the tribunal rendered the measure in the form of an order. Similarly, in ICC case 7489, the tribunal found “no legal or practical need to decide the issue by a formal award.”¹⁴⁸ Accordingly, the tribunal issued an order. In two other cases, requests were made either for an award or for an order but they are denied. Instead, the measure was granted in the form of a recommendation¹⁴⁹ or a proposal¹⁵⁰. Even though neither a recommendation nor a proposal has a binding effect, the parties are likely to accept and implement such

interim protection measure in any other form. That is confirmed with the fact that “[f]requently, parties are anxious to have the tribunal’s order, whatever its form.” Lew, Commentary, 28.

¹⁴⁶ Final Report on Awards, para. 37.3. Jarvin, *Arbitral Proceedings*, 43; and Yves Derains / Eric A. Schwartz, *A Guide to the New ICC Rules of Arbitration* (The Hague / London / Boston: Kluwer 1998), 275. The last two authors indicate:

The ICC was reluctant to specify in Article 23(1) [of the 1998 ICC Arbitration Rules] what form orders of interim or conservatory relief ought to take. Article 23(1), thus, leaves it up to the arbitrators to determine whether such a decision should take the form of an order, with reasons, or an award, a matter that will often depend upon the nature of the measure and the laws of the place of arbitration or the country where the measure is to be carried out. (Citation omitted.)

Derains / Schwartz, 275.

¹⁴⁷ ICC Final Award 5804 of 1989, extracts published in 4(2) ICC Int’l Ct Arb Bull 76 (1993).

¹⁴⁸ ICC Final Award 7489 of 1993, extracts published in 8(1) ICC Int’l Ct Arb Bull 68 (1997), (1993) Clunet 1078; and Hascher, *Procedural Decisions*, 48.

¹⁴⁹ In ICC case 5887, the claimant and the respondents entered into a contract for realisation of a brewery. A dispute arose on a payment of a contractual obligation. The claimant pleaded for a payment of the allegedly outstanding amount and the release of performance guarantee provided by the claimant in favour of the respondents. While arbitration proceedings had been continued, the respondents called the bank guarantee. Upon this event, the claimant:

asked the Tribunal to order the defendants to abstain from any action which might de facto change unilaterally the Terms of Reference and the course of arbitration procedures and, in particular, to abstain from calling the bank guarantees pending the arbitration proceedings.

In its reply . . . the Tribunal *recommended* the defendants to formally renounce from calling the bank guarantee pending the arbitration proceedings. (Emphasis added.)

See ICC Final Award 5887 of 1991 (unpublished). See Yesilirmak, *Interim Measures*, 31, note 6.

¹⁵⁰ See ICC Partial Award 3896 of 1982, extracts published in (1983) Clunet 914; X YCA 47(1985), and Jarvin / Derains, 161.

decision.¹⁵¹ These forms may particularly be useful where the tribunal is not authorised to grant provisional measures under applicable laws.¹⁵²

What criteria should a tribunal consider in exercising its discretion as to the form? The criteria recommended for ICC arbitration could, in this author's view, provide useful guidance in this respect: "[p]otential savings of time and costs for the parties, the effective and efficient conduct of the arbitration and the need to make every effort to ensure that an award is enforceable...."¹⁵³ Among all, apparently, the parties' wishes should be taken into account to a possible extent. In addition, in making the decision between award and order, the tribunal should take into account the advantages and disadvantages of one form to the other.¹⁵⁴ In particular, the form of "award" may be preferred where enforcement of the decision (particularly, international enforcement) is necessary and the decision in this form can be awaited.¹⁵⁵ In any case,

¹⁵¹ In this connection, see Craig / Park / Paulsson, ICC Arbitration, 418; and ICC Award No. 3896, extracts published in (1983) Clunet 914; X YCA 47 (1985), and Jarvin / Derains, 161. See also generally infra Chapter V, note 2. It should, in this regard, be noted that the ICC Court of International Arbitration "has regularly approved" awards that contain recommendations or proposals. Schwartz, Provisional Measures, 63. A decision in the form of "recommendation" in ICSID arbitration does indeed have a binding effect. See Chapter IV, supra note 121 and accompanying text.

¹⁵² See supra Chapter II, Part 3.

¹⁵³ Final Report on Awards, para. 37.3

¹⁵⁴ See Chapter IV, supra Part 4.1.

¹⁵⁵ On the issue of enforcement, see Chapter IV, supra note 119 and infra Chapter V, Part 3. In this regard, it is noteworthy that Article 26 of the UNCITRAL Arbitration Rules empowers an arbitrator to grant an "interim award". This provision was suggested in the discussion of the Preliminary Draft about the Rules in the Fifth International Arbitration Congress, New Delhi, India, in 1975. *The Vth International Arbitration Congress – Proceedings* (New Delhi: Printaid 1975), D-99. Upon such suggestion, the provision on interim measures (Article 22) was clarified so as to provide "[s]uch interim measures may be established in the form of an interim award." See UN Doc A/CN.9/97/Add. 2, reprinted in VI *UNCITRAL Yearbook*, 182, 184 (1975). This clarification contained in the revised draft (Article 23). See UN Doc A/CN.9/112 reprinted in VII *UNCITRAL Yearbook* 157 (1976). The UNCITRAL Secretariat's comment on Article 23 is noteworthy: "In order to facilitate the enforcement of interim measures taken by the arbitrators ... [this Article] authorizes the arbitrators to establish these measures in the form of interim awards." See Van Hof, 176.

the choice of an arbitral tribunal on the form is subject to the applicable law.

4.3 Provisional Measures in Case of Extreme Urgency After the Appointment of Arbitrators

After the appointment of arbitrators, in cases of urgency (e.g. where there is a need for an *ex parte* measure), an arbitrator may issue an order and then if necessary incorporate it into an award.¹⁵⁶ The benefits of this approach are the satisfaction of speed and enforceability concerns and its being “a strong reminder to the disobedient to comply with the tribunal’s previous decision.”¹⁵⁷ Temporary restraining measures could also serve the similar purpose. The Iran US Claims Tribunal uses these measures. The Tribunal adopted the concept of “temporary restraining measures” as

[a]nalogous to the temporary restraining order of American procedural law, ... pending further determination of a request for interim measures.¹⁵⁸

The temporary restraining measures may be used either because a member of tribunal may not be reached in time

or because the panel wished to reserve its final decision on the interim measures request until after it received comments from the party against whom interim measures were sought. In this way temporary restraining measures reduce the urgency of the tribunal’s rendering its final decision on the interim measures

¹⁵⁶ See, e.g., ICC Interim Award 8879 of 1998, extracts published in 11(1) ICC Int’l Ct Arb Bull 84 (2000).

¹⁵⁷ Lew, Commentary, 28.

¹⁵⁸ Brower, 180. Brower further indicates:

In various municipal systems “interlocutory relief is granted within weeks, days or even hours of the threatened detriment and this is anticipated in the procedure by which it is granted in most jurisdictions”. ... Such speed of deliberation cannot be assumed in international claims litigation, however.

Concurring Opinion of Charles N. Brower to Component Builders, Inc. et al. v. Iran, Case No. 395, Order (10 January 1985), reprinted in 8 Iran-US CTR 3, 6 (“Concurrent Opinion of Charles Brower”). Judge Brower cited to Jerome Elkind, *Interim Protection, A Functional Approach* (The Hague: The Martinus Nijhoff 1981), 191. It is stated, in this respect, that “only where there is a specific and compelling need will the Tribunal grant a request for interim measures prior to receiving the views of the opposing party.” Brower / Brueschke, 224.

request, and the time necessary to fully and properly consider the request gained.¹⁵⁹ (Citations omitted.)

On the source of the power to grant temporary restraining measures under the practice of the Iran-US Claims Tribunal, it is argued that such power is either “inherent” or that Article 26(1) of the UNCITRAL Arbitration Rules,¹⁶⁰ by implication, “encompasses a power to order temporary restraints.”¹⁶¹ This approach should be taken as example for arbitrations taking place under other arbitration rules. The power to issue a temporary restraining measure may be given to or exercised by the chairman of an arbitral tribunal if the applicable laws and rules permit it or, indeed, do not prohibit it.

The temporary restraining measures have, in the practice of the Iran-US Claims Tribunal, taken the form of either orders or interim awards.¹⁶² However, such measures in arbitration should not be granted in the form of an award as such form may be used after hearing the opponent. The requirements to grant temporary restraining measures are more or less similar to those for granting any provisional measure. These requirements are the existence of *prima facie* jurisdiction, urgency, and threat to prejudice the rights in dispute.¹⁶³ On the determination of the *prima facie* jurisdiction, the claimant should

¹⁵⁹ Caron, Interim Measures, 482-483. See also Pellonpää / Caron, 447; and The Government of the United States of America on behalf and for the benefit of Teledyne Industries Incorporated v. Iran, Case No. 10812, Order (8 September 1983), reprinted in 3 Iran-US CTR 336-337 (holding that urgency is an essential element on the grant of the order to stay of the parallel court proceedings pending the Tribunal's decision on the basis of the parties' views).

¹⁶⁰ See, alternatively, Article 26 of the Iran-US Claims Tribunal's Rules.

¹⁶¹ Pellonpää / Caron, 448; and Caron, Interim Measures, 484.

¹⁶² For examples on each category, see, e.g., Caron, Interim Measures, 483, note 52.

¹⁶³ See in this respect, Brower, 181; and also Concurring Opinion of Charles Brower, 7-8. See also Shipperside Packing Co. v. Iran, Interim Award No. ITM 27-11875-1 (6 September 1983), reprinted in 3 Iran-US CTR 331 (grant of a measure of temporary restraint upon threat to sell goods forming the subject matter). Although urgency is not expressly mentioned in any of the awards, it is, in principle, an essential element for granting any provisional measure. On the issue of urgency, see Chapter IV, *supra* Part 3.I.3.

take advantage of the benefit of doubt.¹⁶⁴ For the satisfaction of the other conditions, Caron suggests that the benefit of doubt should be used in favour of granting it; for instance, “temporary restraining measures may be granted unless there is a manifest lack of prejudice.”¹⁶⁵

Both parties do not need to be heard for granting temporary restraining measures as *inter partes* proceedings would undermine the purpose of employing such measures.¹⁶⁶ However, the respondent needs to be heard in a subsequent hearing.¹⁶⁷

5 Duration of Provisional Measure

An arbitral jurisdiction has a temporal element. An arbitral tribunal is empowered to issue a measure, after its formation, upon the commencement of proceedings,¹⁶⁸ “during the course of proceedings,”¹⁶⁹ or “at any stage of proceedings.”¹⁷⁰ The tribunal has no authority to issue a provisional measure once it becomes *functus*

¹⁶⁴ Pellonpää / Caron, 448; and Caron, Interim Measures, 484. See also Brower / Brueschke, 225-226.

¹⁶⁵ Caron, Interim Measures, 484.

¹⁶⁶ See *id.*

¹⁶⁷ See Chapter IV, *infra* Part 8.

¹⁶⁸ See, e.g., Section 21 of the Arbitration Rules of the Court of Arbitration of the Slovak Chamber of Commerce and Industry.

¹⁶⁹ See, e.g., Article 31 of the Arbitration Rules 1999 of the Arbitration Institute of the SCC.

¹⁷⁰ See, e.g., Article 38 of the Arbitration Rules 1998 of the NAI. In fact, a request for a provisional measure could, in principle, be made at any time before the final award is rendered. That is true regardless of the fact that whether or not the resolution of that measure is contained in the terms of reference. At the post-award stage, a provisional measure may be obtained, if necessary, from the competent national court prior to the recognition or enforcement of the award. In this regard, it should be noted that Article VI of the New York Convention provides for stay of an arbitral award’s execution. According to that Article, if a request for setting aside or suspension of an arbitral award is made to a judicial authority, this authority “may, if it considers it proper, adjourn the decision on the enforcement of the award” and may also, upon application, order the party in whose favour the enforcement is stayed to provide “suitable security.” The stay of enforcement, at the post-award stage, may also be requested under Article 50(2) of the ICSID Convention where a request is made for interpretation, revision or annulment of an arbitral award. See Articles, 50(2), 51(4), and 52(5) of the ICSID Convention.

officio. The duration of a measure should normally be that of the arbitral proceedings.¹⁷¹ The effect of an interim measure of protection could possibly extend further to cover uncertainty during the time when a deadline runs out for filing an action to set aside the final award.¹⁷²

6 Revision Reconsideration Modification or Revocation

Provisional measures, as the term suggests, are intended to have a provisional effect pending final resolution of the case in dispute. These measures are not, in principle, intended to have a *res judicata* effect in the conventional sense.¹⁷³ The provisional effect of the measure may be finalised or revoked either prior to or in the final award. The final award could contain a ruling reiterating the earlier provisional measure or amending or revoking such measure.¹⁷⁴ However, even prior to the issuance of the final award, under changed circumstances or in accordance with new facts, a need may arise to amend, revise, reconsider, modify, or revoke the provisional measure previously granted. In such cases, the form of the measure becomes the focal point for determining whether such revision or revocation could be made. If the decision takes the form of an order or any other form but

¹⁷¹ In this respect, see Rule 39(4) of the ICSID Arbitration Rules. Note D to the 1968 ICSID Arbitration Rules also provided: "[t]he measures recommended must be 'provisional' in character and be appropriate in nature, extent and duration to the risk existing for the rights to be preserved." See 1 ICSID Rep 100. These Notes accompany to the 1968 Rules and they aim at providing explanations with regard to the Rules but they, themselves, do not have a legally binding force. However, ICSID tribunals may take these Notes into account. See, e.g., Lalive, 133, note 2. See also Bucher / Tschanz, para. 178 (stating that a provisional measure "ceases to be effective" upon the issuance of the final award).

¹⁷² Karrer, Less Theory, 102.

¹⁷³ Id., 109. See also Chapter IV, *supra* note 140 and accompanying text.

¹⁷⁴ The submission that an arbitral tribunal could have a physiological difficulty in amending or revoking its earlier decision for an interim measure of protection is misconceived. See Karrer, Less Theory, 109. The tribunal, like a state court, should have and, indeed, has, no difficulty in recognising the fact that its earlier decision on the measure given without full examination on the merits (basing on limited facts and under time pressure) and, thus, such examination could result in a further decision or a final award substantially different from the earlier decision. Id. See also ICC Interim Conservatory Award 10021 of 1999 where the tribunal

an award, there is no objection for reconsideration or modification of the decision. However, if the measure issued in the form of an award, then modification or reconsideration becomes troublesome.¹⁷⁵

As to the revision or revocation of orders or other forms of decisions (but awards) on provisional measures, certain arbitration rules give express permission for such revision or revocation.¹⁷⁶ A number of tribunals exercised their authority to either revise or revoke their orders on interim measures of protection or accepted the possibility of such revision or revocation. For instance, in *Iran v. United States, Cases A-4 and A-15*, the Iran-US Claims Tribunal denied, in an order, the request for preventing the auction of the goods, which constitute a part of the subject matter of the dispute.¹⁷⁷ In its order, the Tribunal stated:¹⁷⁸

expressly indicated that the decision may be different in amended or revoked the final award (unpublished).

¹⁷⁵ Caron, *Interim Measures*, 513-514.

¹⁷⁶ See Article 19 of the Rules for International Arbitration 1994 of the AIA, and Rule 39 of the Arbitration Rules of the ICSID, and Article 47 of the ICSID Additional Facility Rules. It is further worthwhile to note Rule 7(11) of the Arbitration Rules 1997 of the SIAC. This Rule provides that "[a]n order for provisional relief may be confirmed, varied or revoked in whole or in part by the arbitrator who made it or any other arbitrator who may subsequently have jurisdiction over the dispute to which it relates." Similarly, decisions of the ICJ on provisional measures could be modified or revoked where "some changes in the situation justifies" so. Article 76(1) of the ICJ Rules. In this regard, see also Sino-Belgian Treaty case (Belgium v. China), 1927 PCIJ Reports, Ser. A, No. 8, 9 (Order of 15 February 1927) (where the tribunal revoked its earlier order). The revision and revocation were expressly permitted under the ICC Arbitration Rules 1923. See *supra* Chapter I, Part 1.2.1.

¹⁷⁷ Cases Nos. A-4 and A-15, Order (18 January 1984), reprinted in 5 Iran-US CTR 112-114. See also Order of 1999 in AAA Case No. 507181-0014299 (preserving, where a request for interim measure is denied, the right to re-present the request in case "a substantial change of facts may cause irreparable harm to" the moving party's business.) (unpublished). Similarly, in accordance with Rule 39(3) of the ICSID Arbitration Rules, an ICSID tribunal "may at any time modify or revoke its recommendation." Such modification or revocation could generally be done where there are new circumstances justifying them. In this regard, Schreuer states that "[i]f the circumstances requiring the provisional measures no longer exist, the Tribunal is under obligation to revoke them". Schreuer, Article 47, 231, para. 48. In this regard, see also *supra* Chapter II, note 274. Apparently, the determination of the existence or non-existence of the circumstances is within the sole discretion of the Tribunal.

¹⁷⁸ Cases Nos. A-4 and A-15, Order (18 January 1984), reprinted in 5 Iran-US CTR 114. However, one should keep in mind that this case was between two states.

The Tribunal holds that the circumstances, as they now present themselves to the Tribunal, are not such as to require the exercise of its power to order the requested interim measure of protection. The Tribunal notes that this decision not to exercise its power does not prevent the Party which has made the request from making a fresh request in the same case based on new facts.

Indeed, within thirteen days from the above decision, the claimant made another request based on the new facts. The Tribunal accepted that the items of the property are irreplaceable, as a result, granted the measure requested.¹⁷⁹

With respect to revision or revocation of an award on a provisional measure, it should be noted that an ordinary award normally has a *res judicata* effect.¹⁸⁰ Accordingly, its revocation and revision could only be done under very restricted circumstances.¹⁸¹ However, an award for interim protection of rights may need to be revised or revoked under the changed circumstances, in accordance with new facts, or if the term of it is expired or perhaps in the final award.¹⁸² As indicated above, although the reconciliation of such revision or revocation with *res judicata* effect of an award is a matter for the applicable law, it is beneficial to have the form of an award on interim protection of rights within armoury of an arbitral tribunal.¹⁸³ In such cases, where a provisional measure previously issued is revised or revoked due to, for

¹⁷⁹ Interlocutory Award No. ITL 33-A-4/A-15(III)-2, (1 February 1984), reprinted in 5 Iran-US CTR 131-133.

¹⁸⁰ See Chapter IV, *supra* note 135-136 and accompanying text.

¹⁸¹ An award is generally corrected in such limited circumstances, e.g. where there is clerical, typographical or computation errors or where there is a need to interpret specific point or part of the award. On the issue of correction or interpretation, see, e.g., Article 30 of the AAA-ICDR Arbitration Rules; Article 29 of the ICC Arbitration Rules; Article 27 of the LCIA Arbitration Rules; Articles 35-37 of the UNCITRAL Arbitration Rules; Article 66 of the WIPO Arbitration Rules; and Article 33 of the Model Law.

¹⁸² See Caron, *Interim Measures*, 515. The circumstances that has already considered in full should not be a cause for reconsideration or revocation unless, for instance, the earlier measure is granted *ex parte*. *Id.* On *ex parte* measures, see Chapter IV, *infra* Part 8.

¹⁸³ See Chapter IV, *supra* notes 142-143, 134 and accompanying text.

example, changed circumstances, the effect of such measure, in part or in full, should cease to exist from the point of revision or revocation.¹⁸⁴ To this end, it should be noted that the arbitral tribunal should, within the text of the new measure or perhaps, most probably, in the final award, take into consideration any adverse effect of the measure revised or revoked. That is to say damages could be granted possibly out of a security.¹⁸⁵

The possibility of revision or revocation of an award on provisional measures is confirmed in arbitral practice. For instance, in *Behring International, Inc. v. Iranian Air Force*, the Iran-US Claims Tribunal, after issuing an award on security for costs of the measure issued, retained the jurisdiction to “revise or supplement” its decision.¹⁸⁶

Similarly, in ICC case 10021, the tribunal ruled, in an interim conservatory award, that the award should stay in force for a certain period of time unless, *inter alia*, the final award was issued prior to the end of that period.¹⁸⁷ The interim conservatory award was based on the tribunal’s assumption that the final award would be rendered within that period of time. However, the tribunal could not render its award within such period. Upon the claimant’s request, the tribunal rendered a partial award in which it was held that the award on conservatory measures was remained to be in force for a further period of time.¹⁸⁸

¹⁸⁴ See Chapter IV, *supra* note 141.

¹⁸⁵ This is, indeed, one of the reasons justifying the grant of a security for damages.

¹⁸⁶ Case No. 382, Interim Award No. ITM 46-382-3 (22 February 1985), reprinted in 8 Iran-US CTR 44, 48. Similarly, in *Fluor Corporation*, after denying the request for a provisional measure in an interim award, the Tribunal held that such denial “is without prejudice to the Respondent renewing its request ... in the event of change in the ... circumstances.” *Fluor Corporation v. Iran*, Case No. 333, Interim Award No. ITM 62-333-1 (6 August 1986), reprinted in 11 Iran-US CTR 296, 298. See also *Boeing Company v. Iran*, Case No. 222, Interim Award No. ITM 38-222-1 (25 May 1984), reprinted in 6 Iran-US CTR 43, 46.

¹⁸⁷ Interim Conservatory Award 10021 of 1999 (unpublished). On this award, see Chapter IV, *infra* note 197 and accompanying text.

¹⁸⁸ ICC Partial Award 10021 of 2000 (unpublished).

The tribunal facilitated this extension by specifically amending in the partial award the relevant terms of the interim conservatory award.

7 Types of a Measure

Unlike laws of a certain small number of states,¹⁸⁹ arbitration rules do not generally clarify the types of provisional measures that could be granted by arbitrators.¹⁹⁰ Indeed, eighteen out of the seventy-two rules surveyed empower tribunals to take “any” or “all” appropriate interim measures.¹⁹¹ The reference to “any” or “all” provisional measures gives a wide discretion to arbitrators in determining the appropriate measure.¹⁹² The benefit of discretion is the ability of arbitrators to issue

¹⁸⁹ See, e.g., Sections 38 & 39 of the EAA 1996; and Section 2GB of the Hong Kong AO.

¹⁹⁰ For an exception, see, e.g., Rule 25 of the Arbitration Rules 1997 of the SIAC. For a long period of time, arbitration rules referred to measures aimed at protection of goods / merchandise in question. The reference was related to the fact that those rules were prepared for resolving disputes in relation to sale of goods transactions. See, generally, *supra* Chapter I. It is noteworthy, in this regard, that arbitrating parties can determine the measures that would be granted by the arbitral tribunal in their tailor-made arbitration rules although such express determination rarely occurs.

¹⁹¹ See Annex. Some of the examples given, in this respect, are preservation of goods or property (by ordering that the goods be deposited with a third person or that perishable goods be sold), preserving evidence, appointment of an expert for a survey, injunctive relief, preventing dissipation of assets, security for costs, and security for payment. See, e.g., Article 7(8) of the Arbitration Rules 2000 of the CIA; Article 28 of the Arbitration Rules 1993 of the Court of Arbitration at the Bulgarian Chamber of Commerce; and Article 8(2) of the Rules of Arbitration and Appeal of the GAFTA. Article 26 of the UNCITRAL Arbitration Rules refers to the conservation of goods, ordering their deposit with a third person or the sale of perishable goods, which are only examples. See, in this regard, e.g., Sanders, *Commentary*, 196; Baker / Davis, 133; and *E-Systems, Inc. v Iran*, Case No. 388, Interim Award No. ITM 13-388-FT (4 February 1983), reprinted in 2 *Iran-US CTR* 51, 60. Some more examples could be added: an arbitral tribunal

may, instead of ordering the goods to be deposited with a third party, order them transferred to a more appropriate storing facility or even take temporary control over them itself. The possibility of utilizing third party depositories is not restricted to “goods;” funds (represented, e.g., by a letter of credit) may be placed to in escrow as an interim measure. (Citations omitted)

Pellonpää / Caron, 444. With respect to types of arbitral provisional measures granted, for instance, in ICC arbitration practice, see Lew, *Commentary*, 29. In addition, arbitral tribunals are generally empowered to collect evidence. See Chapter IV, *infra* note 202 and accompanying text.

¹⁹² See, in this respect, Lew / Mistelis / Kröll, para. 23-3 (indicating that “[w]hat interim measures are appropriate in international commercial arbitration is determined according to the specific facts of each dispute and the arbitrators’ subjective

flexible measures that could never be granted by a court operating under the constraints of a national law.¹⁹³ Having such wide discretion, the tribunal may order any measure available under *lex arbitri*, *lex causae*, or *lex executionis* (law of the forum where the measure is likely to be enforced). However, the tribunal is not generally restricted with the types of measures available to a judge. The tribunal may issue any measure that is usually granted in international arbitration practice. In sum, an arbitral tribunal's armoury includes variety of provisional measures and the tribunal is much more flexible in choosing the most appropriate kind of measure than a state judge.

Certain restrictions may, however, be imposed on the tribunal's discretion in respect of types of measures. In this regard, mandatory rules of the applicable law may need to be observed.¹⁹⁴ To confirm

perception of the risks involved.”). In using their wide discretion, arbitrators occasionally refer to procedural law of the seat of arbitration (as the law applicable to arbitration) in practice. See ICC Second Interim Award 7544 of 1996, extracts published in 11(1) ICC Int'l Ct Arb Bull 56-60 (2000); and ICC Interim Awards 8670 of 1995 and 1996 (unpublished) (in both cases the arbitral tribunals mainly applied the principles of the law of the place of arbitration in reaching the conclusion that security for payment was available under the ICC Arbitration Rules 1988 despite the fact that the Rules were thought not to regulate this kind of security). See also, for the extracts from the decision of the arbitral tribunal in *Sperry International*, *Sperry International Trade, Inc. v. Israel*, 689 F2d 301 (2d Cir. 1982). It should be noted that arbitrators should not restrict themselves with the measures available at the seat of arbitration provided that the measure is intended to have effect at the seat. The seat is often a neutral place in international commercial arbitration. Arbitrating parties and the subject matter may have no connecting element with the seat. Karrer, *Less Theory*, 109. Further, even if the measure is intended to have effect at the seat and elsewhere, it should be kept in mind that measures not available in the form granted under the local law may still be enforceable in some countries, e.g., Germany with some adaptations. *Id.* See also *infra* Chapter V, Part 3.2.1; and Berger, *International Economic Arbitration*, 339 (stating that “the arbitrators are not limited to the remedies known in the procedural law of the country of the seat.”).

¹⁹³ See, in this regard, Craig / Park / Paulsson, *ICC Arbitration 2000*, 462-63 (stating that an arbitral tribunal has “an obligation to try to find an equitable and commercially practicable procedural solution to prevent irreparable and unnecessary injury to the parties.”).

¹⁹⁴ See, Lew, *Commentary*, 29. The observation of, for instance, the *lex arbitri* is necessary for upholding the measures' validity (particularly if it is an award) whereas that of the *lex executionis* (if known) is important if the enforcement of the measure will be sought.

this, it should be noted that arbitral tribunals would not grant measures that are beyond their powers due mainly to consensual nature of arbitration.¹⁹⁵ For instance, tribunals may deny requests for a *Mareva*-type injunction,¹⁹⁶ an attachment,¹⁹⁷ or a post award attachment¹⁹⁸. Further restrictions may arise from the text of the rules incorporated in their agreement by contracting parties. For instance, Article 26 of the UNCITRAL Arbitration Rules restricts the type of measures that may be granted to “the subject-matter in dispute.”¹⁹⁹ The Model Law too

¹⁹⁵ Also because arbitrators do not wish to be in conflict with *lex arbitri* or law of place of enforcement. That is to say that where those laws empower arbitrators to grant, for instance, measures against third parties or measures that intrinsically require the use of coercive powers, arbitrators are likely to grant those measures. But see Karrer, *Less Theory*, 106. He argues that whether or not an arbitrator can grant, for instance a *Mareva* injunction is a matter of comity. *Id.* But see *supra* Chapter II, note 100.

¹⁹⁶ ICC Interim Award 6251 of 1990 (unpublished) (holding that the tribunal does not have the authority to issue a *Mareva* injunction.). Indeed, it is stated that *Mareva* or *Anton Piller* relief requires the use of draconian powers which “are best left to be applied” by judiciary. 1996 DAC Report, para. 201. But see Lew / Mistelis / Kröll, paras. 23-47 – 23-51. Apparently, the reason for not equipping arbitrators with such powers is more political than philosophical. See Karrer, *Less Theory*, 106.

¹⁹⁷ ICC Partial Award 10021 of 2000 (unpublished) (finding “it inappropriate to grant requests of attachment where the power of national courts would be a prerequisite.”). See, e.g., Berger, *International Economic Arbitration*, 341 (attachment, as a coercive remedy, is reserved to jurisdiction of judicial authorities.). See also Article 1696(1) of the Belgian Judicial Code.

¹⁹⁸ ICC Final Award 7828 of 1995 (unpublished) (holding that “[i]t exceeds the arbitrator’s competence to subject the Defendant to attachment if he fails to pay the ordered amount within the period of two weeks.”)

¹⁹⁹ Further, several of the rules surveyed contain similar or other kind of restrictions. See, e.g., Article 21 of the AAA-ICDR Arbitration Rules (“including injunctive relief and measures for the protection or preservation of property.”); Article 35 of the Securities Arbitration Rules 1993 of the AAA (“including measures for conservation of property, without prejudice to the rights of the parties or to the final determination of the dispute.”); Article 10(2) of the Arbitration Rules 1995 of the AFMA (“[s]uch interim measures may include but not need to be limited to measures for the conservation of the rights, funds, goods or materials forming the subject matter in dispute; ordering deposit of disputed rights, funds, goods or materials with a third person or organization; or the freezing of prints or other motion picture materials to prevent further exploitation or utilization of a picture or other materials during the pendency of the proceedings.”); Article 52 of the Arbitration Rules 1986 of the Center for Conciliation and Arbitration of the Chamber of Commerce, Industry and Agriculture of Panama (“including measures for the preservation of the goods forming the subject matter in dispute, such as ordering that the goods be deposited with a third person or that perishable goods be sold”); Article 34 of the Rules of International Arbitration 1992 the Croatian Chamber of Commerce (“including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third

contains almost identical restriction: an interim measure needs to be related to the “subject matter of the dispute.” These limitations should generally be interpreted broadly: the restriction should be related to the subject matter of the rights in dispute.²⁰⁰ In any case, the tribunal’s jurisdiction is limited to the parties involved and the remedy that it could grant in the final award.²⁰¹

This part examines the types of measures regularly seen in arbitral practice: measures concerning preservation of evidence, injunctions, security for payment, security for costs, and provisional payment.

person or the sale of perishable goods”.); Rule 13 of the Non-administered Arbitration of International Disputes 1992 of the CPR Institute for Dispute Resolution (“including measures for the preservation of assets, the conservation of goods or the sale of perishable goods”.); Article 27 of the Arbitration Rules of the European Development Fund (“including measures for the conservation, preservation or safe-custody of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable good”.); Article 27 of the Arbitration Rules 1994 of the Geneva Chamber of Commerce (the “GCC”) Commercial Arbitration Centre (including the measures for preservation of the contentious goods, such as ordering the deposit of the goods with third parties or the sale of the perishable goods with third parties or the sale of the perishable items thereof in compliance with the procedural rules in the country where the interim measure is adopted”.); and Article 46 of the WIPO Arbitration Rules 1994 (“including injunctions and measures for the conservation of goods which form part of the subject matter in dispute, such as order for their deposit with a third person or for the sale of perishable goods”). See also Article 7(11) of the Arbitration Rules 2000 of the CIA; Articles 40 of the Arbitration Rules 1983 of the Korean Commercial Arbitration Board; Rule 25 of the Arbitration Rules 1997 of the SIAC; and Articles 27 of the UNECE Arbitration Rules 1966.

²⁰⁰ See *supra* Chapter II, note 113. However, It is submitted that whether a tribunal operating under the above rules or the Model Law could grant a measure aim at preserving the *status quo* is “doubtful”, and security for claim. Redfern / Hunter, para. 7-26. Such argument could not be made in regard of the restriction contained, for example, under Article 25(1)(c) of the LCIA Arbitration Rules. The tribunal is, under these Rules, empowered to order “any relief which the [a]rbitral [t]ribunal would have power to grant in an award” See also *Charles Construction Company v. Derderian*, 586 N.E.2d 992 (Mass. 1992) (denying an argument that an arbitrator has the power to grant a security for claim where the arbitration agreement empowered arbitrators with the power to grant interim relief to safeguard the property that is the subject matter of the arbitration.).

²⁰¹ See, e.g., Section 39(1) of the EAA 1996.

7.1 Measures Concerning Preservation of Evidence

Preservation of evidence on an interim basis is generally sought where there is a risk that the evidence will be harmed or perished, if an urgent measure is not taken. The aim for such preservation is to facilitate proper conduct of arbitration. The arbitral power to preserve evidence is recognised under nearly all arbitration rules and laws containing a provision on interim measures.²⁰² Such power is exercised with no trouble in arbitral practice.²⁰³

7.2 Injunctions

The term “injunction” refers to asking a person to do or refrain from doing something. In a broad sense, many arbitral decisions are injunctions. Experience demonstrates that arbitrators grant variety of injunctions on, e.g. transfer of goods to another place, sale of goods or stay of the sale, supply of goods, establishing an escrow account to

²⁰² In addition, institutional or *ad hoc* arbitration rules or national laws generally deal with collection of evidence. For instance, under Article 20(1) of the ICC Arbitration Rules, an arbitral tribunal is empowered to establish the facts by all appropriate means. The similar powers are entrusted to an arbitral tribunal in accordance with, e.g., Article 19(3) of the AAA-ICDR Arbitration Rules; Article 23 of the Arbitration Rules 1994 of the CIETAC; Rule 4 of the Rules of Arbitration and Appeal 1997 of the FOSFA; Article 43 of the ICSID Convention and Rule 34 of the ICSID Arbitration Rules; Article 3 of the International Bar Association’s 1999 Rules of Evidence; Article 20 of the ICC Arbitration Rules; Article 22(1)(d)-(e) of the LCIA Arbitration Rules; and Article 24(3) of the UNCITRAL Arbitration Rules. The protection of evidence on an interim basis could be done either by the above provisions or through powers entrusted to arbitrators under the relevant rules or laws for interim protection of rights. The power regarding the collection of evidence is generally used - where there is no urgent need of protection of evidence - for simply establishment of the case in dispute. The benefit of relying on this power is that it is more likely than not that court assistance could be sought for collection of evidence. See, e.g., Article 38(4) of the EAA 1996; Article 27 of the Model Law; Articles 184(2) and 185 of the SPIL; and Section 7 of the U.S. Federal AA 1925. It should, however, be noted that an arbitral tribunal, in principle, ought to be free to rely on whatever power it thinks effective to protect the evidence in peril.

²⁰³ See, e.g., *Behring International, Inc. v. Iranian Air Force*, Case No. 382, Decision (19 December 1983), reprinted in 4 Iran-US CTR 89 (appointing an expert for determining the status of the goods that were deteriorating.); and *AGIP v. Congo*, cited in *Award*, 30 November 1979, 1 ICSID Rep 311 (recommending the collection of all books and documents that might be lost.). But see, e.g., *Vacuum*

hold proceeds of a letter of credit, preserving or changing the *status quo*,²⁰⁴ and anti suit injunctions. An injunction may be coupled with a fine. To illustrate the arbitral case law, for instance, in *Behring International, Inc. v. Iranian Air Force*,²⁰⁵ upon the request of transfer of goods to another warehouse due to possibility of deterioration, the Iran US Claims Tribunal held, *inter alia*, that

the Respondents' property must be removed from [the claimant's warehouse facility] ... in order to prevent unnecessary damage and/or deterioration. The conditions under which the goods are presently stored are inadequate to conserve and protect them and irreparable prejudice to Respondents' asserted rights may result if they are not transferred to a more appropriate facility.²⁰⁶ (Citation omitted.)

In addition, in two cases, the Iran-US Claims Tribunal granted the request for sale of the goods in dispute,²⁰⁷ though, for example, in two other cases, it denied similar requests by mainly relying on the respondents' undertakings.²⁰⁸ Similarly, with respect to the stay of sale

Salt v. Ghana (denying the request for preservation of evidence because of the respondent's undertaking.).

²⁰⁴ The preservation of *status quo* may sometimes be vital as in certain cases an award of damages cannot fully remedy the loss of a party. For instance, damage to reputation, loss of business opportunities and similar heads of claim, which are real enough but difficult to prove and to quantify ..." may be avoided through provisional measures. Redfern / Hunter, para. 7-25.

²⁰⁵ Case No. 382, Interim and Interlocutory Award No. ITM/ITL 52-382-3 (21 June 1985), reprinted in 8 Iran-US CTR 238. See also, e.g., Iran v. The United States of America, Case A-15, Dec. No. Dec 52-A/15-FT (24 November 1986), reprinted in 13 Iran-US CTR 173-175.

²⁰⁶ Case No. 382, Interim and Interlocutory Award No. ITM/ITL 52-382-3 (21 June 1985), reprinted in 8 Iran-US CTR 276. However, the Iran US-Claims Tribunal, by recognising the possibility that the claimant might have a warehouseman's lien over the goods in dispute, granted forty-five days to the claimant to apply to a court in the U.S. for establishing measures protecting its security interest. *Id.*, 282.

²⁰⁷ See *Behring International, Inc. v. Iranian Air Force*, Case No. 382, Award No. ITM 25-382-3 (21 June 1985), reprinted in 3 Iran-US CTR 173-175 (holding that, under Article 26 of the Tribunal Rules, the Tribunal is authorised to grant the stay of sale of goods); and *U.S. (Shipside Packing) v. Iran*, Case No. 11875, Interim Award No. ITM 27-11875-1 (6 September 1983), reprinted in 3 Iran-US CTR 331 (ordering the claimant to halt the proposed sale of goods in dispute).

²⁰⁸ See *Avco Corporation v. Iran*, Case No. 261, Partial Award No. 377-261-3 (18 July 1988), reprinted in 19 Iran-US CTR 200, 201-202; and *United Technologies Int'l, Inc. v. Iran*, Case No. 114, Dec. No. 53-114-3 (10 December 1986), reprinted in 13 Iran-US CTR 254-260. See also, in this regard, *Iran v. United States*, Case A/15,

of goods, in *Iran v. United States, Cases, A-4 and A-15*,²⁰⁹ the claimant made a request from the Tribunal to enjoin the respondent “from auctioning movable properties of Iran’s Embassy and Consulates in the United States”. The Tribunal ordered the respondent

to take all necessary and appropriate measures to prevent the sale of Iran’s diplomatic and consular properties in the United States which possess important historical, cultural, or other unique features, and which, by their nature, are irreplaceable.²¹⁰

In regard of supply of goods, in an AAA case,²¹¹ a dispute arose from various agreements and their amendments concerning exclusive consignment for the storage, marketing and sales of certain surplus parts. The issue in dispute was mainly whether those agreements were rescinded. The sole arbitrator was asked to rule on the destiny of the parts, which were in the possession of the respondents until the issuance of the final award. The arbitrator ordered, *inter alia*, that the respondent should not make or offer to make any sales of the parts without the express permission of the claimant. The respondent was permitted to submit proposals for the sales of goods and the claimant was ordered not to unreasonably withhold or delay its permission to the proposed sales. The aims of such order seem to be the continuation of the respondent’s business until the final award is rendered and also the protection of the claimant’s benefit by subjecting the sales of the parts to its permission, which could not be unreasonably withhold. The arbitrator also kept track of the sale mechanism created by him by

Dec. No. 35-A/15(II)-FT (5 March 1985), reprinted in 8 Iran-US CTR 63-64 (holding that the denial was based on the fact that the request became moot.)

²⁰⁹ Case Nos. A-4 and A-15, Interlocutory Award No. ITL 33-A-4/A-15(III)-2 (1 February 1984), reprinted in 5 Iran-US CTR 131-133. See also ICC Interim Conservatory Award 10021 of 1999 (unpublished) (ordering a party to refrain from, on an interim basis, selling encumbering, leasing or otherwise disposing its interests in shares of a company.).

²¹⁰ *Iran v. United States, Case Nos. A-4 and A-15*, Interlocutory Award No. ITL 33-A-4/A-15(III)-2 (1 February 1984), reprinted in 5 Iran-US CTR 133.

²¹¹ Order No. 5 of 1998 in AAA Case No. 13T153-00870197 (unpublished).

ordering the supply of information concerning the proposals and the permissions.

As regards establishing an escrow account, in *Sperry International Trade, Inc. v. Government of Israel*, an AAA tribunal ordered, where Israel was trying to withdraw the letter of credit given in its favour, that the proceeds of the letter of credit was to be held in an escrow account in the joint names of Israel and Sperry.²¹²

With respect to preserving or changing *status quo*,²¹³ it is noteworthy that an arbitral tribunal should carefully consider contractual and statutory rights of contracting parties; for instance, what risk allocation is envisaged²¹⁴ or what rights a party have under the applicable law.²¹⁵ Further, an applicant should not be permitted to rely on arguments that are or should have known by it at the time of entering into arbitration agreement.²¹⁶ For instance, in ICC case 5835, the tribunal ruled:²¹⁷

The fact that the Defendant is a company with a relatively small capital and small assets, and that its balance sheet for the year [X] showed a deficit, should normally have been investigated by the Claimant when he signed the [agreement]. Likewise, the Claimant also should have known, that the Defendant's balance sheet for the [next year] showed a higher deficit. The Claimant also knew of the terms and dates of payment by [Claimant] to the Defendant.

²¹² See *Sperry International Trade Co. v. Government of Israel*, 689 F 2d 301, 303, note 2 (2nd Cir. 1982).

²¹³ For instance, measures for prohibiting withdrawal of a bank guarantee, selling shares of a company, changing its board of directors, etc.

²¹⁴ On risk allocation, see Chapter IV, *supra* note 92.

²¹⁵ Apparently, as regards the contractual rights, generally, the balance existed between the parties under the agreement should be maintained whereas as regards the statutory rights and remedies, normally, the balance existed at the initiation of arbitration proceedings should be maintained. On the latter, see Cremades, *The Need*, 227.

²¹⁶ A party, for example, cannot argue, if it knew or should have known, that the other party is from or established under the laws of a country that is not a party to major treaties facilitating enforcement of arbitration awards. But see Cremades, *The Need*, 227.

²¹⁷ ICC Second Interim Award 5835 of 1992 (unpublished). On the facts regarding this case, see ICC First Interim Award 5835 of 1988, extracts published in 8(1) ICC Int'l Ct Arb Bull 67 (1997)

Whether or not an arbitrator could grant an anti-suit injunction²¹⁸ is an interesting issue. That is because it, on the one hand, invites the clash of two institutions: judiciary and arbitrators.²¹⁹ On the other hand,

it is highly doubtful whether an arbitral tribunal should be allowed to tell another arbitral tribunal or a state court what to do, or whether it should be allowed to interfere indirectly with the workings of another arbitral tribunal by ordering one of the parties what to do in the other arbitration or litigation.²²⁰

In this regard, it is argued that a tribunal, be it arbitral or judicial, should, in principle, decide on only its own jurisdiction; hence refrain from interfering any other tribunal's decision on jurisdiction.²²¹ However, in case, a party's act is vexatious, the tribunal should be able to order, propose or recommend that party to cease those acts for protection of the other party's rights or prevention of aggravation of the dispute. In other words, if permitted, the tribunal can take a flexible approach. That is because, by agreeing to arbitrate, contracting parties demonstrate their desire of the forum for resolving any possible disputes. Such desire should be upheld. For instance, the ICSID tribunal, in *Holiday Inns v. Morocco*, refrained from directly ordering Morocco to withdraw local court actions taking against the claimant. The tribunal, however, made three recommendations, one of which suggested the withdrawal of court actions. The other two, however,

²¹⁸ For a review of judicial anti-suit injunctions, see, e.g., Lew / Mistelis / Kröll, paras.15-24 - 15-33.

²¹⁹ The courts traditionally have hostility towards arbitrators. See supra Chapter I, Part 2.1. The potential clash is generally resolved by Article 2(3) of the New York Convention. See also, e.g., Article 26 of the ICSID Convention. Domestic laws may too provide for provisions that cause courts or other arbitral tribunals to refer the case to the tribunal validly seized the case in dispute. See, e.g., Article 8 of the Model Law; Section 9 of the EAA 1996. In fact, if a dispute is agreed to be resolved through arbitration, judicial authorities should deny any request to them for the resolution of the dispute and refer the parties to arbitration.

²²⁰ Karrer, *Less Theory*, 106.

²²¹ *Id.*

mainly aimed at remedying the respondent's concerns for court actions.²²²

Injunctions may couple with a fine provided that such fine is permitted under the relevant arbitration agreement²²³ and is not prohibited under the applicable law.²²⁴ Such fine is a penalty payment to prevent disobedience. For instance, in an AAA case, the arbitral tribunal indicated that it could grant a penalty payment in case the injunction granted would not be obeyed.²²⁵ In this case, a dispute arose between the parties with respect to three agreements on assignment, employment and consulting. Upon the claimants' request, the tribunal enjoined, in a partial award, the respondents from, *inter alia*, the use of the claimant's trade name, trademark and know-how. The tribunal in its award refrained from imposing sanctions with the hope that the respondents comply with its directives without the "threat of sanctions". However, the tribunal reserved its jurisdiction to grant any interim measure in case its directives were not complied with. The tribunal expressly indicated that it is within its armoury to sanction the failure to

²²² Decision of Tribunal (2 July 1972). See Lalive, 136-137. See also Wirth, 37 (indicating that, in two unpublished cases, the tribunals granted anti-suit injunctions basing their decisions on the arguments that either by agreeing to arbitrate parties obliged not to seek any relief outside arbitration or confidentiality clause contained in the substantive contract prevented such relief. Wirth, 37. On the issue of comity, see *supra* Chapter II, note 100.

²²³ The power to issue such fine may expressly be contained in the arbitration agreement. Otherwise, the power arises from broad interpretation of the agreement. See, Karrer, *Less Theory*, 105. But see Berger, *International Economic Arbitration*, 341 (stating that the issuance of a penalty payment is "beyond the authority and the mandate of an arbitral tribunal.").

²²⁴ ICC Final Award 7895 of 1994, extracts published in 11(1) ICC Int'l Ct Arb Bull 64-65 (2000) (the tribunal found itself with the power to order an injunction coupled with a fine under the ICC Arbitration Rules 1988 in "the absence of (i) an agreement of the parties to the contrary, and (ii) a mandatory provision of French procedural law requiring otherwise" See also ICC Interim Award 9301 of 1997 (unpublished) and ICC Final Award 9154 of 1998, extracts published in 11(1) ICC Int'l Ct Arb Bull 98-103 (2000). Laws of such countries as Belgium, France, and Netherlands (Article 1056 of the Netherlands AA) seem to recognise the adoption of such arbitral power. Karrer, *Less Theory*, 105. But, for instance, Swedish law too expressly prohibits imposition of fines. Section 25 of the Swedish AA 1999.

comply with its directives by payment of a specified amount for each time period the respondents fail to comply.²²⁶

7.3 Security for Payment

A security for payment or claim is a kind of advance payment guaranteeing for the enforcement of the final award where the applicant proves to be right on the merits of the case in dispute. The power to grant such security generally arises from the broad interpretation of either power given to the tribunal in regard of interim protection of rights or the arbitration agreement.²²⁷ For the grant of security for payment, the moving party needs to demonstrate, *inter alia*, that it is highly likely that the award, if it is rendered in its favour, would not be enforced. For instance, in ICC case 8786, the respondent requested a security for claim by arguing that the claimant would not comply with the award that would be in its favour and the chances of such award's enforcement in State X "are less than slim."²²⁸ The claimant objected to these

²²⁵ Partial Award of 1999 and Final Award of 2000 in AAA Case No. 81.153.002696 (unpublished). The place of arbitration was Nevada, the U.S.

²²⁶ It is noteworthy that the respondents did not comply with the tribunal's directives. The tribunal sanctioned the non-compliance, in its final award; and accordingly, the sanction became a post-award relief. The tribunal ruled that if any of its injunctions as provided in its partial award was not complied with, the respondents were to pay USD 1000 for each day of non-compliance for a period of twenty days.

²²⁷ The arbitration rules surveyed, save for a few, do not generally empower an arbitrator to grant security for payment. For the exceptions, see Article 38(1) of the NAI Arbitration Rules; Article 25(1)(a) of the LCIA Arbitration Rules; and Article 17(1) of the CEPANI Arbitration Rules. In this regard, see also NAI Interim Award No. 1694 (21 December 1996), extracts reprinted in XXIII YCA 97 (1998). For the concept of broad interpretation of arbitration agreement, see, e.g., ICC Second Partial Award 8113 of 1995, extracts published in 11(1) ICC Int'l Ct Arb Bull 65 (2000); and *Lew / Mistelis / Kröll*, para. 23-44. See also *Charles Construction Company v. Derderian*, 586 NE 2d 992 (Mass. 1992) (Massachusetts Supreme Court) (holding that where the arbitration agreement or the applicable law is silent on the power to take security for claim, "the arbitrator's authority to act would be reasonably implied from the agreement to arbitrate itself"). But see *Swift Industries Inc. v. Botany Ind. Inc.* 466 F 2d 1125 (3d Cir. 1972) (holding that "to award [security for claim] as an adjunct to declaratory relief a form of pre-judgement execution which the agreement by its lack of reference to security seems to exclude rather than to intend, is to eclipse the framework of the agreement and to venture on to unprotected grounds.").

²²⁸ ICC Interim Award 8786 of 1996, extracts published in 11(1) ICC Int'l Ct Arb Bull 81-84 (2000). A similar request was denied by another arbitral tribunal on the

arguments. The arbitral tribunal refused the request on the grounds that the applicant “has failed to sufficiently substantiate the existence of a not easily reparable prejudice” and that there was no urgency”.²²⁹ In ICC case 10021, however, the tribunal indirectly complied with the request for security payment. In this case, the claimant requested the tribunal to attach the assets of the respondents. The tribunal, rather than, accepting the request, ordered the respondents mainly to refrain from disposing of the assets in dispute since the power to attach assets would not be within the domain of arbitration.²³⁰ The dispute, in this case, arose from breach of certain agreements including a shareholders agreement concerning a cement company. The claimant made a request for security for claim by arguing that respondents were transferring their shares in the company. The respondents did not deny the claim and made no reasonable explanation about it. Further, the claimant also claimed that apart from its shares in the company, the respondents no longer had sufficient liquid assets enabling them to satisfy a possible award for damages. In fact, the tribunal observed that the respondents refrained from depositing their share of costs and stating real value of their shares or real estate. In addition, the claimant demonstrated to the tribunal that it had certain monetary claims. Under the above circumstances, the tribunal held that the value of the respondents’ shares in the company did not seem to exceed the amount of security requested. Accordingly, the tribunal ordered, the respondents, in an award, not to transfer or in any way dispose of those shares (rather than attaching the respondents’ assets).

ground that the law of the place of arbitration did not provide for security for claim. ICC Final Award 7560 of 1990 (unpublished). See Yesilirmak, *Interim Measures*, 33, note 29.

²²⁹ ICC Interim Award 8786 of 1996, extracts published in 11(1) ICC Int’l Ct Arb Bull 82-83 (2000). The tribunal relied mainly on the requirements set forth under the law of the place of arbitration for the grant of the measure requested. See also NAI Interim Award 1694, extracts reprinted in XXIII YCA 97 (1998).

²³⁰ ICC Interim Conservatory Award 10021 of 1999 (unpublished).

7.4 Security for Costs

Security for costs may be defined as “[p]ayment into court in the form of cash, property or bond by a plaintiff or an appellant to secure the payment of costs if such person does not prevail.”²³¹ Under some national laws, security for costs is referred to as *cautio judicatum solvi*, the duty of an alien claimant to provide security for costs of its defendant.²³²

The issue of security for costs of arbitral proceedings (e.g. legal costs, tribunal’s costs, travelling expenses, etc.) or of arbitrating parties “very occasionally comes up”²³³ and is highly debated. Such security for costs should not “normally” be required in international arbitration.²³⁴ It is rightly argued that a contracting party normally bears, whilst entering into a contract, the risk of having a dispute, which is agreed to be settled in an arbitration.²³⁵ That is because such risk is “the general commercial risk of being engaged in business and trade”.²³⁶ Further, there is and should be no *alien* claimant in international arbitration.

²³¹ *Black’s Law Dictionary*, 6th ed., (St Paul, Minnesota: West Publishing 1990), 1357.

²³² See Sandrock, 17. The examples to those countries where a security for costs may be required in litigation see, e.g., Austria (Article 57 of the CCP); Germany (Article 110 of the CCP); Turkey (Article 32 of the International Private and Procedural Law); and the USA (see, e.g., Noah Rubins, “In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration”, 11(3) *Am Rev Int’l Arb* 307, 327 (2000)). But see Article 17 of the Convention Relating to Civil Procedure, done at the Hague on 1 March 1954, 286 UNTS 265, No. 4173; and Article 9(1) of the European Convention on Establishment of 1955, signed at Paris on 13 December 1955, 1955 UNTS 141, No. 7660.

²³³ Craig / Park / Paulsson, ICC Arbitration 2000, 467.

²³⁴ See, e.g., Blessing, Introduction, para. 886; Redfern / Hunter, para. 7-32 (indicating that arbitrators are unlikely to grant security for costs.); V. V. Veeder, “England” in: Paulsson (gen. ed.), *International Handbook*, Supplement 23 (March 1997), 43 (indicating that an arbitrator’s broad discretion to order security for costs under the EAA 1996 “is likely to be exercised most sparingly where the arbitration is truly international”). Indeed, it is observed that ICC arbitrators “were extremely reluctant to grant” such measures. Craig / Park / Paulsson, ICC Arbitration 2000, 467.

²³⁵ Apparently, where a party becomes successful at the end of arbitration proceedings, the costs would be apportioned in accordance with the applicable rule or law (e.g., costs follow the event, or each party bears its own costs).

²³⁶ Blessing, Introduction, para. 886.

That is because each and every claimant and counter-claimant should be equally distant to the law of the forum where arbitration takes place and indeed because there is no *lex fori* in arbitration.²³⁷ However, in cases where an arbitral tribunal is empowered to grant security for costs, and, under appropriate circumstances, a security for costs may be granted.²³⁸ To this end, there are mainly two issues to examine (i) whether or not the tribunal has the power to grant such security; and (ii) what the appropriate circumstances are.

The power to issue security for costs may derive from arbitration rules²³⁹ or applicable laws²⁴⁰. It is generally accepted that arbitrators should have the power to issue security for costs.²⁴¹ Sixteen of the rules surveyed provide for security for costs of the measure granted.²⁴²

²³⁷ See supra Chapter II, note 103.

²³⁸ See, e.g., Sandroock, 30-37.

²³⁹ Annex.

²⁴⁰ See e.g., SPIL (see, e.g., Wirth, 36 (stating that under exceptional circumstances, e.g., where there is a “clear and present danger” or even where there is a “potential risk” of non-recovery of legal costs, an arbitral tribunal may order security for costs.)); Section 38(3) of the EAA 1996 (stating that, unless otherwise agreed, a tribunal may order security for costs though such order, under that Section, could not be based on the fact that a party is ordinarily resides out of England or that a company or association incorporated under the law of a foreign country or managed or controlled from such country.); Section 2GB(1)(a) of the Hong Kong AO; Section 7(2) of the Ireland AA 1998; Section 12(1) of the Singapore International AA. However, it should be noted that the device of security for costs is unfamiliar to many legal systems. W. Laurence Craig / William W. Park / Jan Paulsson, *Craig, Park & Paulsson’s Annotated Guide to the 1998 ICC Arbitration Rules with Commentary* (Oceana Publications, Inc. 1998), 139 (“Annotated Guide”).

²⁴¹ Craig / Park / Paulsson, *ICC Arbitration* 2000, 467.

²⁴² See, e.g., Article 21 of the Arbitration Rules of the AAA-ICDR; Article 35 of the Securities Arbitration 1993 of the AAA; Article 18 of the Arbitration Rules 1993 of the Board of Arbitration of the Central Chamber of Commerce of Finland; 25(2) of the LCIA Arbitration Rules; Article 38 of the NAI Arbitration Rules; Article 46 (b) of the WIPO Arbitration Rules (under “exceptional circumstances”); and Article 26(2) of the UNCITRAL Arbitration Rules. It is noteworthy, in this regard, that, under Article 25(2) of the LCIA Arbitration Rules, an arbitral tribunal is exclusively (and not a court) empowered to grant security for costs (legal or otherwise). Further, the scope of the security, e.g., whether it covers legal expenses, costs of arbitration, attorney’s fees, remuneration of the tribunal is not generally dealt with under the above rules. See, e.g., Article 7(8)(b) of the Arbitration Rules 2000 of the CIA (provides only for security for costs). But see Rule 11 of the Arbitration Rules 1981

For the remaining arbitration rules that do not contain express provisions on security for costs, the general power to grant a provisional measure should generally be sufficient for the grant of security for costs.²⁴³

None of the rules do set forth what the appropriate circumstances are for the grant of security for costs. It should initially be kept in mind that, in dealing with a request for security for costs, an arbitrator should not hinder access to justice and should treat the parties with equality, e.g. require the moving to provide counter security too.²⁴⁴ Arbitral case law

of the Copenhagen Court of International Arbitration provides “[p]arties to a dispute shall provide security for all expenses of the arbitral proceedings.”

²⁴³ It should be noted, in regard of the power to grant security for costs, that twenty-nine sets of the rules surveyed contain a general provision on the security. According to these rules, the tribunal is generally empowered to ask for appropriate security. The broad interpretation of such rules enables the grant of security for costs by arbitrators. See, e.g., Article 14 of the International Arbitration Rules 1996 of the Chamber of National and International Arbitration of Milan; Article R37 of the Arbitration Rules 1994 of the Court of Arbitration for Sport Arbitration; and Article 23 of the Arbitration Rules 1998 of the ICC. It should be noted, in this regard, that during the preparation of the ICC Arbitration Rules 1998, several suggestions were made to expressly deal with security for costs in the Rules as a result of the founding in the *Ken Ren* decision of the House of Lords. See *Coppée-Lavalin N.V. v. Ken-Ren Chemicals and Fertilizers Limited*, [1995] 1 AC 38, [1994] 2 All ER 499, (1994) 2 WLR 63, [1994] 2 Lloyd's Rep 109. This decision reversed the Court of Appeal's earlier decision in *Bank Mellat v. Helliniki Techniki, S.A.* [1984] Q.B. 291. However, the ICC's "Working Party preferred not to make any specific reference in this respect, but the wording of Article 23 would seem broad enough to allow the making of an application for and the issuing of a ruling by the Tribunal on, the security for costs." See Marc Blessing, "Keynotes on Arbitral Decision Making", in: ICC, 1998 ICC Rules, 44, 44-45. See also, in this regard, Derains / Schwartz, 274, note 622 (stating that "[n]otwithstanding the experience of the *Ken-Ren* cases, those drafting the New Rules were reluctant to mention security for costs expressly because they did not wish to encourage the proliferation of such applications, which, apart from being rare, are generally disfavoured in ICC arbitrations."); Sigvard Jarvin, "Aspects of the Arbitral Proceedings", in: 1998 ICC Rules, 38, 43 (1997); and Craig / Park / Paulsson, Annotated Guide, 139; ICC Final Award No. 7047 of 1994, extracts published in 8(1) ICC Int'l Ct Arb Bull 61 (1997); ICC Interim Award No. 6632 of 1993 (unpublished); and ICC cases cited in the Craig / Park / Paulsson, Annotated Guide, 139.

²⁴⁴ In this regard, see Wirth, 36. Since the moving party generally deposits advance on costs under institutional arbitration rules, an order to deposit further amount in the name of security for costs may have the effect of preventing a commercially weak party to pursue its claims. See Craig / Park Paulsson, ICC Arbitration 2000, para. 26.05; and Lew / Mistelis / Kröll, para. 23-55.

is not generally very helpful in determining the appropriate circumstances.²⁴⁵ It is submitted that, in practice, “arbitrators are unlikely to order security for costs where their eventual award is enforceable under the New York Convention or similar treaty, unless it is shown convincingly that the losing party will almost certainly be unable to meet an award of costs against it [due, for instance, to its insolvency].”²⁴⁶ Such unavailability should be a result of changed circumstances following the entry into force of the parties’ agreement.²⁴⁷ Otherwise, basing on the unavailability to make a claim for security for costs would infringe the principle of good faith.²⁴⁸

7.5 Provisional Payment

Provisional payment is aimed to restore, prior to final adjudication of the merits of the case, an obligation or a right existence of which is not seriously challenged. Provisional payment is not a very typical kind of interim measure of protection. It could even be argued that it is not an interim measure as, for the grant of it, an arbitral tribunal needs to

²⁴⁵ See, e.g., ICC Final Award No. 7489 of 1993, extracts published in (1993) *Clunet* 1078; 8(1) *ICC Int’l Ct Arb Bull* 68 (1997); and Hascher, *Procedural Decisions*, 48 (denying the exercise of the power to grant security for costs by arguing that the application was not “irreconcilable with its ground.”); and ICC Final Award No. 7047 of 1994, extracts published in 8(1) *ICC Int’l Ct Arb Bull* 61 (1997) (denying the request for security for costs mainly because the moving party based its reasoning on the ground that it knew or should have known at the time of entering into the arbitration agreement.). Similarly, in ICC case 6632, upon the raise of the issue of liquidation of the Claimant, the Respondent requested security for costs. The Claimant too made the same request. The Respondent claimed that the Claimant’s liquidation was for the purpose of being judgment proof. The Respondent did not object Claimant’s request for security for costs. It, indeed, expressly offered to provide a security for costs. The Tribunal, under the circumstances of the case, requested from both parties to provide for security for costs. ICC Interim Award 6632 of 1993 (unpublished).

²⁴⁶ Redfern / Hunter, para. 7-32. Whether or not the claimant resides or is incorporated in a place other than the place of arbitration should never be taken into account in granting a security for costs in international arbitration. Section 38(3) of the EAA 1996. Further, contractual arrangement that each party bears its own costs or that each party deposits certain amount of money as an advance to cover the costs may prevent the grant of security for costs. See Craig / Park / Paulsson, *ICC Arbitration* 2000, 467-68.

²⁴⁷ Sandrock, 30.

²⁴⁸ *Id.*

decide, prior to the full adjudication, that the moving party is entitled to a certain amount of money.²⁴⁹ For the purpose of arbitration, provisional measures should be considered as interim remedies, which may be amended or revoked in the final award. For the grant of a provisional payment, it is necessary to establish that an arbitral tribunal is empowered to grant such measure. For instance, in ICC case 7544, an arbitral tribunal found that interim payment on account is not prohibited by the ICC Arbitration Rules where no mandatory provision to contrary existed under the applicable law.²⁵⁰ It should be noted, in this regard, that in another ICC case,²⁵¹ the tribunal ruled that under the circumstances of the case, the grant of provisional payment would be “premature.” Apparently, in this case, the tribunal, by implication, upheld its jurisdiction to grant provisional payment.

Once the jurisdiction is established it is necessary to determine on what grounds a provisional payment may be granted. An ICC tribunal, for example, found that the principles of procedure of the French law principles²⁵² on interim payment on account provide for a useful guidance as the law of the place of arbitration for granting provisional payment in the case before the tribunal.²⁵³ Further, an arbitral tribunal should be very careful for not prejudicing the merits of the case in granting provisional payment. If there is any serious challenge to the right in regard of the provisional payment, the tribunal should refrain

²⁴⁹ See supra Introduction, note 54.

²⁵⁰ ICC Second Interim Award 7544 of 1996, extracts published 11(1) ICC Int'l Ct Arb Bull 56-60 (2000). To this end, it should be noted Section 39(2) of the EAA 1996 expressly permits parties to empower their tribunal with the power to grant security for payment. Even if the *lex arbitri* prohibits the provisional payment such payment may be made in accordance with the *lex causae* or law of the place of enforcement. This approach seems to be adopted by, for example, Swiss law. See Wirth, 35.

²⁵¹ ICC Second Partial Award 5808 of 1994 (unpublished).

²⁵² The tribunal cited Article 809(2) of the French New CCP. This Article provides that where the existence of the obligation cannot seriously be denied, the court may order an interim payment on account.

from granting such payment.²⁵⁴ Even if it grants the measure, the tribunal should seek security for damages in case such measure may prove to be wrong.²⁵⁵

8 *Ex Parte* Measures

Provisional measures are usually granted through *inter partes* proceedings: both the applicant and the respondent are heard in adversarial proceedings. An arbitral tribunal may actually convene and hear parties on a request for a provisional measure. Alternatively, in cases where the convening of the tribunal cannot be awaited (because, e.g. arbitrating parties and arbitrators are from different countries), the parties may be heard, for instance, over a telephone conference²⁵⁶ or a videoconference. Further, in such cases, the parties may, for example in the terms of reference, empower the chairman of the tribunal to grant arbitral provisional measures.²⁵⁷ However, whilst all of the above may facilitate the speedy adjudication of requests for interim protection of rights, there may sometimes be a need, in cases of urgency or where

²⁵³ ICC Second Interim Award 7544 of 1996, extracts published 11(1) ICC Int'l Ct Arb Bull 56-60 (2000).

²⁵⁴ See, in this regard, *id* (after "weighing up the probability as to whether, after the claims and counterclaims have been fully argued before it, the net result will be in favour of" the moving party, the tribunal reached the positive conclusion). However, in ICC case 9984, the arbitral tribunal did not uphold the request for a provisional payment. In this case, the claimant made a request for interim payment of the certain amount of money that is, according to itself, not contested. But the tribunal ruled that the amount was, in fact, seriously contested and whether or not to grant the measure "is too closely linked with the solution of whole dispute." ICC Partial Award 9984 of 1999 (unpublished).

²⁵⁵ ICC Second Interim Award 7544 of 1996, extracts published 11(1) ICC Int'l Ct Arb Bull 56-60 (2000) (requiring a security for damages "in order to cover the risk that the final decision might not be consistent with the decision reached ... [on an interim basis], and not to prejudice the right of set-off ..." in the amount of the provisional payment ordered.). Indeed, the ECJ too held, in *van Uden*, that an interim payment does not constitute a provisional measure within the meaning of the Brussels Convention unless, *inter alia*, the repayment to the defendant of the sum awarded is guaranteed should the applicant proved to be unsuccessful. (1998) ECR I-7136-37, paras. 45-47.

²⁵⁶ See, e.g., *Island Creek Coal Sales Co. v. The City of Gainesville, Florida*, 764 F2d 437, 438-39 (2d Cir. 1985).

²⁵⁷ Otherwise, such transfer of power may arise from the general arbitral procedural powers. See, e.g., Berger, *International Economic Arbitration*, 349.

element of surprise is required,²⁵⁸ for *ex parte*²⁵⁹ provisional measures.²⁶⁰ There is urgency or the element of surprise is necessary, for instance, where a trade secret is likely to be disclosed, or where there is likelihood of dissipation of assets, or where vital evidence is likely to be lost. National courts generally grant *ex parte* measures.²⁶¹ Arbitral tribunals should too be empowered to issue *ex parte* provisional measures. The reasons justifying the grant of arbitral provisional measures also support the arbitral power to issue *ex parte*

²⁵⁸ UN Doc A/CN.9/WG.II/WP.110, para. 52.

²⁵⁹ A measure in the absence of the adverse party or without notification to it.

²⁶⁰ It is observed during the preparation of the UNCITRAL Arbitration Rules that parties were to be given a right to be heard in regard of interim measures except for “urgent matters.” UN Doc A/CN.9/97/Add. 3, reprinted in VI *UNCITRAL Yearbook* 184, 185 (1975).

²⁶¹ For instance, the German Constitutional Court upheld the validity of *ex parte* measures against the claim of a breach of a constitutional principle of *auditor et altera pars* for protecting party interests and; thus, effectiveness of adjudication. Schaefer, Part 4.2.2.2. Similarly, the U.S. Supreme Court found no infringement of the constitutional due process requirement of notice and opportunity to be heard with the issuance of *ex parte* measures. That is, however, subject to a subsequent opportunity to be given to the respondent for the challenge of the measure. See Reichert, 374; and Bösch (ed.), 754-755. Likewise, for English law, see, e.g., *Petroleum Investment Company Limited v. Kantupan Holdings Company Limited*, [2002] 1 All ER (Comm) 124 (indicating that “[u]nless giving notice would be impossible or impracticable e.g., because of the urgency of the situation, an application for an injunction should only be made without notice to the respondent in circumstances where it would be likely to defeat the purpose of seeking the injunction if forewarning were given.”). It is submitted that *ex parte* measures are available in certain Arab states provided that a right to be heard is subsequently given. Aboul-Enein, 82. In addition, although Section 684.16(1) of the Florida International AA, which, in principle, prohibits *ex parte* proceedings for an interim measure of protection, Section 684.16(3) of the Florida International AA permits *ex parte* measures provided that the tribunal immediately extends the right to modify or terminate such measure to all parties not notified. Further, laws of the following countries generally permit *ex parte* court-ordered provisional measures: Australia (Bösch (ed.), 39), Austria, (id., 68), Belgium (id., 98), Brazil (id., 124), Canada (id., 149), China (id., 169), Denmark (id., 188), England (see, e.g., Section 44(3) of the EAA 1996. See also Groves, 190.), Finland (Bösch (ed.), 244), France (id., 269), Greece (id., 325), Hong Kong (id., 345), Ireland (id., 365), Italy (id., 382), the Republic of Korea (id., 398), Liechtenstein (id., 418), Mexico (id., 449), Morocco (id., 465), Norway (id., 514-15), Panama (id., 530), Puerto Rico (id., 573), Scotland (id., 607-8), Singapore (id., 629), the Republic of South Africa (id., 643), Spain (id., 666), Sweden (id., 686-87), Switzerland (id., 716), Turkey (Article 101 of the CCP). On examination of *ex parte* measures from the human rights perspective, see, e.g., Collins, 179-191 (indicating that *ex parte* measures are, under certain circumstances are permitted in various legal system and international bodies.). See also Article 17.2 of the UNIDROIT Principles.

measures.²⁶² The most important of these reasons is the parties' will to seek protection of their rights, including interim protection from an arbitral tribunal. Thus, an arbitral tribunal is the natural forum to seek *ex parte* provisional measures, although it may not be the most appropriate forum in every case. In fact, the need for *ex parte* arbitral measures is likely to be very low as such measures would normally be available from an arbitral tribunal once such tribunal is formed long after the time of a dispute's appearance. The need for *ex parte* measures generally arises at the time of or right after the dispute's appearance but long before submission of a case to an arbitral tribunal. Further, such *ex parte* measures generally require enforceability *per se*. In such cases, a court would be the most appropriate forum to apply for. In this regard, it is noteworthy that the request for and the grant of *ex parte* measures occasionally occur in arbitration practice. For instance, a survey done by the AAA demonstrates that only one out of fifty cases on interim measures were held *ex parte*.²⁶³ Further, this author has not come across any *ex parte* decision on an interim measure in his research at the AAA and the ICC.²⁶⁴

Occasionally, when there is a need for *ex parte* measures, an arbitral tribunal should be empowered to grant such measure. However, the arbitral power to grant *ex parte* provisional measures faces with, among others, two main objections. These objections are generally related to the right to be heard²⁶⁵ and the principle of impartiality in arbitration.²⁶⁶

²⁶² See *supra* Chapter II, Part 1.1.

²⁶³ See Naimark / Keer, 25.

²⁶⁴ Although it does not mean that there has not been any such decision.

²⁶⁵ The right to be heard (*audi alteram partem*) is a facet of the principle of natural justice, or of due process. This right is a universally recognised fundamental right. See, e.g., V. S. Mani, "Audi Alteram Partem - Journey of a Principle From the Realms of Private Procedural Law to the Realms of International Procedural Law", 9 Indian Journal of Int'l Law 381-411 (1969). This right's infringement may cause, in international arbitration, setting aside of the outcome of an award or refusal of the enforcement under, for instance, Article V(1)(b) of the New York Convention, and Article 5 of the Inter-American Convention.

This Part examines objections to arbitral competence to grant *ex parte* provisional measures: (i) the right to be heard and (ii) the principle of impartiality. It also deals with certain other issues on the same measures.

8.1 Right to be Heard As an Objection to Arbitral Power to Grant *Ex Parte* Provisional Measures

The right to be heard should certainly be observed in the adjudication of substantive claims. Would this right fully extend to proceedings concerning provisional measures? *Inter partes* proceedings are generally required for the grant of interim measures of protection. Arbitration rules and practice too seem to confirm this view.²⁶⁷ For instance, the ICSID Arbitration Rules specifically require that an arbitral tribunal “shall only recommend provisional measures, or modify or revoke its recommendation, after giving each party an opportunity of presenting its observations.”²⁶⁸ This rule aims at avoiding “unintentionally unfair dispositions”.²⁶⁹ It seems to be envisaged under the ICSID arbitration system that the arbitral tribunal “must decide how this opportunity will be given.”²⁷⁰ The examination of published awards demonstrates that ICSID arbitral tribunals did not make a decision on interim protection without giving each party an opportunity of presenting

²⁶⁶ For the other objections, see, e.g., UN Doc A/CN.9/487, para. 70; UN Doc A/CN.9/523, para. 21; and Yves Derains, “Arbitral *Ex Parte* Interim Relief”, Dis Res J 61 (August/October 2003) (“*Ex Parte* Relief”). On a very convincing rebuttal of these objections, see, e.g., James E Castello, “Arbitrators Should Have the Power to Grant Interim Relief *Ex Parte*”, Dis Res J 60 (August/October 2003).

²⁶⁷ Six out of seventy-two arbitration rules surveyed expressly require that adverse party shall be heard. See Article 7(11) of the CIA Arbitration Rules; Article 17(2) of the Copenhagen Court of International Arbitration, Arbitration Rules 1981; Article 11 of the FAA Arbitration Rules 1980; Article 22 of the LCIA Arbitration Rules; Rule 25 of the SIAC Arbitration Rules; and Rule 39(4) of the ICSID Arbitration Rules. See also Article 66(2) of the ICJ Rules.

²⁶⁸ Rule 39(4).

²⁶⁹ Note E to the 1968 ICSID Arbitration Rules, reprinted in 1 ICSID Rep. 99.

²⁷⁰ *Id.*

its case.²⁷¹ Similarly, with respect to the practice under the ICC Arbitration Rules, it is submitted that²⁷² “[i]t would be inconsistent with the principles generally governing arbitration . . . to permit *ex parte* relief.” It is further indicated that the ICC tribunals hear all of the parties before rendering any decision on provisional measures.²⁷³ The Iran-US Claims Tribunal too, applying the UNCITRAL Arbitration Rules, has consistently given parties opportunity to comment in writing, whenever possible, when it dealt with requests for a provisional measure.²⁷⁴ This practice seems to be based on the principle of the right to be heard which is envisaged under Article 15(1) of the UNCITRAL Arbitration Rules.²⁷⁵

However, in some cases, there is utmost urgency or element of surprise is necessary, e.g. where vital evidence would be lost due to starting of another phase of construction or to stop the sale of disputed securities. In such cases, *ex parte* measures are required. This is because the principle of fairness requires acting in a speedy manner without giving notice to the responding party. Indeed, the concept of granting *ex parte* measures is recognised by several legal systems.²⁷⁶ Two of the arbitration rules surveyed too expressly recognise such possibility for a

²⁷¹ See Schreuer, Article 47, 216, note 19.

²⁷² Schwartz, Provisional Measures, 59.

²⁷³ See, e.g., ICC Final Award 8893 of 1997 (unpublished.). The requirement to grant the right to a hearing for interim measures of protection, arguably, arises from Article 21(3) of the ICC Arbitration Rules 1998. This argument was raised by Schwartz, Provisional Measures, 59. He referred to Article 15(4) of the ICC Arbitration Rules 1988, which corresponds Article 21(3) of the 1998 ICC Arbitration Rules. This last Article provides that “all parties shall be entitled to be present” at the hearings. Schwartz argues that this rule “arguably prevents an ICC arbitral tribunal from convening a hearing, even for interim or conservatory purposes, on an *ex parte* basis.” *Id.*

²⁷⁴ Caron, Interim Measures, 500; and Brower / Brueschke, 224-225. See also, e.g., Component Builders Inc. v. Iran, Case No. 395, Order (10 January 1985), reprinted in 8 Iran-US CTR 3, 4.

²⁷⁵ Article 15(2) provides that “at any stage of the proceedings each party is given a full opportunity of presenting his case.”

²⁷⁶ See Chapter IV, *supra* note 261.

certain period of time.²⁷⁷ The Iran-US Claims Tribunal used a similar vehicle for interim protection of rights in urgent cases. The Tribunal relied on temporary restraining measures.²⁷⁸ When a temporary restraining measure or another *ex parte* measure is granted, the respondent ought to be heard in a subsequent hearing.²⁷⁹ Some commentators support the possibility of *ex parte* arbitral measures. Berger, for instance, rightly states:

Granting the parties the firm right to be heard would be hardly reconcilable with the function of provisional relief which often requires the surprise effect of *ex-parte* measures to be effective. Also, the arbitrators can later amend or even withdraw their decision at the request of the other party in a subsequent hearing.²⁸⁰

In sum, this author believes that arbitral tribunals should be given the power to grant *ex parte* provisional measures. Although, such power may be used scarcely in practice, it would provide a useful addition to the armoury of the tribunal. So the right to be heard should not be extended to provisional measures.

²⁷⁷ These rules mainly require that “in utmost urgency an order may be given upon the presentation of a request provided that the other party shall be heard subsequently.” See Rule 23 of the CCI Arbitration Rules 1992. In addition, Article R37 of the Court of Arbitration for Sport Arbitration Rules 1994 provides for a very similar provision.

²⁷⁸ This practice seems to be accorded with the observation of a delegate, in the drafting process of the UNCITRAL Arbitration Rules: “The parties should have a right to be heard before the arbitrators take interim measures ..., *except in urgent cases.*” (Emphasis added.) UN Doc A/CN.9/97/Add. 3, Annex I, reprinted in VI *UNCITRAL Yearbook* 185.

²⁷⁹ For a detailed analysis of the Tribunal’s practice concerning temporary measures, see Chapter IV, *supra* Part 4.3.

²⁸⁰ Berger, *International Economic Arbitration*, 337. See also, e.g., Blessing, *Introduction*, para. 879; Bucher / Tschanz, para. 175; and Wirth, 38. But see, e.g., Schwartz, *Provisional Measures*, 59; and Bernardini, 27. The last author suspects the legal validity of the above solution. His suspicion relies on the argument that, contrary to domestic court proceedings, there is no recourse against arbitrators’ order issued on an *ex parte* basis. Bernardini, 27. However, this argument fails to take into account the fact that such an order could be amended or revoked by the same arbitrators following the hearing of both parties. See Jacques-Michel Grossen, “Comment” in ICC (ed.), *Conservatory Measures*, 115, 116; and Blessing, *Introduction*, para. 866.

8.2 Observance of the Principle of Impartiality As an Objection to Arbitral Power to Grant *Ex Parte* Provisional Measures

Impartiality of the fact finder is a fundamental principle of arbitration. This principle would normally prevent an arbitral tribunal to engage in *ex parte* communications with arbitrating parties.²⁸¹ It is argued that such prevention extends to the tribunal's *ex parte* contacts even for *ex parte* provisional measures.²⁸² However, such restriction should, in this author's view, be related to the merits of the case and interim protection of rights should constitute an exception to the restriction. The principle of fairness justifies the exception, e.g. the need to safeguard a party right in cases of utmost urgency. In addition, in order to grant an *ex parte* measure, the tribunal needs to be satisfied, among others, that there is a grave danger, which would require the tribunal's immediate interference. As a result of which, it would grant an *ex parte* measure that would stand only for a limited period of time. The tribunal is aware of the fact that it heard only the applicant but not the respondent and that the respondent's side of story should and will need to be heard. In sum, an *ex parte* communication with a party for granting a provisional measure should not be considered as violation of the principle of impartiality. Indeed, in such countries as Turkey, a judge adjudicating the merits of a case is empowered to grant an *ex parte* provisional measure and that would not be considered as a breach of his impartiality.

In granting provisional measures, the tribunal should make sure that any *ex parte* communication is recorded and communicated to the respondent later prior to the *inter partes* hearing. The tribunal should clearly indicate its reasoning for issuing the *ex parte* measure in the text of the measure. It should also indicate that such measure stands for

²⁸¹ See, e.g., Redfern / Hunter, para. 4-51.

until it is confirmed or revoked in an *inter partes* proceedings, which will take place upon the respondent's petition.

The right to a hearing²⁸³ should not, in principle, extend to applications for interim measures of protection.²⁸⁴ However, arbitrators, where necessary,²⁸⁵ can invite parties to present their case orally.²⁸⁶

²⁸² Derains, 2.

²⁸³ See, e.g., Gaillard / Savage (ed.), paras. 1296-1299.

²⁸⁴ Indeed, oral hearings were held in four of the Iran-US Claims Tribunal's initial twenty-nine cases on interim measures. Caron, *Interim Measures*, 500. In this regard, see, e.g., *Component Builders, Inc. v. Iran*, Case No. 395, Order (19 February 1985) (unpublished) quoted in *Interim and Interlocutory Award No. ITM/ITL 51-395-3*, reprinted in 8 Iran-US CTR 216, 219 (holding that "neither the Tribunal Rules nor the Tribunal practice requires that ... a Hearing be held on requests for interim measures ..."). Further, Judge Mosk, in his concurring opinion, argued:

[T]he rule [Article 15(2) of the Tribunal Rules], although somewhat ambiguous, should not be read to provide a right to a hearing in connection with a request for interim measures. The request for interim measures here is for the purpose of preserving the rights of the Parties pending the Tribunal's award, and thus the issue raised by the request is arguably a procedural matter. Moreover, the purpose of the rule seems to be to guarantee a right to a hearing in connection with a decision on the merits of the case.

Concurring Opinion of Richard M. Mosk of 21 October 1983 to *Ford Aerospace v. The Air Force of Iran*, Case No. 159, *Interim Award No. ITM 28-159-3* (20 October 1983), reprinted in 3 Iran-US CTR 384, 387. Caron further adds:

It is Richard M. Mosk's substantive/procedural distinction that ultimately justifies the conclusion that there is no right under the UNCITRAL Rules to a hearing in the case of interim measures. A tribunal constantly makes decisions without hearings. The vast majority of these decisions are merely procedural and, although important, do not ordinarily dispose of the rights of the parties. Although the procedural/substantive distinction is not always easy to make, it is clear that if disposition of the rights of the parties is the test then interim measures more properly are regarded as procedural. Indeed, the doctrines relating to interim measures all aim at avoiding final adjudication of rights; alleged rights are affected for at most a limited time, and provision for security ameliorates even such temporary effects.

Caron, *Interim Measures*, 502. On the substantive/procedural nature of interim measures see *supra* Chapter II, note 91.

²⁸⁵ On the exercise of the discretion to determine such necessity, Pellonpää / Caron state:

As to decisions on interim measures (those which do not affect the final disposition of the rights of the parties nor terminate the whole proceedings), the decision whether or not to grant a requested hearing should be made in light of the particular circumstances. Sometimes the urgency of the matter may not allow a hearing; in other cases the very nature of the measure requested may recommend that oral hearing be heard. The principle of party autonomy suggests that a hearing be granted whenever requested by both parties. Even where requested by only one of the parties, the arbitral tribunal should keep in mind that Article 15(2) spells out the principle of right to a hearing. Should a

8.3 Certain Other Considerations on *Ex Parte* Arbitral Measures

For the grant of an *ex parte* arbitral measure, all requirements sought for the grant of an *inter partes* measure should be satisfied. In addition, it is clear that the onus is on the applicant to prove that the tribunal has *prima facie* jurisdiction on the case, if the jurisdiction is yet to be established. It is further, imperative that the applicant should submit convincing evidence that would justify an *ex parte* measure. Moreover, the claimant should act in good faith and disclose all facts, circumstances and documents that are known to it. The absence of the respondent in the proceedings justifies the claimant's duty to act in good faith.²⁸⁷

The fairness upon which the arbitral power to grant an *ex parte* provisional measure or a temporary restraining order is based on also requires taking certain measures for safeguarding the right of the respondent. In other words, an *ex parte* measure itself protects the right of the applicant if it is granted. However, since the respondent was not heard in granting such measure, its rights too need to be safeguarded.²⁸⁸ There are many safeguarding measures that can be taken.²⁸⁹ First, the grant of an *ex parte* measure should be subject to appropriate security. In addition, such measure, as indicated above,

party request a hearing abusively, that party may be forced to bear the costs resulting from an unnecessary hearing. (Citation omitted.)

Pellonpää / Caron, 39-40.

²⁸⁶ See, Caron, Interim Measures, 502

²⁸⁷ On such duty see also *supra* Chapter III, Part 2.4.1. The breach of this duty may result in damages for which the moving party may be held responsible. See also *id.*

²⁸⁸ However, an arbitral tribunal ought to carefully consider whether a measure requested is "so severe that the possible damage can hardly be covered by the payment of any security by the applicant" or "the amendment or withdrawal of the interim measure is not sufficient to restore the *status quo ante*." In such cases, the tribunal should give the right to be heard to the other party. Berger, *International Economic Arbitration*, 338. Further, the tribunal may consider, for the protection of the respondent's rights, whether by granting an *ex parte* measure it infringes this party's confidence to the arbitration and whether they may face with its accusation of "trial by ambush". *Id.*

needs to be open for amendment or withdrawal following the respondent's subsequent hearing, which should be done as soon as possible.²⁹⁰ It is submitted, in this regard, that *ex parte* measures should be given in the form of an order whose revision or amendment is relatively easier than an award.

Even if *ex parte* arbitral provisional measures are not available, an arbitral tribunal can still give priority to the request for interim measures for safeguarding the petitioner's rights.²⁹¹ This approach of giving priority relies on the assumption that the resolution of a request for a provisional measure may require a speedy action.²⁹²

9 Costs Regarding Provisional Measure Proceedings

The costs associated with proceedings for provisional measures may be substantial despite the fact that such proceedings constitute only a part of arbitration proceedings.

On who would bear such costs, national laws and arbitration rules are, with one exception, generally silent. Article 21(4) of the AAA-ICDR (International) Arbitration Rules 2003 provides that "[t]he tribunal may in

²⁸⁹ For other safeguarding measures, see Castello, 9-10.

²⁹⁰ Berger, *International Economic Arbitration*, 337. It is noteworthy that it would be a prudent practice to indicate within the text of the measure granted, for the sake of clarity and as an indication to the respondent, that the amendment or revocation of the measure is reserved. This prudent practice could even be followed for the measures granted in *inter partes* proceedings. It should also be noted that "under extreme circumstances" an *ex parte* measure should not be permitted. That is particularly where the security for costs would not cover the potential damage or where the "subsequent amendment or withdrawal would not be sufficient to restore the status quo." Marchac, 131; and Berger, *International Economic Arbitration*, 338.

²⁹¹ See Rule 39(2) of the ICSID Arbitration Rules.

²⁹² Note C to the 1968 ICSID Arbitration Rules, reprinted in 1 ICSID Rep. 99. Based on this assumption, in ICSID arbitration, "the president of the Tribunal may, if he considers the request as urgent, propose a decision to be taken by correspondence (Rule 16(2)), or even convene the Tribunal for a special session." *Id.* In compliance with the above approach, the tribunal took its decision on a provisional measure by correspondence in *AGIP v. Congo*. Award, (8 January 1988), reprinted in 4 ICSID Rep 311.

its discretion apportion costs associated with applications for interim relief in any interim award or in the final award.” The logic behind this provision is clear. Subject to the tribunal’s full discretion, the losing party may have to bear the costs²⁹³ of provisional measure proceedings.²⁹⁴ This logic should, in this author’s view, be supported. This is mainly because liability as to costs may be used as a deterrent factor to avoid vexatious applications²⁹⁵ for provisional measures. There are, indeed, a few cases supporting the above logic.²⁹⁶ For instance, in ICC case 10062, the arbitral tribunal denied the application for a provisional measure. The tribunal expressly held that the costs are to be born by the losing party in the provisional measure proceedings.²⁹⁷ Similarly, another ICC tribunal expressly left the burden of costs to the losing party in those proceedings.²⁹⁸

Likewise, in *Behring International, Inc. v. Iranian Airforce*, the respondents claimed that property warehoused by the claimant needed to move in a more modern air-conditioned and humidity-controlled facility in order to avoid further deterioration. The respondents also

²⁹³ Where the applicable rule or law contains no restriction, the scope of costs should include costs for proceedings, the arbitral tribunal, and party costs. However, such rules as Article 26 of the UNCITRAL Arbitration Rules restrict the measure that could be granted to “subject matter” in dispute. Thus, it is argued that, under these Rules, the party’s costs are not recoverable. See Baker / Davis, 143; and van Hof, 177. In this regard, see also UN Doc A.CN.9/SR 166, 187. Nevertheless, Article 26 should be read as providing interim protection in regard of rights related to subject matter in dispute. See supra Chapter II, note 113. Accordingly, since the costs are concerning interim protection is related to rights regarding subject-matter in dispute, they should too be recoverable.

²⁹⁴ The apportionment of costs may be made in an interim (partial) or in final award. It should be noted that the costs initially borne by the moving party in the provisional measure proceedings. See, in this regard, Pellonpää / Caron, 449; Baker / Davis, 143; and Caron, Interim Measures, 504.

²⁹⁵ These are the applications aimed, in part or in full, to disrupt or delay arbitrations. See supra Chapter II, Part 1.1.

²⁹⁶ However, it should also be noted that where there is no specific party agreement as to the costs of arbitral interim measures, it is arguable that the parties’ agreement about the costs of arbitration proceedings should be applicable; for instance, each party bears its own costs or the costs follow the success. See, e.g., Redfern / Hunter, paras. 8-85 – 8-92.

²⁹⁷ ICC Final Award 10062 of 2000 (unpublished).

requested appointment of an expert in order for mainly inventorying the goods warehoused. The Tribunal granted both of the measures. In regard of the goods, as both parties agreed that there was a necessity to avoid deterioration, the Tribunal asked the claimant if it could make available a modern part of its warehouse for the storage of the goods. In its interim award,²⁹⁹ with respect to the costs of the measures concerned, the Tribunal ruled:

The Tribunal orders that, in accordance with Article 26, paragraph 2 and Article 41, paragraph 2, of the Tribunal Rules, [which are identical to the UNCITRAL Arbitration Rules] Respondents shall provide ... [a certain sum of money] toward the expenses of the expert and costs associated with his work, including the leasing of the full Behring warehouse, to be deposited within 30 days from the date of this Decision (and prior to actual commencement of inventorying and the other tasks assigned specifically to the expert). This amount shall be remitted to account number ... in the name of the Secretary General of the Iran-United States Claims Tribunal This account shall be administered by the Secretary-General of the Tribunal, who shall consult with the Tribunal.

The Tribunal further retains jurisdiction to request from arbitrating parties such other amounts as may be required from time to time in connection with the expert's work, or to decide any disputes which may arise in connection with that work. The Tribunal shall

²⁹⁸ ICC Partial Award 10704 of 2000 (unpublished).

²⁹⁹ Case No. 382, Interim Award No. ITM 46-382-3 (22 February 1985), reprinted in 8 Iran-US CTR 44-48. The Tribunal issued three different awards on this issue. It should, in this regard, be noted that the costs may be contained in an interim or partial award or may finally be distributed in a final award. That may be done, for instance, in accordance with Article 38 of the UNCITRAL Arbitration Rules. Pellonpää / Caron, 449; and Baker / Davis, 143. Further, this author is aware of an unpublished case arbitrated under the UNCITRAL Arbitration Rules where the sole arbitrator ruled that the losing party born the costs of provisional measure proceedings, including costs of parties. It is interesting to note that the winning party in the provisional measure proceedings failed to convince the arbitrator on the merits of its case. See also The AAA Task Force on the International Rules, "Commentary on the Proposed Revisions to the International Arbitration Rules", ADR Currents, 6, 7 (Winter 1996-97); and Final Report on Awards, para. 10 (recommending that "[o]rders in relation to costs, including any proposed allocations of costs between the parties, should be left to the final award."). Indeed, experience demonstrates that costs regarding provisional measures are generally distributed in the final award.

later determine which party will bear the costs of the expert's work.³⁰⁰

The tribunals' power to apportion costs should, if not expressly given, arise from arbitration agreement or the power to grant provisional measures.³⁰¹

10 Damages As Compensation for Arbitral Provisional Measures Found to be Unjustified or Disobeyed

Where an arbitral provisional measure granted proves to be unjustified or where it is disobeyed, the damages caused by such measure or disobedience should, in principle, be recoverable.³⁰² For the purpose of such recovery, costs regarding such measure may, in principle, be considered as part of damages.³⁰³ The power to grant such damages, if not expressly given, should arise from the broad interpretation of arbitration agreement or may imply from the power to grant a provisional measure.³⁰⁴

Any such damages should be granted upon request and substantiated by the moving party. Damages arising from disobedience of an arbitral

³⁰⁰ Behring International, Inc. v. Iranian Air Force, Case No 382, Interim Award No. ITM 46-382-3 (22 February 1985), reprinted in 8 Iran-US CTR 47-48.

³⁰¹ Karrer, *Less Theory*, 103.

³⁰² See Schwartz, *Provisional Measures*, 53. Any such recovery, particularly from a court, is, apparently, subject to the permission under applicable law. The recovery is available under laws of such countries as Australia (Bösch (ed.), 42-3), Austria (id., 71-2), Belgium (id., 99), Brazil (id., 125-26), Canada, (id., 15), China (id., 170), Denmark (id., 191-92), England (id., 222), Finland (id., 245-46), France (id., 271), Germany (id., 298-99), Italy (id., 383), Korea (id., 399-400), Liechtenstein (id., 419-20), Luxembourg, (id., 436), Mexico (id., 450), Morocco (id., 466), the Netherlands (id., 499-500), Norway (id., 515), Panama (id., 532), Philippines (id., 556-57), Scotland (id., 608), Sweden (id., 687), Switzerland (id., 719-20), and the U.S. (id., 756-57). The scope and grant of compensation are naturally subject to requirements set forth under the laws of each country concerned. If the damages are recovered from a court, arbitrators' decision on the merits is likely to be taken into account in determination of damages as it is the case in Denmark. See id., 191. On the issue of damages, see also *infra* Chapter V, Part 1.2.

³⁰³ See Chapter IV, *supra* Part 9. Karrer indicates that whether costs are damages are not clear. Karrer, *Less Theory*, 103. See also, e.g., Redfern / Hunter, para. 7-24.

³⁰⁴ Karrer, *Less Theory*, 103.

provisional measure are examined elsewhere.³⁰⁵ In assessing whether the measure is unjustified, the tribunal should use its discretion and consider whether or not

- there was, indeed, a real urgency,
- the request for the measure was aimed at delaying or obstructing the arbitration proceedings, and
- the moving party claims were ultimately unsuccessful.³⁰⁶

In the exercise of such discretion, arbitrating parties' behaviour throughout the arbitration should also be taken into account. The damages are generally paid out from the security, if taken.³⁰⁷

Conclusion

The standards of procedure and principles for the grant of arbitral provisional measures are very important. The importance is related to the fact that the determination of such standards and principles assists in efficacy of arbitration process by making it consistent and predictable.³⁰⁸ The consistency and predictability makes arbitration more effective dispute resolution mechanism.

Arbitration laws and rules are generally silent in respect of such standards and principles. According to those laws and rules, arbitrators are generally given broad discretion.³⁰⁹ They could either apply or adopt the principles set out under the applicable law(s) (e.g. the law of place of arbitration) or may take the guidance from arbitral case law in establishing such standards and principles.³¹⁰ The former is *hardly*

³⁰⁵ See *infra* Chapter V, Part 1.2.

³⁰⁶ Schwartz, *Provisional Measures*, 53.

³⁰⁷ On the issue of security for damages, see this Chapter IV, *supra* Part 3.3.

³⁰⁸ See Chapter IV, *supra* note 1 and accompanying text.

³⁰⁹ See Chapter IV, *supra* note 2 and accompanying text.

³¹⁰ See Chapter IV, *supra* notes 5-8 and accompanying text.

ever done in practice whereas the latter is *often* observed.³¹¹ In any case, these standards and principles should be flexible to tailor-made the appropriate measure in each case. Further, provisional nature of such measure and specific needs of international commerce should, *inter alia*, be taken into account.³¹²

This author suggests that the guidelines for the grant of arbitral provisional measures may derive from comparative analysis of arbitration rules, arbitral case law, and scholarly opinions. This analysis demonstrates that there is an emerging principles and standards regarding transnational procedural rules on arbitral provisional measures.³¹³ In this respect, it should be noted that although arbitrators were very cautious about granting provisional measures until the 1990s, the trend has been changing.³¹⁴

This author suggests the following principles and standards for the grant of arbitral provisional measures: It is the applicant who should generally make a request for a measure.³¹⁵ That is mainly because of the principle of party autonomy. In rare cases, an arbitral tribunal may too, in the absence of a request, grant such measure in order to avoid aggravation of a dispute.

Such request should contain certain basic elements in order for assisting the tribunal to render a decision.³¹⁶ The request should at least include the relevant right whose protection is sought, kind of the

³¹¹ Id.

³¹² See Chapter IV, *supra* note 4 and accompanying text.

³¹³ See Chapter IV, *supra* notes 12-13 and accompanying text.

³¹⁴ See Chapter IV, *supra* notes 14-15 and 17-24 and accompanying text.

³¹⁵ On the initiation of proceedings for a provisional measure, see Chapter IV, *supra* Part 1.1.

³¹⁶ See Chapter IV, *supra* Part 1.2.

measure that is sought, and the circumstances that necessitate such measure. The request may be made orally or in writing.

The request, as it is generally the case in practice, should be given priority and handled in a short period of time.³¹⁷

The requirements to grant a measure are not clearly defined under arbitration rules or laws, although many of them leave the determination of the requirements to the discretion of the tribunal.³¹⁸ The examination of arbitration rules, laws, arbitral practice and scholarly opinions demonstrates that there are positive and negative requirements. The positive requirements are:

- *prima facie* establishment of jurisdiction,
- *prima facie* establishment of case,
- urgency,
- imminent danger, serious or substantial prejudice to the moving party if the request for the measure is denied, and
- proportionality.³¹⁹

The negative requirements are:

- the request should not necessitate examination of merits of the case in question,
- the tribunal may refrain from granting final relief in the form of a provisional measure,
- the request may be denied where the moving party does not have clean hands,
- the request may be denied where such measure is not capable of being carried out;

³¹⁷ See Chapter IV, *supra* Part 2.

³¹⁸ See Chapter IV, *supra* Part 3.

³¹⁹ See Chapter IV, *supra* Part 3.1.

- when the measure requested is not capable of preventing the alleged harm; or
- the request must not be moot.³²⁰

The tribunal may seek the satisfaction of any or all of the above requirements. The tribunal may further require from the applicant a security for damages.³²¹ Alternatively, the tribunal may deny the request upon receipt of an undertaking by the respondent that it will not infringe the right whose protection was sought with the request.³²² Even if the tribunal refrains from granting the measure requested, it may nevertheless expedite the proceeding in order to avoid any potential or actual prejudice to the rights of the applicant.³²³ The provisional nature of an interim measure justifies summary assessment in regard of the asserted facts and rights.³²⁴

An arbitral provisional measure traditionally takes the form of either an order or an award.³²⁵ This measure may also be granted in the form of decision, direction, request, proposal, recommendation, temporary restraining order or else. The parties are at freedom to agree on the form of a decision on such measure. In the absence of such agreement, an arbitral tribunal generally has the discretion to determine the most appropriate form. In such determination, the tribunal should mainly take into account parties' will, potential savings of time and costs for arbitrating parties, and effective and efficient conduct of arbitration.³²⁶ In any case, the tribunal ought to take into consideration

³²⁰ See Chapter IV, *supra* Part 3.2.

³²¹ See Chapter IV, *supra* Part 3.3.

³²² See Chapter IV, *supra* Part 3.4.

³²³ See Chapter IV, *supra* note 64 and accompanying text.

³²⁴ See Chapter IV, *supra* notes 65-67 and accompanying text.

³²⁵ See Chapter IV, *supra* Part 4.

³²⁶ See Chapter IV, *supra* note 153 and accompanying text.

mandatory provisions of *lex arbitri*.³²⁷ The form of “award” is chosen where, among others, enforcement of the decision would be necessary. In cases of urgency, the tribunal initially issues an *ex parte* order and then, if necessary, incorporate it, into an award or a further order. The *ex parte* order may take the form of a temporary restraining order.³²⁸

Since the jurisdiction of an arbitral tribunal has a temporal element, the tribunal could issue a provisional measure in a period between its formation and its becoming *functus officio*.³²⁹

A provisional measure is aimed to have a provisional effect pending final resolution of the case in dispute.³³⁰ Accordingly, it is bound to be amended, revoked, or, otherwise, finalised in a final award. Such measure, after its issuance, may be amended or revoked under changed circumstances or in light of new facts or evidence.

Arbitration laws and, particularly, arbitration rules generally, in the absence of party agreement, leave the discretion to determine types of measures to an arbitral tribunal.³³¹ The laws and rules generally empower the tribunal to grant any and all types of provisional measures. This power gives wide discretion to the tribunal. Such discretion invites flexibility. The tribunal may generally grant any measure available under *lex arbitri*, *lex causae*, and *lex executionis*. The tribunal may also grant the types of measures that are generally granted in arbitration practice. To this end, it should be noted that the tribunal is, in principle, not restricted with the types of measures

³²⁷ See Chapter IV, *supra* note 155 and accompanying text.

³²⁸ See Chapter IV, *supra* notes 156-161 and accompanying text.

³²⁹ See Chapter IV, *supra* Part 5.

³³⁰ See Chapter IV, *supra* Part 6.

³³¹ See Chapter IV, *supra* Part 7.

available to a judge. Experience demonstrates that arbitral tribunals generally granted on an interim basis:

- measures for preservation of evidence,
- injunctions,
- security for payment,
- security for costs, and
- provisional payment.

Arbitral provisional measures are usually granted in *inter partes* proceedings. However, where there is utmost urgency or where the element of surprise is required, there is a need to have measures in *ex parte* arbitration proceedings.³³² *Ex parte* arbitral provisional measures should be allowed in arbitration provided that certain safeguards are taken.

Costs regarding provisional measure proceedings should generally be borne by the losing party.³³³ The logic behind such trend is to deter or punish any vexatious applications.

In cases where provisional measures granted prove to be unjustified or disobeyed, damages caused by such measures or disobedience may, in principle, be recoverable.³³⁴

³³² See Chapter IV, *supra* Part 8.

³³³ See Chapter IV, *supra* Part 9.

³³⁴ See Chapter IV, Part 10.

CHAPTER V

ENFORCEMENT OF ARBITRAL PROVISIONAL MEASURES

The weight and enforceability of a provisional measure differ depending upon the issuing forum. Arbitral provisional measures are not self-executing whereas judicial provisional measures are directly or through execution offices enforceable at the state where they are ordered.¹

Despite their non-coercive characteristic, arbitral provisional measures traditionally have a certain weight. An arbitral tribunal, which is entrusted by contracting parties with the power to resolve their disputes, has persuasive powers over such parties. Due to such powers, the tribunal's decision is often voluntarily complied with.² There may, however, be occasions where those decisions are not abided. For such occasions, the tribunal may have sanctions for the non-compliance. These sanctions are mainly drawing adverse inferences and holding the recalcitrant party liable for damages and costs. The weight and effect of these sanctions vary.

¹ Each national statute provides for enforcement of decisions on provisional measures of domestic judicial authorities. States back those decisions with coercive powers and non-compliance with the decisions constitutes contempt to court. Such decisions, however, is usually effective only within the borders of a state. In other words, they generally have a territorial effect. A court order may have an extraterritorial effect should the court be able to, under the competent law, threaten non-compliance of its order with detention or a fine. In such countries as Switzerland (see Wirth, 39), the U.S. (see, e.g., Gary Born, *International Civil Litigation in United States Courts – Commentary and Materials*, 3rd ed. (The Hague / Boston: Kluwer 1996), 484-85), and the UK (see e.g., id.), such extraterritorial orders may be made. However, in such cases, enforcement abroad “may be impossible.” Id., 935-36.

² For instance, according to Aboul-Enein, all four of the measures granted in 2000 were complied with in arbitrations administered by the Cairo Regional Centre for International Commercial Arbitration. Aboul-Enein, 81. Further, a survey done by the AAA reflects that, in 90 % of the international and national cases (45 out of 50 cases

Drawing adverse inferences concerning preservation of evidence against the recalcitrant party could provide full protection. However, the threat of holding such party liable for damages or costs may not always be sufficient for measures related to conduct of arbitration and of relations between the parties during arbitration proceedings. Further, where there is a threat of dissipation of assets by one party, none of the above sanctions would be helpful to prevent the dissipation. Without assets against which to enforce the award rendered, being successful in arbitration is often meaningless. Accordingly, the need for enforceability of arbitral provisional measures differs depending upon the weight and effectiveness of the sanctions for disobedience.

Due mainly to the varying weight and effectiveness of the sanctions for non-compliance and to the varying need for enforceability, it is felt that the issue of enforceability of arbitral provisional measures should be resolved for making arbitration more effective.³ There are several reasons supporting enforceability of such measures:

surveyed), arbitrating parties comply with their tribunal's decision on interim relief. Naimark / Keer, 26.

³ For a long time, the issue of enforcing arbitral provisional measures was not even raised. There were some other important issues in promoting arbitration, e.g., enforcing arbitration agreements and awards, appointment of foreign arbitrators, competence-competence, etc. For instance, on the problems of arbitration in the 1950s, see UN/ECE Doc Trade/WP1/12, paras. 41-42. These issues were resolved in due course of time and arbitration developed to become, commencing from the beginning of the 1980s and, particularly, with the boom of international trade in the beginning of the 1990s after the collapse of the Eastern Block (or of the Berlin Wall), the main dispute resolution mechanism of international commercial disputes. With this development, attention is turned to resolving other issues or problems that would assist promoting international commercial arbitration and would enhance its effectiveness. See, e.g., UN Doc A/CN.9/460; and UN Doc A/54/17. The issue of enforceability of arbitral provisional measures is thought to be one of those problems that need to be tackled. But see Sanders, *Quo Vadis*, 417 (stating that it is possible to live without making arbitral provisional measures enforceable.).

- The non-enforceability influences effectiveness of arbitral provisional measures. That is simply because, the sanctions for non-compliance with an arbitral provisional measure may not always, and is potentially not sufficient to protect arbitrating parties' rights on an interim basis.⁴ That is also because parties are reluctant to rely on the other parties' good will (voluntary compliance) because of the concerns of predictability and hostility. In other words, the traditional view that parties comply with the decisions of arbitrators who are appointed by them does not find general acceptance nowadays. It is not clear whether or not today arbitrating parties have less goodwill.⁵ What is clear, however, is that arbitrating parties want more predictability in regard of interim protection of their rights.

It is also clear that the parties wish to avoid hostile tactics of the opponent once the relationship with it becomes sour. Indeed, in some cases, the parties do everything they can, including non-complying with arbitral decisions and even challenging the jurisdiction of arbitrators without justifiable grounds just to gain tactical advantage over the opponent throughout the arbitration (adjudication) process.⁶

⁴ See Chapter V, *infra* Part 1.3. In this regard, it was stated that if a "temporary equitable relief [a provisional relief] is to have any meaning, the relief must be enforceable at the time it is granted, not after an arbitrator's final decision on the merits." See *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 935 F2d. 1019, 1023 (9th Cir. 1991). The Ninth Circuit further held that "[g]iven the potential importance of temporary equitable awards [on provisional relief] in making the arbitration proceedings meaningful, court enforcement of them, when appropriate, is not an 'undue intrusion upon the arbitral process,' but essential to preserve the integrity of that process." *Id.* (Citation omitted.).

⁵ See, e.g., Chapter V, *supra* note 2.

⁶ This is perhaps an unwelcome adoption of an American litigation tradition of hostility to international commercial arbitration.

- Arbitrating parties are nowadays more concerned with the ease of movement of assets from one country to another, generally to a safe heaven.⁷ The enforceability of arbitral provisional measures; particularly, their international enforceability, would, to a certain extent, overcome a party concern of a *Pyrrhic* victory, *i.e.* becoming successful in arbitration but finding no asset to enforce the award.
- Nowadays arbitrating “parties have higher expectations of their ability to enforce their rights.”⁸ The raise of this expectation⁹ may be related to the predictability and speed required in international commerce and to counselling provided by very able lawyers¹⁰ in the resolution of international commercial disputes.
- Finally, a loss or damage that could be avoided with enforcement of arbitral provisional measures should not be allowed to happen.¹¹ In this regard, it is rightly

[a]rgued that resources would be used more efficiently if parties were able to make their requests for interim measures directly to the arbitral tribunal rather than to the court and if measures would be enforceable by intervention of the court in an expedited fashion. Such a possibility is said to be desirable, in particular since the arbitral tribunal is already familiar with the

⁷ Indeed, for aiming to prevent the movement of assets to a safe heaven in international litigation, the ILA Principles were introduced. See Introduction, note 13.

⁸ UN Doc A/CN.9/WG.II/WP.111, para. 7.

⁹ The commercial life is today more fragile and is open to crisis, as we have been currently experiencing. In order to survive and to be a part of such commercial life, speed and predictability are of the essence. Otherwise, businesses may take, in some cases, a heavy burden that may cause its loss. Accordingly, it is tenable, under such circumstances, why businessmen are generally eager in regard of the immediate enforcement of their rights.

¹⁰ That is the involvement of lawyers who generally have offices in different countries and familiar with all available tools for structuring a strategy for the resolution of a dispute that is most suitable to their client's benefit.

¹¹ UN Doc A/CN.9/WG.II/WP.108, para. 73. A “preventable loss or damage should not be allowed to happen (e.g., if a party refuses to take precautionary measures at the site or it fails to continue construction works while the dispute is being resolved).” *Id.*

case, is often technically appraised of the subject-matter and may make a decision in a shorter time than the court.¹²

Addressing the need for enforceability of arbitral provisional measures, laws of a number of states provide for enforcement of such measures. Further, under some of these laws such measures are enforceable even if the seat of arbitration is abroad.¹³ Apparently, the approach of these laws to the enforcement issue varies.

¹² UN Doc A/CN.9/WG.II/WP.108, para. 77. The reasons for making arbitral provisional measures enforceable is closely related to and derived from the reasons for empowering arbitrators to grant provisional measures. Perhaps, the most important two of those reasons are avoiding (i) vagaries of various national laws and judicial systems in respect of interim measures of protection, and (ii) abuse of requests for interim measures of protection by preventing, to a great extent, forum shopping. See UN Doc A/CN.9/WG.II/WP.108, para. 77. Also,

[o]btaining a court measure may be a lengthy process, in particular, because the court may require arguments on the issue or because the court decision is open to appeal. Furthermore, the courts of the place of arbitration may not have effective jurisdiction over the parties or the assets. Since arbitrations are often conducted in a State that has little or nothing to do with the subject-matter in dispute, a court in another State may have to be approached with a request to consider and issue a measure. Moreover, the law in some jurisdictions may not offer parties the option of requesting the court to issue interim measures of protection, on the ground that the parties, by agreeing to arbitrate, are deemed to have excluded the courts from intervening in the dispute; even if the courts would have the jurisdiction to order an interim measure, a court may be reluctant to order it on the ground that it is more appropriate for the arbitral tribunal to do so.

See UN Doc A/CN.9/WG.II/WP.108, para. 76. See also UN Doc A/CN.9/460, para. 119. On those reasons for empowering arbitrators to grant provisional measures, see generally *supra* Chapter II, Part 1.1.

¹³ Court decisions on provisional measures may have a cross-border or extra-territorial effect through bilateral, regional or multilateral treaties or other instruments to that effect. A court order may have an extraterritorial effect should the court be able to, under the competent law, threaten non-compliance of its order with detention or a fine. In countries such as England, Switzerland, and the U.S. extraterritorial orders may be made. See Chapter V, *supra* note 1. There are a small number of bilateral treaties dealing with the enforcement of those decisions. See Cremades, *Exclusion*, 108-109. There is no multilateral treaty dealing with the enforcement issue. In this regard, it is noteworthy that the current draft of the Judgments Convention prepared by the Hague Conference on Private International Law is not applicable to arbitration (Article 1(5)). See Preliminary Doc No 8 (March 2003), Preliminary Result of the Work of the Informal Working Group on the Judgments Project available at <ftp://hcch.net/doc/genaff_pd08e.pdf> last visited at 28 October 2003. On a regional level, for instance, neither the Conventions on the Enforcement of Judgments Between the States of the Arab League (approved by the Council of the League of

Could arbitral provisional measures be enforceable through bilateral or multilateral treaties? There seems to be a few bilateral treaties enforcing

Arab States, Cairo, 14 September, 1952, entered into force 28 August 1953 published in French in *Recueil d'Accords Interarabes* 19 (Bureau des documentation Libanaises et Arabes, Beyrouth 1966). For the English translation, see Saudi Arabia, *Intl. Handbook on Comm. Arb.* (Suppl. 17 January 1994) Annex III, 17-4) nor the similar conventions entered into in the Americas deal with such issue. See Treaty Concerning the Union of South American States in Respect of Procedural Law signed in Montevideo, 11 January 1889 published in II Register of Texts 5 (1973); and Bustamante Code (Convention on Private International Law) signed at Havana, 20 February 1928 published in LNTS 246, no. 1950 (1929), and II Register of Texts 18 (1973). It, however, seems that judicial provisional measures potentially have extraterritorial effect within the European Union ("E.U.") and the European Free Trade Area ("E.F.T.A.") countries under the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (done at Brussels on 27 September 1968, OJ 1972 L 299, 32; as amended. The Convention is concluded between the E.U. member states.), the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988, (done at Lugano on 16 September 1988, reprinted in 28 ILM 620 (1989). This Convention is concluded between the member states of the E.U. and the E.F.T.A. countries and is a parallel convention to the Brussels Convention.), or the Council Regulation (EC) No 44/2001 of 22 December, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "Regulation") (see OJ 2001 L 12, 1.). The ECJ dealt with the issue of cross-border enforcement of a decision given in a member state in *Mietz*. The dispute in this case arose from non-fulfilment of payment obligations concerning a sale contract. One of the issues in question was whether decision of a Dutch court on interim payment obtained in adversarial interim proceedings (*kort geding*) is enforceable in Germany. The ECJ implied in *Mietz* that a decision concerning provisional measures within the scope of the Convention may be enforceable so long as the requirements set forth under the Brussels Convention's enforcement regime is satisfied. See, e.g., Hans Hermann Mietz v. Intership Yatching Sneek BV, Case C-99/96, (1999) ECR I-2277, I-2318, paras. 54, 56. See also, e.g., G. Maher / B. J. Rodger, "Provisional and Protective Remedies: The British Experience of the Brussels Convention", 48 ICLQ 302, 316-318 (1999); and Trevor C. Hartley, "Interim Measures under the Brussels Jurisdiction and Judgments Convention", 24 E L Rev 674, 675 (1999). See also Denilauer v. Couchet, Case No. 125/79 (1980) ECR 1553, para. 17; Schlosser Report, 1979 OJ C59/71, para. 183; Bernardini, 28; Maher / Rodger, 316-318; and Ali Yesilirmak, "Provisional Measures under the Brussels Convention of 1968 and Arbitration", XX(4) BATIDER 215, 226-227. However, there needs to be a real connecting link between the subject matter of the measure sought and the forum to which the request for the measure is made. See Van Uden Maritime BV, Trading as Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line and Another, Case C-391/95, (1998) ECR I-7140. Where a measure need to be sought from a forum, which has the "real connecting link" then it is highly likely that the measure is to be enforceable in such forum. Thus, there would be no need for cross border enforcement.

arbitral provisional measures.¹⁴ None of the multilateral conventions does expressly provide for arbitral provisional measures' enforcement. Whether or not such measures are enforceable under the New York Convention is unclear. There are arguments both in favour and against the application of the Convention's enforcement regime to provisional measures.¹⁵ No firm court precedent is yet to clarify the enforcement issue. The need for the promotion and harmonisation of arbitral provisional measures' enforcement is clear. In order to promote the enforcement of arbitral provisional measures and harmonise the approaches of laws that deal with the issue of enforcement, UNCITRAL is currently carrying out a study.¹⁶

This Chapter examines sanctions for non-compliance, varying need for enforceability, and enforcement of arbitral provisional measures.

1 Sanctions for Non-Compliance

Whilst the modern practice of arbitration was commencing in the beginning of the last century, it was thought that arbitrating parties, generally, by entrusting their disputes to arbitrators, comply with their decisions voluntarily. Perhaps, the following belief arose from that thought: decisions of arbitrators on provisional measures (or on other issues) have traditionally their own weight and parties in practice are likely to voluntarily abide with those decisions.¹⁷ Indeed, it was stated in the 1960s, for instance, that an order on provisional measures would

frequently not require any enforcement on the ground that the party applying for it is itself the one who has to carry out the order which, for its part, is required primarily for the purpose of removing any doubt that the party wishing to take the measure of conservation is legally

¹⁴ See Chapter V, *infra* Part 3.2.2.

¹⁵ *Id.*

¹⁶ See Chapter V, *infra* Part 3.3.

¹⁷ See, e.g., Bond in: ICC (ed.), *Conservatory Measures*, 16.

entitled to do so. Nor must one forget that in [international commercial] arbitrations ... which may be expected to form bulk of those which these [international commercial arbitration] Rules apply a large measure of voluntary submission under the arbitrators' rulings may be expected.¹⁸ (Citation omitted.)

When the measure ordered is not complied with the issue of whether there is a sanction for non-compliance becomes relevant. That is because arbitrators lack *imperium* to coerce the recalcitrant party.¹⁹ However, there are other sanctions for non-compliance. These sanctions fall into two categories. One of those is the possibility of drawing adverse inferences by arbitrators if a provisional measure they were ordered is not complied with.²⁰ And the other one is that the recalcitrant party may be held liable for costs and/or damages.²¹ In addition, an arbitral tribunal may impose time limits for the compliance with its awards.²² Such limits may have an effect of psychological coercion. Moreover, the tribunal may even impose a penalty for failure to comply with its decision if such penalty is permitted under the law of the place of arbitration.²³

¹⁸ E. J. Cohn, "The Rules of Arbitration of the United Nations Economic Commission for Europe", 16 ICLQ 946, 966 (1967). Further, for instance, parties generally comply with arbitral decisions on interim protection of rights. See Chapter V, *supra* note 2. See also UN Doc. A/CN.9/264, para. 5, extracts reprinted in Holtzmann / Neuhaus, 543.

¹⁹ See *supra* Chapter II, Part 4.1.

²⁰ In this regard, see, e.g., Article 19 of the Rules for International Arbitration 1994 of the AIA; and Article 27(1) of the Arbitration Rules of the European Development Fund (stating that if an award is not complied with the tribunal may take such failure into account). See also UNCITRAL Doc A/CN.9/264, para. 5; and Berger, International Economic Arbitration, 349.

²¹ See, e.g., U.N. Doc A/CN.9/264, para. 5, extracts reprinted in Holtzmann / Neuhaus, 543; and Karrer, *Less Theory*, 103.

²² See Article 14(3) of the International Arbitration Rules 1996 of the Chamber of National and International Arbitration of Milan; and Article 19 of the Rules for International Arbitration 1994 of the AIA.

²³ Article 19 of the Rules for International Arbitration 1994 of the AIA. For more information, see *supra* Chapter IV, Part 7.2.

This part examines, in detail, the issues of drawing adverse inferences and of holding the recalcitrant party liable for costs and/or damages.

1.1 Adverse Inference

An arbitral tribunal may draw adverse inferences for not complying with its ruling on preservation of evidence.²⁴ This is to say the tribunal, for instance, considers that such evidence supports the case of the applicant for it. The evidence ought to be in the recalcitrant parties' possession or, at least, available to it.

Could the tribunal draw adverse inferences for non-compliance with any other measure? The response should be negative. The tribunal could not hold a party liable on the substance of the case in question just because the party is uncooperative in regard of the tribunal's ruling on a provisional measure.²⁵ This is because "[t]he obligation of an arbitral tribunal to act fairly towards the parties extends even to parties that are 'difficult'."²⁶ However, one should keep in mind that arbitrators have a quite wide leverage on adjudication of arbitration e.g., adjudging the evidence submitted to them.²⁷ It is, perhaps for this reason, argued that parties

²⁴ Von Mehren states, in this regard, that a tribunal can "advise the parties that the tribunal will draw whatever inferences it deems appropriate from a failure to comply with an instruction to produce evidence." Robert B. von Mehren, "Rules of Arbitral Bodies Considered from a Practical Point of View", 9(3) J Int'l Arb 105, 111 (1992). See also, e.g., Bond in: ICC (ed.), *Conservatory Measures*, 16. See also Article 9(4)-(5) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

²⁵ See UN Doc. A/CN.9/WG.II/WP.108, para. 76. See also UN Doc A/CN.9/460, para. 119; and Karrer, *Less Theory*, 103. The tribunal, for instance, cannot dismiss the recalcitrant party's claim. Stalev, 110.

²⁶ Karrer, *Less Theory*, 103.

²⁷ In this regard, see Ancel, 111 (arguing that an arbitral tribunal may take into account in its final award the arbitrating party's good faith or failure in complying with its decision on an interim measure).

generally refrain from “unnecessarily antagonising” their arbitrators.²⁸ That may be partly related to the fact that “parties are often concerned that arbitrators will, at least subconsciously, have in mind the conduct of the parties when deciding on the issues.”²⁹ In some cases, the conduct of the parties may have a more direct effect. For instance, where there is an issue of evaluation of evidence before an arbitral tribunal, it may take into account the relevant party’s previous behaviour e.g., whether or not such party is trustworthy.

1.2 Damages and Costs

An arbitral tribunal may hold a “recalcitrant party liable for costs and damages arising from [or related to] its non-compliance” with the measure it ordered.³⁰

The power to hold the recalcitrant party liable for costs and damages is based on “a broad interpretation of the arbitration agreement itself since the damages obligation arises in connection with the contract, more precisely, in connection with the dispute resolution [clause] provided for in the contract.”³¹ It could also be argued that such power is implied “in the

²⁸ Bond, 16. See also Schwartz, *Provisional Measures*, 59 (stating that [p]arties seeking to appear before the arbitrators as good citizens who have been wronged by their adversary would generally not wish to defy instructions given to them by those whom they wished to convince of the justice of their claims.”); Redfern / Hunter, para. 7-23; and Born, *International Arbitration*, 972.

²⁹ Bond in: ICC (ed.), *Conservatory Measures*, 16. However, it is noteworthy that if the applicable law, in an arbitration, leaves no room for an arbitrator’s discretion and “leads to a finding in favour of the party resisting the order [on a provisional measure], the arbitrators will have no option but to apply it.” Jacques-Michel Grossen, “Comment” in ICC (ed.), *Conservatory Measures*, 115, 116.

³⁰ UN Doc A/CN.9/WG.II/WP.108, para. 76. See also UN Doc A/CN.9/460, para. 119; and UN Doc A /CN.9/264, para. 5, extracts reprinted in Holtzmann / Neuhaus, 543; and Stalev, 110.

³¹ Karrer, *Less Theory*, 103.

power to issue interim measures.”³² This is because the security for costs or damages aims to remedy possible damages that may arise from a provisional measure granted. In this regard, there seems to be an intrinsic link between the power to grant a provisional measure and a security for costs or damages.³³

The scope of costs would extend to those related to provisional measures. Indeed, the scope would cover the expenses made due to a party's disruptive behaviour that makes provisional measure proceedings lengthy and/or expensive.³⁴

Multiple or punitive damages arising from disobedience with an arbitral provisional measure can, in principle, be sought from an arbitral tribunal. This is, however, subject to the scope of arbitration agreement and law governing arbitration or arbitration agreement.³⁵

The amount of costs and damages that a party held liable could be deducted from the security for damages or from the security for costs as the case may be, if these securities were taken.³⁶

2 Varying Need for Enforceability

Despite the availability of the above sanctions for non-compliance, there may still be cases where a party disregarding the sanctions may refuse to

³² Id.

³³ See supra Chapter IV, Parts 3.3 and 7.4.

³⁴ See Karrer, *Less Theory*, 103. See also supra Chapter IV, Part 10.

³⁵ Lew / Mistelis / Kröll, para. 24-75; Redfern / Hunter, para. 8-13. See also, e.g., E. Allan Farnsworth, “Punitive Damages in Arbitration”, 7(1) *Arb Int'l* 3 (1991); M. Scott Donahey, “Punitive Damages in International Commercial Arbitration”, 10(3) *J Int'l Arb* 67 (1993); and Karen J. Tolson, “Conflicts Presented by Arbitral Awards of Punitive Damages”, 4(3) *Arb Int'l* 255 (1988). The enforceability of any arbitral decision on punitive damages is subject to the law of place of enforcement.

comply with a provisional measure issued by its arbitral tribunal.³⁷ Perhaps, one obvious example is the case of dissipation of assets. If a party is to dissipate all of its assets then it may have no fear of being unsuccessful in the arbitration or of the threat of being held liable for costs or damages. Another example is where a party, by non-complying, e.g., aggravating the dispute or cease to carrying out with the construction or selling the goods in dispute may put a heavy burden on the other party who may need to cave in or suffer heavily due to such burden prior to the arbitrators' resolution. In those cases, the enforceability of arbitral provisional measures becomes necessity for effective protection of rights or in other words, effective resolution of the dispute.

However, the need for enforceability is not the same for all types of arbitral interim measures.³⁸ The need is absolute for measures aimed to facilitate later enforcement of an award (those measures that are aimed at preventing dissipation of assets). That is because if "a party is determined to attempt to thwart the enforcement of the award, the arbitral tribunal or the interested party may have no effective means to avoid the negative consequences of a party's failure to abide by the interim measure."³⁹ In fact, today, dissipation of assets is a lot easier: "twinkling of a telex" was enough to dissipate assets ten years ago,⁴⁰ a click of a mouse from anywhere in the world is sufficient today. An award would be meaningless if it is not satisfied due to dissipation of losing party's assets to jurisdiction, a safe heaven, where the award's enforcement is impossible.

³⁶ See UN Doc A/CN.9/264, para. 5.

³⁷ UN Doc A/CN.9/460, para. 118.

³⁸ See, generally, UN Doc A/CN.9/WG.II/WP.108, paras. 78-80.

³⁹ *Id.*, para. 79.

Further, there may also be a need for enforcing measures related to conduct of arbitration and to relations between arbitrating parties after a dispute has arisen. The threat of possible liability for costs or damages may assist with the compliance under which a party does not voluntarily abide with the measure ordered.⁴¹ However, again there may be circumstances where those sanctions might not be sufficient for the protection of a party right. This is where, for instance, the loss of one party is so grave that it may put that party in financial difficulty. In other words, “the failure to comply with the measure may have severe and irreparable consequences, and it might be regarded as being in the interest of an orderly administration of justice ...” to enforce an arbitral interim measure.⁴²

In contrast, the degree of the necessity for enforcement of the measures for protection of evidence may perhaps be less than the degree of necessity for the other measures. This is because where an arbitrating party

fails to comply with one of those measures, the arbitral tribunal may “draw adverse inferences” from the failure and make the award on the basis of information and evidence before it. In addition or alternatively, the arbitral tribunal may take the party’s failure to comply with the measure into account in its final decision on costs of the proceedings. Thus, with respect to these kinds of measures, the arbitral tribunal may have considerable leverage over the parties, which may reduce the need for court intervention.⁴³

⁴⁰ Deutsche Schachtbau-und Tiefbohr GmbH v. Ras Al Khaimah National Oil Co. and Shell Petroleum Co. Ltd [1987] 2 All ER 769, 772.

⁴¹ UN Doc A/CN.9/WG.II/WP.108, paras. 78-80.

⁴² Id.

⁴³ Id., para. 78.

3 Enforcement of Arbitral Provisional Measures

It is felt that the arbitrators' lack of coercive powers causes a problem⁴⁴ and this problem may result in infringement of arbitrating parties' rights and thus it may ultimately hamper the effectiveness of international arbitration.⁴⁵ The problem may, consequently, have adverse effect on the future of international commercial arbitration.

In order to rectify the adverse effects of the above problem and foster international commercial arbitration by making it more effective, laws of a number of states offer various solutions, which, one way or other, make decisions of arbitrators on provisional measures enforceable, generally, through national courts.⁴⁶ In this regard, it is noteworthy that there is no harmonised solution to the problem of arbitrators' lack of coercive powers.

The enforcement of arbitral provisional measures is allowed for either domestic measures (the measures that are issued and enforced at the seat of arbitration)⁴⁷ or, under laws of a few states,⁴⁸ foreign measures (the measures that are to be enforced in a country other than the seat). In

⁴⁴ In fact, the need for enforceability of arbitral provisional measures is emphasized by several commentators. See, e.g., Otto Sandrock (see Blessing, Introduction, para. 876); Lord Mustill, 120; von Mehren, 122; and Wagoner, 68-73. Further, such need is in the highest where "the losing party in arbitration has little to gain by obeying the arbitration award and continuing its relationship with the prevailing party." Hoellering, Interim Relief, 4.

⁴⁵ In this regard, it is noteworthy that coercive powers are generally not a problem in litigation the sole competitor of arbitration for resolving international disputes and there are efforts to resolve the problem of enforcing judicial interim measures abroad. See Chapter V, *supra* note 13 and accompanying text.

⁴⁶ It is noteworthy that laws of many states still do not deal with enforceability of arbitral provisional measures. It is also noteworthy that parties cannot confer on, by agreement, their arbitrators with coercive powers as such powers are exclusive to sovereign and are not delegated to private individuals. See, e.g., Jarvin, Exclusion, 180; Gaillard / Savage (ed.), para. 1323; and Cremades, The Need, 226.

⁴⁷ See Chapter V, *infra* Part 3.1.

⁴⁸ See Chapter V, *infra* Part 3.2.

addition, some bilateral treaties envisage enforcement of arbitral provisional measures. Further, since the issue of arbitral provisional measures' enforceability is not widely recognised and no harmonised approach is taken in countries that recognise and regulate the issue, UNCITRAL is currently undertaking and well-advanced on a study on the issue for a harmonised and widely-accepted solution.⁴⁹

This Part examines enforcement of provisional measures at the seat of arbitration and abroad. It also deals with UNCITRAL's harmonisation efforts.

3.1 Enforcement at the Seat of Arbitration

Like any other decision of an arbitral tribunal, a decision on provisional measures is expected to be complied with.⁵⁰ If a party does not abide with the measure granted, the assistance of a competent court may, if possible, be sought.

Laws of a number of states provide for enforcement of the arbitral decisions on provisional measures where the seat of arbitration is within these states. Accordingly, these decisions could be enforced through the assistance of judicial authorities at the seat. National laws envisage four main approaches for providing this assistance.

- The first approach is direct enforcement of an arbitral provisional measure as if it were a court decision
- The second approach is national courts' executory assistance in regard of the enforcement of such measures.

⁴⁹ See Chapter V, *infra* Part 3.3.

⁵⁰ See Chapter V, *supra* note 2.

- The third approach is recasting the decision of arbitrators, as the case may be, to transpose the arbitral decision into the legal system of the state in question.
- Finally, under the fourth approach, a court orders, by taking into consideration the arbitral provisional measure, an interim measure of protection of its own.

This Part examines these four approaches.

3.1.1 First Approach: Direct Enforcement of Arbitral Provisional Measure as if It Were a Decision of a Court

The Ecuadorian Law on Arbitration and Mediation 1997 uniquely provides that interim measures are directly enforceable without the need for court intervention if parties so provide in their arbitration agreement.⁵¹

This approach eliminates the time that would be spent were a court review required for providing executory assistance to an arbitral decision on interim protection of rights. The approach reflects utmost trust to arbitrator as it equates an arbitral decision to a judgment. This author believes that this approach reflects ultimate goal for arbitration world to reach as a solution for resolving the issue of enforcement of arbitral provisional measures. However, the pitfall of this approach is that there are no safeguards if anything went wrong in arbitration. This is particularly important in arbitration as there is no appeal against an arbitral decision

⁵¹ Article 9(3). This Article provides:

If the parties so provide in the arbitration agreement, the arbitrators may request the assistance of public and judicial officers, the police and administrative authorities if necessary to carry out the interim measures, without the need of resorting to the court of the place where the property is located or the measures are to be carried out.

although the decision may be reviewed under changed circumstances.⁵² So for instance, if, for some reason, due process is not observed, there would be no way of remedying this irregularity. This is, in practice, unacceptable to international community and to business persons. Even the enforcement of arbitral awards is subject to certain safeguards. These safeguards are expressed, for instance, under Article V of the New York Convention and Article 34-36 of the Model Law. The lack of safeguards protecting the interest of state and business persons makes this approach unacceptable.

3.1.2 Second Approach: Executory Assistance from National Judicial Authorities

Under this approach, the judicial authorities are given executory assistance for enforcement of arbitral decisions on provisional measures. In other words, the arbitral decisions (usually orders) are enforced through judicial authorities at the seat without any further (or at least with limited) examination. Alternatively, the decisions are enforced as if they were arbitral awards. This is to say that orders are effectively equated to awards.⁵³

Prior to examining the examples regarding this approach, it is useful to note the UNCITRAL Secretariat's approach initially taken during the preparation process of the Model Law in 1985. The Secretariat proposed the following language in regard of enforcement of arbitral interim measures in the last sentence of Article XIV (Article 17 in the final text):

⁵² See *supra* Chapter IV, Part 6.

⁵³ Sanders, *Quo Vadis*, 272.

If enforcement of any such interim measure becomes necessary, the arbitral tribunal may request [a competent court] ... to render executory assistance.⁵⁴

In the Fourth Working Group that discussed the issue of enforceability a divergent views were expressed but the above provision was not adopted

since it dealt in an incomplete manner with a question of national procedural law and court competence and was unlikely to be accepted by many States.⁵⁵

The Working Group further noted that the avoidance of the adoption

should not be read as a preclusion of such executory assistance in those cases where a State was prepared to render such assistance under its procedural law.⁵⁶

There are several examples to the executory assistance from courts:

(i) Article 36 of the Bolivian Law on Arbitration & Conciliation 1997 states:

For the enforcement of interim measures, the production of evidence or compliance with mandatory measures, the arbitral tribunal or any of the parties may request the assistance of the competent judicial authority of the place where the measure or course of action mandated by the arbitral tribunal is to take place.

(ii) Section 1297(92) of the Californian CCP provides:

Any party to an arbitration ... may request from the superior court enforcement of an award of an arbitral tribunal to take any interim measures of protection Enforcement shall be granted pursuant to the law applicable to the granting of the type of interim relief requested.

⁵⁴ UN Doc A/CN.9/WG.II/WP.40, Article XIV of the Second Draft (Article 17 in the final text).

⁵⁵ UN Doc A/CN.9/245, para. 72.

⁵⁶ Id.

(iii) In accordance with Article 24 of the Egyptian Arbitration Law, where an arbitrator's order on interim or conservatory measure is not complied with, the applicant for the measure has the right to apply to the president of the court for an execution order.⁵⁷

(iv) In accordance with Article 22(2) of the Arbitration Law of Guatemala 1995, arbitral interim measures could be enforceable by a court.

(v) The English AA 1996 provides for enforcement of "*peremptory orders*" on interim measures of arbitrators upon request from either the arbitrators or from any of the parties.⁵⁸ For the enforcement of such order, a party needs to exhaust any available arbitral process concerning the failure to comply with the order.⁵⁹ Another condition is attached to the enforcement. The enforcing court needs to be satisfied that the order is not complied with within the period of time as prescribed in the arbitral decision, failing such prescription, within a reasonable time.⁶⁰

⁵⁷ A similar provision is contained under Article 24(2) of the Law of Arbitration on Civil and Commercial Matters of Oman.

⁵⁸ Section 42. A peremptory order (concerning interim protection) may be given where arbitrating parties agreed to empower their arbitrators with powers to grant interim measures and where, upon the grant of an interim measure, such measure is not complied with. See Sections 41(1) and (5), and 42(2)(c) of the EAA 1996. The definition of the term "peremptory order" provided for in Section 82 of the Act: a 'peremptory order' means an order made under Section 41(5) or made in exercise of any corresponding power conferred by the parties." Article 42 is not mandatory: the parties can opt out from it. The decision on enforcement is open to appeal with the court's leave. Section 42(5).

⁵⁹ Section 42(3).

(vi) Section 2GG of the Hong Kong AO reads:

An award, order or direction made or given in or in relation to arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction.

(vii) The Act on International Commercial Arbitration 1999 of Greece permits the enforcement of *arbitral orders* on interim measures.⁶¹ If there is a previous application to a court for a similar measure, the enforcement of the arbitral order is not authorised.

(viii) Under the General Law of Arbitration 1995 of Peru, an arbitral tribunal may request, for the enforcement of its *ruling* concerning interim measures,⁶²

the assistance of the court of the place where the assets are located or of the place where the measures are to be adopted. The court shall proceed with the enforcement on the merits of a certified copy of the arbitration agreement and the arbitral ruling, without permitting any recourse or challenge whatsoever.⁶³

(ix) According to Section 2712.14(B) of the Ohio International Commercial AA,

[a]ny party to an arbitration ... may request the court of common pleas to enforce an *award* of an arbitral tribunal ...,

⁶⁰ Section 42(4). It is noteworthy that the decision of the court as regards the enforcement of a peremptory order could be appealed with the leave of the court. See Section 42(5).

⁶¹ Article 17(2).

⁶² Interim measures that may be ordered are generally related to securing assets in dispute.

⁶³ Article 81(2).

which award orders a party to take any interim measure of protection. Enforcement shall be granted pursuant to the law applicable to the granting of the type of interim measure of protection requested. (Emphasis added.)

(x) Under Article 24(4) of the Decree Law No. 5 1999 of Panama, the carrying out of arbitral provisional or protective measures may be assisted by a judge. The judge shall carry out the measure within ten business days from the request.

(xi) In accordance with the Singapore International AA1994,⁶⁴

[a]ll *orders or directions* made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the High Court or a Judge thereof, be enforceable in the same manner as if they were orders made by a court and, where leave is so given, judgment may be entered in terms of the order or direction. (Emphasis added.)

(xii) The Sri Lanka AA 1995 provides that arbitrators' *orders* on interim measures may be enforced, upon a party request, by the court.⁶⁵

(xiii) Under the Switzerland PIL, unless otherwise agreed,⁶⁶ arbitrators⁶⁷ may seek assistance of a court for enforcement of

⁶⁴ Section 12(5).

⁶⁵ Article 13.

⁶⁶ Through an agreement, the parties may too seek assistance of a court for the enforcement of an arbitral interim measure. See Bucher / Tschanz, para. 172.

⁶⁷ The benefit of taking the approach of empowering only arbitrators to seek enforcement of an arbitral provisional measures is perhaps ensuring that all arbitral recourse for making compliance with the measure is taken; thereby avoiding any bad-faith applications to a court for the enforcement. The down side of the approach is making arbitrators to pursue the enforcement proceedings before the court (e.g., preparing and making application to the relevant court, paying court charges, etc.), which could be better done by a party representative. In order to avoid a bad-faith application to a court for enforcement, taking into consideration the down side, a party representative may be empowered to make the application but he could act only

their decisions.⁶⁸ Such assistance may be required where an arbitral order on provisional or protective measure is not voluntarily complied with.⁶⁹ The court or arbitral tribunal may make granting of the measure subject to providing appropriate security.⁷⁰

(xiv) Under Section 2 of Article 249-9 of the Act Relating to Arbitration and Conciliation of International Commercial Disputes of Texas:

A party to an arbitration ... may request from the district court enforcement of an *order* of an arbitral tribunal granting an interim measure of protection Enforcement shall be granted as provided by the law applicable to the type of interim relief requested. (Emphasis added.)

where he is permitted by the arbitrators. In this regard, it should be noted that whether a party, in the absence of such permission, may apply for the enforcement is questionable. See Tijana Kojovic, "Court Enforcement of Arbitral Decisions on Provisional Relief – How Final is Provisional?", 18(5) J Int'l Arb 511, 514 (2001).

⁶⁸ Article 183(2). It is noteworthy that the parties could launch an appeal against a court's enforcement order. Bucher / Tschanz, para. 176. On how a Swiss court would apply this provision, Blessing states that the competent Swiss court "neither make a *de novo* examination, nor simply affix a rubber-stamp on the Tribunal's order [on a provisional measure] in the sense of *exequatur*." He states that "the court will adopt a middle-way and, in essence check on a *prima facie* basis, whether certain formal prerequisites had been met and whether, on the merits, the urgency and/or the exposure to irreparable harm or damages is sufficiently explained, and whether the measures ordered by the Arbitral Tribunal are also available under the state court's own domestic procedural law." Blessing, Introduction, para. 862. The court shall only enforce the measures available under Swiss law and it shall otherwise deny the enforcement. It is argued that the court can transpose the arbitral measure into an appropriate court order available under Swiss law. See, e.g., Wirth, 40. But see Olivier Merkt, *Les Mesures Provisoires en Droit International Prive* (Zurich: Schulthess 1993), 194-95.

⁶⁹ The tribunal need not have to await a party's non-compliance. If the circumstances of the case or the conduct of a party demonstrates the party's unwillingness to abide with the decision, the tribunal should apply directly to a court to prevent evasion from the measure. Bucher / Tschanz, para. 172.

⁷⁰ Article 183(3).

(xv) Article 62 of the Tunisian Arbitration Code 1993 provides:

If a party does not comply with an arbitral order than the tribunal may require the assistance of the court.

(xvi) In accordance with Article 28 of the Law on Commercial Arbitration 1998 of Venezuela:

The arbitral tribunal, or any of the parties with the approval of the arbitral tribunal may request the assistance of the competent court of first instance for ... the enforcement of the required interim measures. The court shall entertain the request within the scope of its jurisdiction and in accordance with the applicable rules.

(xvii) Under Article 17(3) of the AA 1996 of Zimbabwe, the arbitral tribunal or a party with the approval of the tribunal may request “executory assistance” of a court for the enforcement of interim measures of protection.

Laws of some states extend the regime for enforcement of arbitral awards to the enforcement of arbitral decisions on provisional measures. The examples to those states are Australia,⁷¹ Bermuda,⁷² British Columbia,⁷³ France,⁷⁴ Ireland,⁷⁵ Malta,⁷⁶ New Zealand,⁷⁷ Ontario,⁷⁸ and Scotland,⁷⁹ and

⁷¹ Article 23 of the International AA 1974 of Australia, as amended. In accordance with this Article, the enforcement regime envisaged by the Act is also applicable to arbitral orders for providing a security in relation to the measure ordered. Article 23 is applicable only where parties opt for it. See Article 22. This Article too provides that the enforcement regime envisaged by the Act is also applicable to arbitral orders for providing a security in relation to the measure ordered.

⁷² Article 26 of the Bermuda International Conciliation and AA 1993.

⁷³ Section 2 of the International Commercial AA. The Act makes it possible to render and interim award on preservation of property.

⁷⁴ Pluyette, 88 (indicating that an arbitral decision granted in the form of “an interim award or even a non-final one” may be enforced.). Similarly, it is argued that awards on provisional measures are enforceable in Belgium. Herman Verbist, “Reform of the Belgian Arbitration Law (The Law of 19 May 1998)”, 7 RDAI/IBLJ 842, 848 (1998).

⁷⁵ Sec. 14(3) of the Irish AA 1998.

the U.S.⁸⁰ Similarly, under the Dutch Arbitration Act 1986, arbitrating parties may empower their arbitral tribunal or only its chairman to grant provisional measures in summary arbitral proceedings.⁸¹ The decision given in summary arbitral proceedings is considered an arbitral award and enforced accordingly.⁸²

This approach reflects practically the most acceptable solution to the issue of enforcement of an arbitral provisional measure. Since the enforcement is permitted with the assistance of a court with certain safeguards, there is a possibility that the court can remedy any irregularity e.g., due process is not observed. The safeguards are clear for those laws that extend the regime for enforcement of an arbitral awards to arbitral provisional measures. The clearance of safeguards makes the process more predictable. The predictability makes arbitration more effective. The pitfall of this approach is the time spent for courts for giving permission for enforcement of an arbitral decision.

⁷⁶ Article 62 of the Malta AA 1996. The Act allows the enforcement of both interim measures and orders granting security concerning such measures.

⁷⁷ Section 17(2) of the First Schedule to the New Zealand AA 1996.

⁷⁸ Section 9 of the International Commercial AA. The Act treats orders on interim measures as if they were arbitral awards.

⁷⁹ Article 17(2) of Schedule 7 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

⁸⁰ Although, the U.S. Federal AA (see 9 USC 1 (1925)) is silent on the issue, several courts have enforced arbitral provisional measures. See *Sperry Int'l Trade, Inc. v. Israel*, 689 F.2d 301 (2d Cir. 1982); *Island Creek Coal Sales Co. v. Gainsville*, 729 F.2d 1046 (6th Cir. 1984); *Metallgesellschaft AG v. M/V Capitan Constante*, 790 F.2d 280 (2d Cir. 1986); *Southern Seas Navigation Ltd v. Petroleos Mexicanos of Mexico City*, 606 F.Supp 692 (S.D.N.Y. 1985); and *Puerto Rico Maritime Shipping Auth. V. Star Lines Ltd*, 454 F.Supp. 368, 375 (S.D.N.Y. 1978). On some of those cases, see Chapter V, *infra* note 108. See also *Holtzmann / Donovan*, 37 (indicating that an interim award on a provisional measure should be enforced in the U.S. just like any other arbitral award.).

⁸¹ Article 1051(1).

⁸² Article 1051(3). The decision not given in summary proceedings are not considered awards. Thus they are not enforceable by a court. See C.C.A. Voskuil, "Provisional

This second approach, in this author's opinion, is the right way forward for international commercial arbitration and it is in line with the enforcement regime created by the New York Convention, which system has worldwide acceptance. It should be recalled that the enforcement of a final award needs to be done through courts in order for them to assess, either *ipso iure* or, upon a party request, that the tribunal has observed some basic safeguards.⁸³ Similar safeguards should be observed for enforcement of arbitral provisional measures. In establishment of the safeguards, the characteristics of arbitral provisional measures should be taken into account.⁸⁴

3.1.3 Third Approach: Transposition of Arbitral Order Into Court Order

This approach requires “exequatur or transposition of the arbitral tribunal’s measure into a measure that could have been issued by a court and will be treated accordingly by the state court system.”⁸⁵ In accordance with Article 1041(2) of the German CCP, upon a party request, the court may permit enforcement of an *order* on an arbitral provisional measure.⁸⁶ The prerequisite for the enforcement is, as indicated in the same Section, that no

Measures in Arbitration”, in: C.C.A. Voskuil (ed.) *Hague-Zagreb-Gent Essays on the Law of International Trade* (1988), 108, 124.

⁸³ These safeguards are set out, for instance, in Articles 34-36 of the Model Law and Article V of the New York Convention.

⁸⁴ See *supra* Introduction, notes 19-34 and accompanying text. On the principles in establishing such safeguards, see Chapter V, *infra* notes 132-142 and accompanying text.

⁸⁵ Karrer, *Less Theory*, 107.

⁸⁶ This permissive language gives German courts the discretion to deny applications where the measure applied is not enforceable in its form under German law. See Friedrich Niggemann, “The New German Arbitration Law”, 6 *RDAl/IBLJ* 656 (1998); and Schaefer, Part 4.2.2.3. It should be noted that Article 1063(2) of the German CCP allows enforcement of *ex parte* arbitral provisional measures.

prior application to a court for the same measure is made.⁸⁷ The court is empowered to recast the order concerning the measure for the aim of enforcement.⁸⁸ In addition, the court may, again upon a party request, repeal or amend the order.⁸⁹ If the measure ordered and then enforced is “unjustified from the outset, the damages incurred as a result of the enforcement may be recovered through arbitration or court proceedings.”⁹⁰

This approach complements the second approach. It enhances court assistance to the enforcement of arbitral measures. It has the same pitfall as the second approach. Further, by allowing the recast of an arbitral decision to make it enforceable, it opens the way for further court review of such decision. As a result some safeguards should be taken to avoid court review of the substance of the arbitral measure ordered.

3.1.4 Fourth Approach: Enforcing Separate Court Order Based on Arbitral Provisional Measure

Under this approach, a court issues its own, separate order, which is inspired from, or which takes as conclusive the measure of an arbitral tribunal.⁹¹ Laws of Kenya, New Zealand, North Carolina, and Oregon are some examples to this approach:

(i) Article 7(2) of the Arbitration Act 1995 of Kenya states:

If an arbitral tribunal has already ruled on an interim measure the court treat it as conclusive for the purpose of application [for an interim measure].

⁸⁷ The other unwritten pre-conditions are whether or not the arbitration agreement is valid and the order is “wholly misbalanced.” Schaefer, Part 4.2.2.3.

⁸⁸ Article 1041(2).

⁸⁹ Article 1041(3).

⁹⁰ Article 1041(4). In accordance with the same Article, damages incurred in cases where a security provided for suspension of the enforcement may also be recovered.

⁹¹ Karrer, *Less Theory*, 107.

(ii) Article 9(3) of the New Zealand AA provides:

Where a party applies to a court for an interim injunction or other interim order and an arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any findings of fact made in the course of the ruling as conclusive for the purposes of application.

(iii) Under Section 1-567(39) of the North Carolina International Commercial AA,

(b) ... a party to an arbitration ... may request from the superior court enforcement of an order of an arbitral tribunal granting interim measures

...

(d) In considering ... the enforcement of interim measure, the court shall give preclusive effect to any finding of fact of the arbitral tribunal in the proceeding, including the probable validity of the claim that is the subject of ... the interim measures granted.

(e) Where the arbitral tribunal has not ruled on an objection to its jurisdiction, the court shall not grant preclusive effect to the tribunal's findings until the court has made an independent finding as to the jurisdiction of the arbitral tribunal. If the court rules that the arbitral tribunal did not have jurisdiction, the application for interim relief or the enforcement of interim measures shall be denied. Such a ruling by the court that the arbitral tribunal lacks jurisdiction is not binding on the arbitral tribunal or subsequent judicial proceedings.

(iv) In accordance with Section 36.470(2) of the Oregon International Commercial Arbitration and Conciliation Act,⁹²

⁹² Sec. 19.08.03 of the Florida International AA provides for a somewhat similar provision. Under this Section, the tribunal itself, or a party with its permission to seek the assistance of "a state court, tribunal or other governmental authority" for securing the objectives intended in the arbitral interim measure.

[a]ny party to an arbitration ... may request the circuit court to take any interim measure of protection of an arbitral tribunal Enforcement shall be granted pursuant to the law applicable to the granting of the type of interim relief requested.

This fourth approach reflects the least trust of all approaches to arbitrators for interim protection of rights. This approach is also cumbersome and, in this author's view, less favourable of all. This is mainly because this approach requires double proceedings for obtaining a provisional measure; one before the tribunal, and then one before a court. Since the time is often the essence for interim protection of rights, this approach should have the least preference.

3.2 Enforcement Abroad

Due to the progress of "internationalisation" since the beginning of the last decade, "the problem has emerged of enforcing ... interim measures overseas outside the seat of arbitration."⁹³ Indeed, it is vitally important and necessary that an arbitral provisional measure is enforceable in a place other than the seat of arbitration. That is because the seat (or the place) of arbitration often has nothing to do with the parties or the dispute in question.⁹⁴ Indeed, arbitrations are generally held in, albeit carefully considered and chosen by arbitrating parties, a convenient place that is often neutral to the parties and subject matter of underlying legal relationship.⁹⁵ For instance, in international arbitration, often, parties have no assets at the seat of arbitration, the construction contract involves work in a place other than the seat, or the distribution agreement has no connection with the seat. As a result, an arbitral provisional measure

⁹³ Veeder, *The View*, 207.

⁹⁴ See, e.g., Bond, 14.

⁹⁵ Lalive, 23-33.

should be enforceable outside the seat of arbitration. The enforcement outside the seat may be sought either under national law of a foreign state, or in accordance with a treaty. These two possibilities will be examined below.

3.2.1 Enforcement Through National Laws

Arbitral provisional measures may be enforced abroad where the law of the forum of enforcement allows their enforcement. In other words, courts of the enforcement forum lend their assistance to arbitrators seated in a foreign state. Laws of a few states e.g., Australia,⁹⁶ Hong Kong,⁹⁷ and Switzerland⁹⁸ permit the enforcement of arbitral provisional measures issued abroad.⁹⁹

3.2.2 Enforcement Through Treaties

An international treaty may permit enforcement of an arbitral provisional measure rendered by an arbitral tribunal whose seat is outside the place where the enforcement is sought. There are, indeed, a small number of bilateral treaties permitting enforcement of arbitral provisional measures.¹⁰⁰ In contrast, there is no multilateral treaty under which the possibility of

⁹⁶ See Articles 22 and 23 of the International AA 1974 of Australia, as amended.

⁹⁷ Section 2GG of the Hong Kong AO. See also Robert Morgan, "Enforcement of Chinese Arbitral Awards Complete Once More – But with a Difference", 30 HKLJ 375, 379 (2000).

⁹⁸ Karrer, *Less Theory*, 108. However, there are conflicting views as to whether or not arbitral decisions concerning provisional measures are enforceable in Switzerland. See Kojovic, 516.

⁹⁹ For instance, Article 42 of the EAA, which provides for enforcement of arbitral peremptory orders is not applicable where the seat of arbitration is outside England, Wales or Northern Ireland. See Section 2(2) of the AA. See also *Bocotra Construction Pte Ltd v. Attorney-General of Singapore* [1995] 2 SLR 523.

¹⁰⁰ See, e.g., Sébastien Besson, *Arbitrage International et Mesures Provisoires – Etude de Droit Comparé* (Zurich: Schulthess 1998), 351-352. It is also interesting to note that arbitral provisional measures are made enforceable through an annex to a tripartite treaty (between Azerbaijan, Georgia, and Turkey). Article 18(11) of the Host

international/transnational/cross-border enforcement of arbitral provisional measures is expressly dealt with. To this end, it should be noted that neither the text of the New York Convention nor the preparatory materials on it do explicitly deal with the Convention's application to enforcement of those measures. It is only an educated guess that the drafters of the Convention did not consider, nor was it in their mandate, to create a mechanism under which arbitral provisional measures might too be enforceable.¹⁰¹ Further, it is noteworthy that there are only a few and contrasting court decisions on the issue of whether an interim measure of protection is enforceable under the Convention. The contradiction exists as to the views of commentators.

The Supreme Court of Queensland denied the enforcement under the New York Convention of an arbitral provisional measure in *Resort Condominiums International Inc. v. (1) Ray Bolwell and (2) Resort Condominiums (Australasia) Pty. Ltd.*¹⁰² In this case, parties enter into a licence agreement relating to time-sharing business in Australia, Fiji, New Zealand, and Tahiti.¹⁰³ The agreement made a reference to arbitration under the AAA Arbitration Rules in Indianapolis, U.S. Disputes on several issues arose between the parties. Resort Condominiums International ("RCI") made a request for injunctive relief in Indiana State Court and filed a request for arbitration. The Court's temporary restraining order

Government Agreement published in the Turkish Official Gazette, 10 September 2000, No. 24166(bis).

¹⁰¹ The concept of arbitral provisional measures was not considered an important issue in the 1950s and not even in the 1970s. See *supra* Introduction, note 54.

¹⁰² Excerpts published in XX YCA 628-650 (1995) (Supreme Court of Queensland, 29th October, 1993). See also Pryles, 385-394.

¹⁰³ This business "operates principally by way of exchange whereby a person agrees to utilise the time sharing facilities of a resident in another country, who in turn has the reciprocal right to utilise the time sharing facilities of the first person in that person's country." XX YCA 629.

requested the respondents to supply and provide access to certain information. Resort Condominiums Australasia (“RCI Aust.”) removed the case to the federal district court and moved to vacate the order. A few months later, the district court granted, upon a request, a preliminary injunction enjoining the respondents from, *inter alia*, “directly or indirectly operating or entering into an agreement with any exchange entity other than RCI” and from, in broad terms breaching the licence agreement. Within two days, the sole arbitrator, after her appointment, granted an order broadening the terms of that injunction.¹⁰⁴ The order was tagged as “interim arbitration order and award” for, probably, facilitating enforcement in either form. The Supreme Court of Queensland denied the enforcement of the arbitrator’s decision on several grounds. The Supreme Court took the view that an award on an interim measure needs to deal with one or more of the differences or disputes referred to arbitration.¹⁰⁵

In addition, according to the Queensland Court, an arbitral decision needs to be a final and binding award for its enforcement under the New York Convention. The Court held that the determination of the arbitrator of its decision as an “award” does not make such decision an award within the meaning of the Convention. The Court based its finding on the determination that the arbitrator’s injunction is of “an interlocutory and procedural nature and in no way purport to finally resolve the disputes ... referred by RCI for decision or to finally resolve the legal rights of the parties.”¹⁰⁶ The Court added that such injunction is “provisional only and liable to be rescinded, suspended, varied or reopened by the tribunal which

¹⁰⁴ Pryles, 387-390.

¹⁰⁵ XX YCA 640. In this regard, the Court held that the arbitral decision is not even an award as it is an interlocutory decision on a procedural point. To this end, the Court referred to *Three Valleys Water Committee v. Binnie and Partners*, (1990) 52 BLR 42, 52.

pronounced them”¹⁰⁷ In sum, according to the Court, the arbitrator’s description of her decision as “award” does not make it an award within the scope of the Convention provided that the decision finally resolves the parties’ legal rights.¹⁰⁸ The Queensland’s Court further indicated that a decision that could be enforceable under Articles 8(1) and (2) of the Queensland AA (Articles I(1) and (3) of the Convention) needs to be “final and binding” on the parties. Although, according to the Court, an interlocutory order, in one sense, is binding until it is varied or discharged, such an order that may be rescinded, suspended, varied or reopened by the tribunal was not final and binding on the arbitrating parties.¹⁰⁹ Thus, the Court refused the enforcement of the arbitral decision.

In contrast, some U.S. courts held that an award on provisional measures is, under certain circumstances, enforceable under the New York Convention. For instance, in *Sperry International Trade, Inc. v. Government of Israel*,¹¹⁰ a contract requiring Sperry to design and construct a communication system for the Israeli Air Force. Under the contract, Sperry caused Citibank N.A. to open an irrevocable letter of credit in favour of Israel, which could be called upon Israel’s certification that Sperry is in breach of the contract. Sperry initiated arbitration proceedings claiming breach of the contract and eventually requested from the arbitrators to enjoin Israel from calling the letter of credit. The arbitrators ordered, in an “award,” that the proceeds of the letter of credit was to be

¹⁰⁶ XX YCA 630.

¹⁰⁷ XX YCA 630.

¹⁰⁸ XX YCA 641. The Court based its decision on Articles I(1), I(3), V(1)(c), V(1)(e), and VI of the Convention. XX YCA 636-640. The Court did not examine whether an interim award is enforceable under the New York Convention. It observed that “[i]t would appear to be unduly restrictive if the expression ‘arbitral award’ in the Convention was construed as excluding a valid interim award.” XX YCA 641.

¹⁰⁹ XX YCA 642.

¹¹⁰ 532 F. Supp. 901 (S.D.N.Y.), *aff’d.*, 689 F.2d 301 (2 Cir. 1982).

held jointly by Israel and Sperry in an escrow account pending a decision on the merits. Israel argued that the award is not final and, therefore, could not be enforced. The court rejected this argument holding that the award was severable from the merits and because, by its nature, it required "affirmative action," the award would be rendered a meaningless exercise of the arbitrators' powers if it were not enforced.¹¹¹ Accordingly, the court confirmed the award.

¹¹¹ 532 F. Supp. 909. See also *Ministry of Finance and Planning v. Onyx Development Corp.*, 1989 U.S. Dist. Lexis 11995 (S.D.N.Y. 1989) (confirming a partial/final award on provisional measures.); (1) *Publicis Communication* and (2) *Publicis S.A. v. True North Communications, Inc.*, 206 F.3d 725 (7th Cir. 2000) (ruling that the arbitral provisional measure in the form of an 'order' on turning over tax records is final as it finally resolves a separable issue from the substance of the case in question.) The *Publicis* court also cited several cases and ruled that arbitration between the parties "is controlled by the New York Convention, not the Federal AA. But the New York Convention supplements the Federal AA, and the logic of decisions applied to the latter may guide the interpretation of the former." 206 F.3d 729. Indeed, there are several cases that are considered under the Federal AA and that are in line with the rationale of *Sperry* and *Publicis* cases. In those cases, courts went "beyond a document's heading and delve into its substance and impact to determine whether the decision is final." *Id.*, 729. The resemblance of the *Publicis* court's approach with the *Brasoil* decision is noteworthy. See *Braspetro Oil Services Company v. The Management and Implementation Authority of the Great Man-Made River Project* extracts from the French original published in XXIVa YCA 296 (1999) (1 July 1999, Court of Appeal, Paris) (holding that the arbitral tribunal's qualification of its decision as "award" does not make the decision an award). In this regard, see also *Southern Seas Navigation Limited of Monrovia v. Petroleos Mexicanos of Mexico City*, 606 F. Supp. 692 (SDNY 1985) (holding that an interim award on an interim measure "is an end in itself, for its very purpose is to clarify the parties' rights in the 'interim' period pending a final decision on the merits. The only meaningful point at which such an award may be enforced is when it is made, rather than after the arbitrators have completely concluded consideration of all the parties' claims."); *Island Creek Coal Sales Co. v. City of Gainesville, Florida*, 729 F.2d 1046, 1049 (6th Cir. 1984), cert. denied, 474 U.S. 948, 106 S. Ct. 346, 88 L. Ed.2d 293 ("ruling that interim award on an interim measure "disposes of one self-contained issue, namely, whether [a party] is required to perform the contract during the pendency of the arbitration proceedings. The issue is a separate, discrete, independent, severable issue."); *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir. 1991) (holding that "temporary equitable orders calculated to preserve assets or performance needed to make a potential final award meaningful ... are final orders"); and *Yasuda Fire & Marine Ins. Co. of Europe, Ltd. v. Continental Casualty Co.*, 37 F.3d 345 (7th Cir. 1994) (confirming an interim order directing Yasuda to post an interim letter of credit in the certain amount.).

Some commentators argue that a decision on a provisional measure is not enforceable under the New York Convention. These commentators indicate that such decision should not/cannot be issued in the form of an interim/partial award. That is generally because, in their view, such decision is, unlike an award, not final but subject to review or revocation.¹¹² Some other commentators take the view to contrary. These commentators rightly argue that an award is enforceable under the Convention so long as it is “an enforceable award in the jurisdiction in which it is granted.”¹¹³ The

¹¹² See, e.g., Bucher / Tschanz, para. 176; and Karrer, *Less Theory*, 109 (collectively arguing that interim measures cannot be issued in a form of an award); Berger, *International Economic Arbitration*, 345; Craig / Park / Paulsson, *ICC Arbitration 2000*, 466; and Pryles, 394 (arguing that enforcement of provisional measures is probably not envisaged by the drafters of the Convention and that since an interim award is interlocutory in nature and thus could not be final and binding, it falls outside the scope of the Convention.). Jarvin, too, seems to follow this view as he thinks that the New York Convention is only applicable to “final awards”. Jarvin, *Alternative Solutions*, 403. See also UN Doc A/CN.9/WG.II/WP.108, n. 12. para. 83 (14 January 2000).

¹¹³ These arguments derive from Article V(I)(e) of the Convention, which provides that the recognition and enforcement of an award may be refused where “[t]he award has not yet become binding on the parties or has been set aside in which, or under the law of which, that award was made.” See Gurry, 4. See also Albert J. van den Berg, *The New York Arbitration Convention of 1958 – Towards a Uniform Judicial Interpretation* (Kluwer 1981), 337-346 (“New York Convention”); Albert J. van den Berg, “The 1958 New York Arbitration Convention Revisited” (“Revisited”) in: Pierre A. Karrer (ed.), *Arbitral Tribunals or State Courts: Who Must Defer to Whom?*, ASA Special Series No. 15 (Basel 2001), 125, 141 (“Arbitral Tribunals”); WIPO Document ARB/AC/III/96/3, para.10; Holtzmann, *Remarks*, 205; von Mehren, 361-62; Bernardini, 28; Gerold Herrmann, “Does the World Need Additional Uniform Legislation on Arbitration?”, 15(3) *Arb Int'l* 211, 230 (1999) (indicating that “an interim measure is not only ‘binding’ (on the parties) but also ‘final’ in the sense of ‘definite’ according to its terms, which typically include a time limitation or a revision possibility.”); Veeder, *The View*, 210 (arguing that the New York Convention “could allow” the enforcement of provisional measures.”); Holtzmann / Donovan, 37 (indicating that an an award on arbitral provisional measures is enforceable in a court just like any other arbitral award.); Schwartz, *Discussion*, 215 (indicating, in criticising Queensland Supreme Court’s decision, that an award on provisional measure should have been enforceable under the New York Convention “even though by its nature an interim award is not final.”); Walter G. Semple, “The UNCITRAL Model Law and Provisional Measures in International Commercial Arbitration”, 3 *ADRLJ* 269, 271 (1994) (stating that the New York Convention applies to all types of awards, including interim awards); and Marchac (stating that a provisional measures rendered in the form of an award should normally be enforceable). Gurry seems to agree with the Schwartz’s analysis. *Id.* In this respect, it is submitted that interim measures could be granted in a form of

law of such jurisdiction may require that a decision is to be final and binding to be considered as an award.¹¹⁴ Accordingly, although the New York Convention expressly refrained from using the term “final” for awards’ enforceability,¹¹⁵ an award on a provisional measure may be required to be “final and binding” for the enforcement under the Convention.¹¹⁶ Alternatively, as the Queensland Court did, a court might misread the New York Convention by requiring that the award should not only be binding but also be final. In such cases, an award needs to satisfy two criteria: it needs to be both final and binding.¹¹⁷

As regards the “binding” nature of an interim or partial award on a provisional measure under Article V(1)(e) of the New York Convention, an award (or an order) on an interim measure is “contractually binding upon parties” either because they explicitly accepted the binding nature of the

summary awards that could also be enforceable under the Convention. Karrer, *Less Theory*, 99-100. Interim measures could be issued in the form of summary / provisional awards in such countries as England (Section 39), France (see Karrer, *Less Theory*, 100), and the Netherlands (Article 1051).

¹¹⁴ Laws of a number of states expressly contain a provision on finality of an award. See, e.g., Article 1703 of the Belgium Judicial Code; Article 1476 of the France CCP; Article 1055 of the German CCP; and Article 1059 of the Netherlands AA.

¹¹⁵ See, e.g., van den Berg, *New York Convention*, 333-337.

¹¹⁶ See Blessing, *Introduction*, para. 874 (arguing that where the test for the enforceability under the Convention is its finality in a strict sense (with *res judicata* effect) then this test would not meet for interim awards on provisional measures).

¹¹⁷ It is noteworthy that an award on provisional measures should be considered within the scope of differences or disputes referred to arbitration. The Queensland Supreme Court’s decision that an interim award should deal with one or more of the *issues originally referred* to arbitration is wrong. See van den Berg, *Revisited*, 143. That is simply because an interim award aims to deal with interim protection of rights whose final protection is sought in arbitration. Hence, such issues could not be considered out of the scope of differences originally referred to arbitration. Also, such late issues regarding interim measures should be considered as sub-disputes attached to original disputes or differences. This argument was raised in *Resort Condominiums* but denied by the Court. See XX YCA 636.

award¹¹⁸ or because the authority to grant such measure is vested with the arbitral tribunal.¹¹⁹

As to the finality of an award on a provisional measure, an interim award or a partial award, in order to be final, needs to dispose of an issue in dispute. To this end, it is arguable that an interim award is final in respect of the issues it deals with so long as these issues are separable from the remaining issues.¹²⁰ The prevailing view in U.S. practice supports that argument.¹²¹ It is rightly submitted that the “pragmatic approach” taken by

¹¹⁸ See, e.g., Article 28(6) of the ICC Arbitration Rules 1998; and Article 32(1)-(2) of the UNCITRAL Arbitration Rules. Indeed, the award should be considered binding so long as parties agreed in advance to accept it as binding. Derains, *Refere Arbitral*, 189. Further, van den Berg states:

An award will be enforced in accordance with its terms. If one of the terms is that the order contained in the award is for a limited period of time, the enforcement will correspondingly cover that period of time. If the interim [or partial] award is subsequently rescinded, suspended or varied by an arbitral tribunal, that will as a rule be laid down in a subsequent interim [or partial] award which can also be enforced.

Van den Berg, *Revisited*, 143. He further argues that to be on the safe side, arbitrating parties may agree that interim or partial awards are binding as a number of courts interpreting the New York Convention accepts that the parties can agree on when an arbitral award becomes binding. On examples of such decisions, see *id.*, note 36. Such agreement could be done in the arbitration clause itself. Alternatively and perhaps more conveniently, a stipulation to that effect could be made in arbitration rules. See *id.* But see Berger, *International Economic Arbitration*, 345 (arguing that an award containing an interim measure is not binding under Article V(1)(e) of the New York Convention because it can be amended or revoked.). In addition, it is noteworthy that on the issue of when an award becomes binding, the Model Law does not contain any clarification. Nor are the preparatory materials helpful. See, e.g., UN Doc A/40/17, paras. 256-258, reprinted in Holtzmann / Neuhaus, 864-65.

¹¹⁹ Blessing, *Introduction*, para. 869. See also *id.*, para. 874.

¹²⁰ See cases cited in Chapter V, *supra* note 108. In this regard, it is noteworthy that according to some authors, finality is not a characteristic of an award. See, e.g., Gaillard / Savage (eds.), para. 1316; Schwartz, *Provisional Measures*, 63; Albert Jan van den Berg, “The Application of the New York Convention by the Courts” in: van den Berg (ed.), *Improving the Efficiency*, 25, 29. It is further noteworthy that according to Derains, a decision of an arbitral referee is final in the context of “the appropriateness to take interim measures at a certain moment on the basis of a *prima facie* appraisal of a factual situation.” Derains, *Refere Arbitral*, 189.

¹²¹ The tendency of U.S. courts is that “interim awards are enforceable so long as they relate to issues that are separable from the issues that remain to be decided.” Van

some U.S. courts should preferably be followed in interpretation of the New York Convention.¹²² It is also this author's view that such pragmatic approach should be taken. Such interpretation is, in this author's view, in line with the overall object and purpose of the Convention: enhancing effectiveness of arbitration through facilitating international enforcement of arbitral decisions. The above views, however, neither are free from criticism nor have wide acceptance.¹²³

3.3 UNCITRAL's Endeavours

The enforceability of provisional measures at the place of arbitration or abroad is, despite the growing trend, still sporadic and not harmonised.¹²⁴ Indeed, only a few national laws clearly provide for, in a disharmonised manner, enforcement of an arbitral provisional measure regardless of where the measure was rendered. The disharmony and lack of regulation attracted UNCITRAL's attention, which caused a study resulting in the recommendation to consider whether any work on the enforcement issue is "desirable and feasible."¹²⁵

den Berg, Revisited, 141; and Robert B. von Mehren, "The Enforcement of Arbitral Awards under the Conventions and United States Law", 9 *Yale Journal of World Public Order* 343, 361-63 (1983). For the decisions of U.S. courts, see Chapter V, *supra* note 112.

¹²² See, e.g., Van den Berg, Revisited, 141.

¹²³ Indeed, it is suggested that "it would not be prudent to rely on the enforceability by national courts of such decisions [on provisional measures] as awards." Craig / Park / Paulsson, ICC Arbitration 2000, 466.

¹²⁴ See, e.g., V. V. Veeder, "Provisional and Conservatory Measures" ("Provisional Measures") in: *Enforcing Arbitration Awards under the New York Convention – Experience and Prospects* (New York: United Nations 1999), 21 ("Enforcing Arbitration Awards"); Lebedev, 23; and Herrmann, 230. Apparently, the Model Law "would have greatly contributed to harmonisation" if it would have contained a provision providing the possibility of the issuing interim measures in the form of interim awards. See Sanders, *Quo Vadis*, 275-76.

¹²⁵ UN Doc A/CN.9/460. The problem of non-enforceability of arbitral interim measures was raised in different platforms by various arbitration specialists. See, e.g., *Enforcing Arbitration Awards*; Sandrock, (proposing that a new subsection should be inserted into Article 35 of the Model Law permitting acceptance of arbitral decisions given

The UNCITRAL Secretariat has prepared several proposals regarding the enforcement of arbitral provisional measures.¹²⁶ The main criterion in drafting those proposals was a degree of discretion that would be given to the enforcing court. It should, however, be noted that a few proposals were prepared by taking Article 36 of the Model Law¹²⁷ on enforcement of awards into account with adaptation of specific features of provisional measures as compared to final awards.¹²⁸ The wisdom of following that Article is clear. Article 36 and the model created by the New York Convention have been successfully tested for enforcement of arbitral awards. It was also decided that the enforcement of provisional measures should take the form of a provision added to the Model Law (an amendment to the Model Law) rather than a protocol to the New York Convention.¹²⁹

Adopting variety of principles, there are several proposals before the UNCITRAL's Working Group, which is studying provisional measures in arbitration.¹³⁰ In analysing these proposals, this author recommends the following set of principles that, in his view, should be considered in preparing a draft for the recognition and enforcement of arbitral provisional measures.

under Article 17 as an "award" (see Blessing, para. 876, 282); Lord Mustill in: ICC (ed.), *Conservatory Measures*, 120.

¹²⁶ For the current proposals, see UN Doc A/CN.9/524.

¹²⁷ Which is almost identical to Article V of the New York Convention.

¹²⁸ UN Doc A/CN.9/485, para. 80.

¹²⁹ UN Doc A/CN.9/WG.II/WP.108, para. 81.

¹³⁰ See UN Doc A/CN.9/524.

- The harmonisation may be achieved if the proposal takes the form of an additional protocol to the New York Convention.¹³¹ A Model Law provision is likely to fail the desired harmonisation as it is very difficult to reach any agreement on the issue interim protection of rights among states.¹³²
- Pro-enforcement bias should be contained whatever form is chosen.
- There needs to be some safeguards protecting the interests of the enforcing state and arbitrating parties. In this regard, the standards set out in Article V of the New York Convention or Articles 34-35 of the Model Law may provide guidance¹³³ as they constitute tested and accepted standards for enforcing awards.
- However, the above standards should be modified to reflect the characteristics of interim protection of rights. This is to say:
 - The validity of arbitration agreement should not be fully examined. The test for an arbitral tribunal to grant a measure is generally the *prima facie* existing for jurisdiction.¹³⁴ A court's review of the jurisdiction should not be more extensive.

¹³¹ See, e.g., Lew / Mistelis / Kröll, para. 23-95; Veeder, Provisional Measures, 21-23, and William Wang, "International Arbitration: The Need for Uniform Interim Measures of Relief", 28 Brook J Int'l L 1059 (2003). But see, e.g., Pieter Sanders, "The Making of the Convention" in: Enforcing Arbitral Awards, 3, 4; and Albert Jan van den Berg, "Striving for Uniform Interpretation" in: Enforcing Arbitral Awards, 41, 43.

¹³² This can be observed from the work of the Hague Conference. The current draft of the Convention fails to deal with cross border enforcement of arbitral provisional measures. See Preliminary Doc No 8 (March 2003), Preliminary Result of the Work of the Informal Working Group on the Judgments Project available at < [ftp.hcch.net/doc/genaff_pd08e.pdf](ftp://ftp.hcch.net/doc/genaff_pd08e.pdf) > last visited at 28 October 2003.

¹³³ As this is the case under current proposals to the Working Party. See UN Doc A/CN.9/524.

¹³⁴ See *supra* Chapter IV, Part 3.1.1.

- A party should, unless otherwise agreed, be given notice of the appointment of an arbitrator.
- Due process should be observed either at the time the measure is granted or, for *ex parte* measures, subsequent to the issuance of it.
- The underlying dispute in question should be arbitrable in the state of enforcement.
- A state court will obviously enforce a measure that is compatible with the laws of such state. In case of incompatibility, the court should reformulate the measure, without touching its substance, and enforce it. Otherwise, it should refuse the enforcement. This is a natural extension of pro-enforcement bias.
- The enforcement of a measure may be refused where it is against the public policy of the state.
- Parties should not have obligation to request permission from their arbitral tribunal for enforcement of a measure.¹³⁵
- The measure enforced may be subject to the tribunal's later modification or revocation.¹³⁶
- The enforcement of the measure should extend to both arbitral orders and awards. As provisional measures are generally granted in the form of an order,¹³⁷ the enforcement should naturally be extended to this form. Further, the form of an award is preferred for facilitating enforcement of an

¹³⁵ But see UN Doc A/CN.9/524, paras. 25-27.

¹³⁶ See *supra* Chapter IV, Part 6.

¹³⁷ See *supra* Chapter IV, Part 4.

arbitral decisions, such decisions should too be enforceable. In each case, the enforceability should be subject to the tribunal's decision in favour of non-enforcement. In such case, the decision on interim protection should be granted in the form of, for instance, a recommendation.

- *Ex parte* measures should, in principle, be enforceable.¹³⁸ The court should not have the power to review the appropriateness of the *ex parte* measure but make sure that at some point either prior to or following the enforcement of such measure, the principle of due process is observed.
- An arbitral provisional measure should be given priority over a judicial provisional measure. This is due to the principle of party autonomy.¹³⁹
- A court should not request any security for enforcement of an arbitral decision. This issue should be left with the tribunal granted the measure. This is again for the principle of party autonomy.
- Enforcement of an arbitral measure should be allowed regardless of the place of arbitration as the place of arbitration is generally chosen as a neutral and/or geographically convenient place.¹⁴⁰
- It should be kept in mind that any mistake made by the tribunal in exercising its powers to grant a provisional measure can be and should be corrected by it. If necessary,

¹³⁸ There are conflicting views as to enforcement of such measures. Derains, *Ex Parte Relief*, 3; and Castello, 15-24.

¹³⁹ See *supra* Chapter IV, Part 2.

¹⁴⁰ See *supra* Chapter II, Part 4.3.

damages may be granted in favour of the party against which a measure was enforced.¹⁴¹

- Emergency arbitral provisional measures should too be enforceable.¹⁴²

Conclusion

Arbitral provisional measures are, unlike judicial provisional measures, not self-executing. However, such arbitral measures traditionally have a certain weight.¹⁴³ An arbitral tribunal has some persuasive powers over arbitrating parties. Thus, as a result, the tribunal's decision on interim protection of rights is often complied with.¹⁴⁴ There may, however, be occasions where that decision is not abided. For such occasions, the arbitral tribunal mainly have two sanctions for disobedience. The tribunal may draw adverse inference from the disobedience.¹⁴⁵ Such inferences may only be drawn where the tribunal's decision on preservation of evidence is disobeyed. For no other provisional measure, an adverse inference should be drawn. However, arbitrating parties should refrain from 'unnecessarily antagonising' their tribunal, which has a quite wide leverage in arbitration process e.g., adjudging evidence. In addition, the recalcitrant party may be held liable for costs and/or damages related to its non-compliance.¹⁴⁶ The power to hold the recalcitrant party liable for costs and damages generally derive from a broad interpretation of the arbitration agreement. Further, the tribunal may impose time limits for compliance,

¹⁴¹ See supra Chapter IV, Part 10.

¹⁴² On these measures, see generally supra Chapter III.

¹⁴³ See Chapter V, supra Part 1.

¹⁴⁴ Id.

¹⁴⁵ See Chapter V, supra Parts 1.1.

¹⁴⁶ See Chapter V, supra Part 1.2.

which has psychological coercion.¹⁴⁷ Moreover, the tribunal may, if permitted, impose a penalty for failure to comply with its decision.¹⁴⁸

The weight and effectiveness of the above sanctions differ. Thus, the need for enforceability of an arbitral provisional measure is critical but varies.¹⁴⁹ The need is absolute for measures aimed to facilitate later enforcement of awards. Further, there may also be a need for enforcement of measures related to conduct of arbitration and to relations between arbitrating parties after a dispute arisen. However, the need for enforcement of measures related to preservation of evidence is almost none. This is because drawing adverse inference for preservation of evidence against a recalcitrant party could provide for full protection. This is to say drawing adverse inferences from the failure and making the award on the basis of information and evidence before the tribunal.

Due to the above need, it is generally felt that an arbitral tribunal's lack of power to enforce its decision on provisional measures causes a problem. This problem may result in infringement of parties' rights and it may hamper effectiveness of arbitration.

In order to make arbitration more effective, a number of legislatures offer various solutions to the problem of an arbitral provisional measure's enforceability by, one way or another, lending coercive powers to an arbitral tribunal.¹⁵⁰ Laws of some states provide for enforcement of arbitral provisional measures where the tribunal has its seat in that state whereas

¹⁴⁷ See Chapter V, *supra* Part 1.

¹⁴⁸ *Id.*

¹⁴⁹ See Chapter V, *supra* Part 2.

¹⁵⁰ See Chapter V, *supra* Part 3.

laws of a small number of states envisage enforcement of such measures regardless of the seat of arbitration.

On the enforcement of arbitral provisional measures at the seat of arbitration, the approach of national laws varies:¹⁵¹

- Under the first approach, an arbitral provisional measure is directly enforceable as if it is a decision of the court.
- According to the second approach, a national court lends its executory assistance for the enforcement of an arbitral provisional measure. Under this approach, a court enforces, upon request of either an arbitral tribunal or a party, an arbitral provisional measure without any further (or at least limited) examination. Further, a court assistance may take the form of enforcing a decision on an arbitral provisional measure by equating and then enforcing such measure as if it were an arbitral award.
- In accordance with the third approach, an arbitral decision, in certain cases, is transposed into a court order where the original decision cannot be enforced as it stands.
- Under the fourth approach, a court issues, basing its decision on an arbitral provisional measure, a separate order for interim protection of rights.

Out of which, the combined reading of the second and third approaches should be most preferable. Under these approaches, there is a pro-enforcement bias and court assistance for enforcement is given but some safeguards are taken for protecting the interests of the state and arbitrating parties. The first approach has no such safeguards whereas the fourth

¹⁵¹ See Chapter V, *supra* Part 3.1.

approach requires a second court proceeding to give executory assistance to an arbitral provisional measure.

The jurisdictions adopting any of the above approaches generally deal with enforcement at the seat of arbitration. However, the seat of arbitration is generally chosen as a geographically convenient and neutral place. The seat often has nothing to do with the parties or the dispute in question. Accordingly, cross border enforcement of an arbitral provisional measure has utmost significance. The cross border enforcement may be permitted under a national law or an international treaty.¹⁵² Laws of a few states allow enforcement of a provisional measure rendered by an arbitral tribunal whose seat is in a foreign state.¹⁵³ Further, there are a few bilateral treaties, but no multilateral treaty, that enable cross-border enforcement of an arbitral provisional measure.¹⁵⁴

Whether or not the New York Convention allows enforcement of an arbitral provisional measure is not clear. The text and preparatory materials on the Convention are silent on that issue. In addition, both courts and commentators have divergent views. The Convention requires that, *inter alia*, an award is to be binding for its enforcement in accordance with Article V(1)(e) under the law of the state where the award was rendered. That should be sufficient for the enforcement of an award on provisional measure. However, an arbitral decision may, under one interpretation, be required to be final or not subject to revision or revocation under the New York Convention. Further, the finality of an award may be required under the law where it was rendered. In such cases, for its enforcement under

¹⁵² See Chapter V, *supra* Part 3.2.

¹⁵³ See Chapter V, *supra* Part 3.2.1.

¹⁵⁴ See Chapter V, *supra* Part 3.2.2.

the Convention, an award is required to be binding and final. Arbitrating parties either explicitly accepted binding nature of the award or the binding nature arises from the fact that the authority to grant provisional measures is vested with the tribunal. As to the finality, it should be accepted that an interim award on provisional measures is final in regard of the issues it deals with so long as the issues separable from the other issues in dispute. This interpretation is in line with the purpose and objective of the Convention: enhancing arbitration's effectiveness. However, the above views have no wide acceptance.

Having noted the lack of uniformity in regard of enforcing arbitral provisional measures, UNCITRAL is currently studying the enforcement issue.¹⁵⁵ In this author's view, the enforcement issue may be resolved and harmonisation may be achieved where an additional protocol to the New York Convention is adopted.¹⁵⁶ Further, pro-enforcement bias should be contained whatever form is chosen for adoption. However, certain safeguards should be taken for the enforcement for protecting the interests of a state and of arbitrating parties.¹⁵⁷ In establishing these safeguards, Article V of the New York Convention and Articles 34-36 of the Model Law may provide guidance. Nonetheless, the characteristics of provisional measures should be considered.¹⁵⁸

¹⁵⁵ See Chapter V, *supra* Part 3.3.

¹⁵⁶ See Chapter V, *supra* note 129 and accompanying text.

¹⁵⁷ See Chapter V, *supra* note 132 and accompanying text.

¹⁵⁸ See Chapter V, *supra* notes 134-142 and accompanying text.

CONCLUSION

In order to enhance the effectiveness of arbitration, to meet the expectations of business persons, and, ultimately, to ensure the success of arbitration, the problems and uncertainties regarding the interim protection of rights¹ should be resolved. This is because, generally, interim protection of rights in arbitration is as important as their final protection.²

The identification of the above problems and uncertainties as well as their suggested solutions and clarifications affected by business needs³ are set out below:

Forum to Request Provisional Measures: Arbitrators or Courts

The main problem concerning interim protection is which forum to apply to for a provisional measure when a need arises.

Provisional measures should be sought from arbitrators or any other party-determined authority. Several reasons support this proposition.⁴ The jurisdiction of an arbitral tribunal in regard of interim protection almost always derives from arbitration rules⁵ by reference to such rules in arbitration clauses or agreements.⁶ National arbitration laws (*lex arbitri*)

¹ For this concept and its definition, see generally supra Introduction, notes 12-18 and accompanying text. On the characteristics and types of provisional measures in arbitration, see id., notes 19-34, 45-56 and accompanying text.

² See supra Introduction, notes 57-76 and accompanying text.

³ Like the effect of business needs that had shaped the evolution of interim protection of rights throughout the last century. See supra Chapter I.

⁴ See supra Chapter II, Part 1.1.

⁵ On the evolution of arbitral jurisdiction to grant provisional measures under various arbitration rules, see supra Chapter I, Part 1.

⁶ See supra Chapter II, Part 1.2.

also may provide for default powers for interim protection.⁷ On rare occasions, where none of the above deals with arbitral interim protection, then the power to issue arbitral provisional measures may derive from inherent or implicit powers of the tribunal or its power to conduct arbitration proceedings.⁸ The tribunal should comply with contractual⁹ or legal¹⁰ restrictions and prohibitions as to its jurisdiction to grant provisional measures.

In spite of the fact that an arbitral tribunal is the natural forum to seek interim protection of rights, the exercise of arbitral jurisdiction is, in some cases, impossible or ineffective. This relates to the nature and operation of arbitration. There are three salient problems, and certain other shortcomings, surrounding an arbitral tribunal's jurisdiction to grant provisional measures.¹¹ Due to these problems and shortcomings, to enhance the efficiency of arbitration and for better distribution of justice, the concept of concurrent jurisdiction of arbitrators and of courts should, in principle, be accepted.¹² The concept of concurrent jurisdiction regulates and sheds light on the grey area, sometimes considered to be a "no man's land": the area of interaction between arbitral and judicial jurisdictions for interim protection of rights.

A logical conclusion that stems from the concept of concurrent jurisdiction is the acceptance of the principle of compatability.¹³ This principle has two facets:

⁷ See supra Chapter II, Part 1.2.1.

⁸ See supra Chapter II, Part 1.2.2.

⁹ See supra Chapter II, Part 1.3.

¹⁰ See supra Chapter II, Part 1.4.

¹¹ See supra Chapter II, Part 4.1.

¹² See supra Chapter II, Part 4.

¹³ See supra Chapter II, Part 4.

- a request for a provisional measure is not a waiver of the right to arbitrate; and
- the existence of the arbitration agreement does not prevent a court from issuing an interim measure.¹⁴

Convenience and efficiency require, in this author's view, the grant of provisional measures in aid of foreign arbitration.¹⁵ This is because the seat of arbitration is generally chosen as a geographically convenient and neutral place. As a result, a provisional measure granted at the seat of arbitration is often meaningless. It should however be noted that not all national laws adopt assistance to foreign arbitration for interim protection of rights. Further, in case the assistance is given, the foreign court should, provided that it has jurisdiction, ask itself whether it is the most appropriate / convenient forum to grant the measure sought. If it decides that it is, then it will, in principle, apply the standards available under the forum where the court is located to decide whether it should grant such measure.

In determining the degree of court involvement in the arbitral process under the concurrent jurisdiction concept, party autonomy should be taken into account.¹⁶ However, such autonomy should not extend to total autonomy. This is to ensure that arbitration is effective. This is also to preserve the effective and good administration of justice, which reconciles the tension between court involvement in arbitration and parties' will to keep courts out of the arbitration process. This reconciliation results in the satisfaction of the needs of international commerce: balancing security with flexibility in arbitration by preventing abuse of the court's involvement. The

¹⁴ See supra Chapter II, Part 4.2.

¹⁵ See supra Chapter II, Part 4.3.

¹⁶ See supra Chapter II, Part 4.4.

reconciliation requires the cooperation of arbitrators and of courts. Such cooperation must be coordinated. Most national laws and arbitration rules are silent on the method of coordination. Examination of the remaining (few) national laws and arbitration rules demonstrates that there are two methods of coordination:

- the freedom of choice approach; and
- the restricted-access approach.

Under the freedom of choice approach, parties are free to choose the forum to seek interim protection of rights regardless of the stage of arbitration.¹⁷ Such freedom is, however, an open invitation for abuse and against the principle of party autonomy. Thus, the freedom of choice approach should not be adopted.

Under the restricted-access approach, the principles of complementarity and subsidiarity are accepted.¹⁸ At the stage prior to the formation of an arbitral tribunal, the role of the courts is complementary to arbitral jurisdiction for interim protection of rights. After that stage, the role is subsidiary. The court should only act where the tribunal or another party-determined authority is unable to act or where its action would be ineffective.

The principles of complementarity and subsidiarity are also accepted by a small number of arbitration rules.¹⁹ The ICC Arbitration Rules is a prominent example. Under the ICC Arbitration Rules, court assistance is permitted at the pre-formation stage. Following the formation of an arbitral

¹⁷ See *supra* Chapter II, Part 4.4.1.

¹⁸ See *supra* Chapter II, Part 4.4.2.

¹⁹ See *supra* Chapter II, Part 4.4.2.2.

tribunal, the Rules indicate that the tribunal should have *priority* in regard of interim protection of rights and that courts should assist an arbitration where the circumstances are *appropriate*. The circumstances are appropriate, under the ICC arbitral practice, where:

- there is urgency for interim protection of rights;
- the tribunal's power is limited; or
- the tribunal is paralysed or otherwise unable to act.

The contractual restriction or exclusion of a court's jurisdiction in arbitration rules, e.g. the ICC Arbitration Rules, is subject to applicable laws.²⁰ The restriction envisaged under such rules as the ICC Arbitration Rules should, in this author's view, be permitted as it does not constitute denial of justice since effective interim protection of rights would, under the contractual restriction approach, always be available.²¹ Total contractual exclusion should, in this author's view, also be permitted due to the principle of party autonomy, although one should keep in mind that some national laws would not permit such exclusion.²²

This author suggests that the restricted-access approach should be accepted as it preserves the principle of party autonomy in arbitration and permits court assistance to arbitration where it is necessary. Thus, the court assistance to arbitration, under this approach, enhances the effectiveness of arbitration and facilitates better distribution of justice.

²⁰ See *supra* Chapter II, Part 4.4.4.

²¹ *Id.*

²² *Id.*

Emergency Provisional Measures: Complementary Mechanisms

Another problem is how court involvement prior to the appointment of arbitrators is restricted, as there are certain objections to such involvement at this stage.²³ These objections are:

- court involvement prior to the appointment of arbitrators undermines both the parties' choice of forum for the resolution of disputes as well as the neutrality of that forum;
- such involvement is an open invitation for abuse;
- court involvement may infringe the principle of confidentiality in arbitration;
- a request to a court may, on rare occasions, be considered a waiver of the right to arbitrate; and
- court assistance may not always be available.

The involvement of courts may, to a certain extent, be avoided through the use of complementary mechanisms. Such mechanisms envisage the grant of emergency provisional measures by a neutral / party-determined authority at the pre-formation stage.

The need for complementary mechanisms is not new. Indeed, the 1915 Plan provided for such a mechanism.²⁴ Nowadays, business persons may create their own complementary mechanisms.²⁵ Arbitration institutions also provide for such mechanisms. Some of the institutions empower their head or organ to grant emergency measures.²⁶ Some other institutions, e.g. the ICC, the ECA, the NAI, and the AAA propose certain emergency

²³ See supra Chapter III, notes 10-18 and accompanying text.

²⁴ See supra Chapter III, Part 1.

²⁵ See supra Chapter III, notes 24-27 and accompanying text.

²⁶ See supra Chapter III, Part 1.

arbitral provisional measure procedures.²⁷ These procedures aim to provide effective mechanisms for obtaining emergency arbitral relief. These mechanisms are not exclusive: they do not fully obviate judicial assistance. In shaping the above procedures, three main principles are taken into account:

- the need to create a speedy mechanism;
- the principle of party autonomy; and
- the principle of due process.

A decision of an emergency arbitrator has certain weight and there are some remedies available against the recalcitrant party:²⁸

- an emergency measure has, by contract, binding effect;
- such measure has also the backing of the relevant arbitration institution;
- damages may be ordered in case of failure with the measure; and
- such measure is potentially enforceable at the place where it is rendered and under the New York Convention.

In this regard, it should be noted that the availability of such procedures potentially has a deterrent effect on vexatious requests to a court for interim protection and on forum shopping.

The emergency measure procedures facilitate the effectiveness of arbitration by remedying one of the salient problems regarding arbitral jurisdiction to grant provisional measures. There is a growing recognition

²⁷ See supra Chapter III, Part 2.

²⁸ See supra Chapter III, Part 2.13.

and use of such procedures.²⁹ This author predicts that these procedures will be widely used in the next ten to twenty years.

Arbitral Provisional Measures

The establishment of standards or procedures and principles for the grant of arbitral provisional measures constitutes another problem / uncertainty issue. The establishment of such standards and principles enhances the efficacy of arbitration by making it consistent and predictable.³⁰

Arbitral tribunals are generally given broad powers in regard of the above standards and procedures under most national laws and arbitration rules.³¹ Tribunals *rarely* turn to applicable laws for the establishment of such standards and principles. Experience demonstrates that arbitral case law often provides guidance to the tribunals in this regard, notwithstanding that in each case they probably consider all applicable laws and scholarly opinions in order to grant the most appropriate measure, *i.e.* one that suits the characteristics of the case at hand.³² The arbitral practice also demonstrates that there are emerging transnational standards and principles on arbitral interim protection.³³

This author suggests the following standards or procedures and principles, where arbitrators are given wide discretion to establish them, for the grant of arbitral provisional measures, which standards and procedures, in his belief, are of transnational character and which are subject to parties' agreement to contrary:

²⁹ See supra Chapter III, Part 3.

³⁰ See supra Chapter IV, note 1.

³¹ See supra Chapter IV, note 2 and accompanying text.

³² See supra Chapter IV, notes 9-11 and accompanying text.

³³ See supra Chapter IV, notes 12-15 and accompanying text.

Due mainly to the principle of party autonomy, a provisional measure should be given upon request by a party.³⁴ The request and response to it should, at least, contain certain main elements; namely,

- the relevant rights which are sought to be protected;
- kind of measure that is sought; and
- the circumstances that necessitate such measure.³⁵

Arbitral tribunals should give priority to such request and handle it in a short period of time.³⁶

Tribunals should, in principle, consider the positive and negative requirements set out below for granting provisional measures.³⁷ The positive requirements are:

- *prima facie* establishment of jurisdiction;
- *prima facie* establishment of case;
- urgency;
- imminent danger, serious or substantial prejudice; and
- proportionality.

The negative requirements are:

- the request should not necessitate examination of the merits of the case in question;
- the tribunal may refrain from granting the final relief in the form of an interim relief;

³⁴ See supra Chapter IV, Part 1.1.

³⁵ See supra Chapter IV, Part 1.2.

³⁶ See supra Chapter IV, Part 2.

³⁷ See supra Chapter IV, Part 3.

- the request may be denied where the moving party does not have clean hands;
- the request may be denied where the measure requested is incapable of being carried out;
- the request may be denied where the measure is incapable of preventing the alleged harm; or
- the request may be denied where the request is moot.

Tribunals may further require security for damages and for costs. Alternatively, they may deny the request where there is an undertaking from the adverse party that it would not infringe upon the right sought to be protected.

In any case, even if the tribunals refrain from granting the measure sought, they may, nevertheless, expedite the arbitration proceedings in order to avoid any potential or actual prejudice towards the rights of the moving party.

An arbitral provisional measure may be granted in the form of an order, award, decision, direction, request, proposal, recommendation, or temporary restraining order.³⁸ In determining the form of a decision, the tribunal should mainly take into account parties' will, potential time saved, the cost and effective conduct of arbitration, and mandatory provisions of the applicable laws.

³⁸ See *supra* Chapter IV, Part 4.

An arbitral tribunal could order a measure upon its formation until it becomes *functus officio*.³⁹

Due to its interim nature, a provisional measure, whatever its form is, may be amended or revoked under changed circumstances or in light of new facts or evidence.⁴⁰

On the types of arbitral provisional measures, arbitral tribunals are generally given broad powers.⁴¹ In exercising these broad powers, this author suggests that the tribunals should be able to grant:

- measures for preservation of evidence;
- injunctions,
- security for payment;
- security for costs; and
- provisional payment.

Arbitral provisional measures are usually granted in *inter partes* proceedings. In urgent cases, where it is permitted under applicable rules and laws, tribunals should be able to grant *ex parte* provisional measures provided that the right to respond is subsequently given to the adverse party.⁴²

As to who bears costs of arbitral provisional measure proceedings, this author suggests that the losing party should be liable for such costs.⁴³

³⁹ See supra Chapter IV, Part 5.

⁴⁰ See supra Chapter IV, Part 6.

⁴¹ See supra Chapter IV, Part 7.

⁴² See supra Chapter IV, Part 8.

⁴³ See supra Chapter IV, Part 9.

Where an arbitral provisional measure is disobeyed or proves to be unjustified, damages arising from such disobedience or lack of justification should be recoverable.⁴⁴

Enforcement of Arbitral Provisional Measures

The last issue is the how effective arbitral provisional measures are and how their effectiveness can be enhanced.

Although an arbitral provisional measure is not self-executing, it has certain weight,⁴⁵ and is thus often complied with. There may, however, be occasions where the provisional measure granted is disobeyed. For such occasions, an arbitral tribunal has certain sanctions:

- it may draw adverse inference from the disobedience regarding measures related to the preservation of evidence;
- the recalcitrant party may be held liable for costs and/or damages related to disobedience;
- the tribunal may impose time limits for compliance, which has a psychological effect; and
- the tribunal, if permitted, may impose a penalty for failure to comply with its decision.

The weight and effectiveness of the above sanctions differ. Thus, the need for enforceability of an arbitral provisional measure varies.⁴⁶ The need is firm for measures aimed to facilitate later enforcement of awards. There may, in many instances, be a need for enforcement of measures related to the conduct of arbitration and relations between arbitrating parties.

⁴⁴ See supra Chapter IV, Part 10.

⁴⁵ See supra Chapter V, Part 1.

⁴⁶ See supra Chapter V, Part 2.

However, the need is practically nonexistent, or very limited, for measures relating to the preservation of evidence. This is because drawing adverse inference generally satisfies such need.

Due to the need for enforceability, it is generally felt that the lack of power to enforce an arbitral provisional measure causes a problem. This problem may result in infringement of parties' rights and it may thus hamper effectiveness of arbitration.

In order to make arbitration more effective, legislatures in 34 jurisdictions offer various solutions to the problem of enforceability. This is done by, one way or another, lending state courts' executory assistance to arbitration.⁴⁷ Laws of many states permit enforcement of arbitral provisional measures where the seat of arbitration is in that state. The approach of such national laws differs:

- an arbitral provisional measure is directly enforceable as if it is a court decision;
- a court lends its executory assistance to arbitrators;
- a court transposes an arbitral decision into a court order where the former one cannot be enforced in its original form; and
- a court issues a provisional measure basing its order on the arbitral decision.

Of these approaches, the combined reading of the second and third should be preferred. Under these approaches, there is a pro-enforcement bias. Court assistance for enforcement is given, but some safeguards are taken to protect the interests of the state and the arbitrating parties. The first

⁴⁷ See supra Chapter V, Part 3.

approach has no such safeguards; whereas the fourth approach requires additional court proceedings to give executory assistance for the enforcement of an arbitral provisional measure.

Laws of a few states deal with enforcement of an arbitral provisional measure given by an arbitral tribunal whose seat is in a foreign state.⁴⁸ The court assistance to foreign arbitration is tenable and desirable as the seat of arbitration is generally chosen, as a geographically convenient and neutral place, and often has nothing to do with the parties, the dispute and the underlying contract. A few bilateral treaties, but no multilateral treaty, deal with cross-border enforcement of arbitral provisional measures.⁴⁹ Whether or not the New York Convention permits enforcement of an arbitral provisional measure is questionable. This author believes that the enforcement of such measure should be permitted so long as the measure is binding under the law of the state where the award was rendered.

In this author's view, the enforcement issue may be resolved and harmonisation may be achieved if an additional protocol to the New York Convention dealing with this issue is adopted. In any case, a court's executory assistance should be given to arbitral provisional measures where certain safeguards are taken to protect the interests of the state and of the arbitrating parties. In establishing these safeguards, Article V of the New York Convention and Articles 34-36 of the Model Law may provide guidance. Nonetheless, in determining the safeguards, the features of provisional measures should be taking into account.

⁴⁸ See supra Chapter V, Part 3.2.1.

⁴⁹ See supra Chapter V, Part 3.2.2.

The above proposed solutions to the problems and uncertainties surrounding provisional measures in arbitration, in this author's view, satisfy, to a great extent, the business needs. The adoption of those solutions will enhance the effectiveness of arbitration by providing better interim protection of rights. It will also assist in better fulfilling the function of arbitration as a dispute resolution mechanism independent and distinct from litigation.

ANNEX

Interplay between Jurisdiction of courts arbitral tribunals		Jurisdiction of arbitral tribunal to grant provisional measures ("PM")	Initiation of proceedings	Requirements to grant Provisional measures	Form of PM	Types of PM	Security
Abu Dhabi Commercial Conciliation and Arbitration Center- Arbitration Rules ("AR")	-	-	-	-	-	-	-
AAA ICDR International AR 2003, Article 21	A request to a judicial authority is not in compatible with arbitration agreement or a waiver of the right to arbitrate	Yes	At the request of any party	Where the tribunal deems necessary	The measure may take the form of an interim award	All necessary interim measures	A tribunal may require security for the costs of measures granted. The tribunal may apportion the costs in an interim or final award.
AAA-Securities AR 1993, Article 35	-	Yes	-	Where the tribunal deems necessary	Any decision including interim awards	Any interim measures with respect to the dispute	The tribunal may require security for the cost of the measure taken.
American Film Marketing Association AR 1995, Article 10	Concurrent jurisdiction	Yes	At a request from a party	-	The form of the measure may be an interim award	Any interim measure	Deposits or security for costs in connection with the measure granted

Rules of the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agriculural Chamber of the Czech Republic - Arbitration Rules 2002, Section 12	-	-	-	-	-	-	-
Arbitration Institute of the SCC AR 1999, Article 31	A request to a judicial authority for interim measures is not incompatible with arbitration agreement or the Rules	Unless otherwise agreed by the parties, yes	At the request of a party	A measure may only be granted for the purpose of securing the claim to be tried by an arbitral tribunal.	Order	Only a specific performance by the adverse party for purpose of securing the claim which is to be tried	Security for damages
Arbitration Institute of the Oslo Chamber of Commerce-AR 1983	-	-	-	-	-	-	-
Belgian Center for the Study and the Practice of National and International Arbitration (CEPANI)-AR 1997	-	-	-	-	-	-	-
Board of Arbitration of the Central Chamber of Commerce of Finland-Arbitration Rules 1993, Article 18	-	Yes	-	-	-	-	Security for costs of the proceedings and the fees, including the tribunal's fees

British Columbia International Commercial Arbitration Centre International Commercial AR 1986, Section 16	-	Yes	At the request of a party	As the tribunal may consider necessary	Order or interim award	Any interim measure with respect to the subject matter in dispute	A tribunal may require a party to provide appropriate security in connection with the measure ordered.
Center for Conciliation and Arbitration of the Chamber of Commerce, Industry and Agriculture of Panama-AR 1986, Article 52	An application to a court is not incompatible with or a waiver of the arbitration agreement	Yes	At the request of either party	Where the tribunal deems necessary	Order or an interim award	Any measure with respect to the subject matter of the dispute	Security may be required to in order to guarantee payment of the costs of such measures.
Ceylon Chamber of Commerce-Rules for Arbitration 1963	-	-	-	-	-	-	-
Chamber of Commerce and Industry of Geneva-AR 1992, Rule 23	Concurrent jurisdiction	Yes	-	The tribunal shall request the respondent party to state its position	Order	Any provisional or conservatory measure	-
Chamber of National and International Arbitration of Milan-International AR 1996, Article 14	A request to a court for a measure is not incompatible with the arbitration agreement	Yes, provided that it is allowed under the applicable law	A request from a party	To prevent events otherwise could not be avoided	Award	Urgent matters related to the object of the dispute	The measure may be conditioned upon posting a bond, guarantee or other security

Chambre Arbitrale de Paris Rules of Arbitration 1998	-	-	-	-	-	-	-
Chartered Institute of Arbitrators- Commercial AR 2000, Articles 7(8)-(11)	-	Yes but limited power (e.g., any relief claimed in arbitration)	At a request from a party or upon a tribunal's own motion	Under appropriate circumstances	Order	Any measure claimed in arbitration and interim payment of money or disposal of property	Security for costs of arbitration
CIETAC-AR 2000, Article 23	Yes	No	-	-	-	-	-
CAMCA AR 1996, Article 23	A request for an interim measure from a court is compatible with the arbitration agreement and is not a waiver of the right to arbitrate	Yes	A request from a party	Where the tribunal deems necessary	An interim award or else	Any interim measure, including injunctive relief and measures for the conservation of property	The tribunal may require security for the costs of such measures
Commercial Arbitration Tribunal of the Federation of Pakistan Chambers of Commerce and Industry- AR 1964	-	-	-	-	-	-	-
Copenhagen Court of International Arbitration- AR 1981, Rules 11, 17, and 18	-	Yes	At a party request	-	Order	A survey by an expert	Parties to a dispute shall provide security for all expenses of the arbitral proceedings

Court of Arbitration	An application may be made to a court only for obtaining evidence upon request from the tribunal or a party	Yes but restricted	-	Order	Measures for taking evidence and security for claim	Security for the claim
Court of Arbitration at the Bulgarian Chamber of Commerce and Industry-AR 1993, Article 28	-	-	-	-	-	-
Court of Arbitration at the Polish Chamber of Foreign Trade- AR 1970	-	-	-	-	-	-
CANE AR, Clauses 27 & 28	Concurrent jurisdiction though the tribunal is favoured if it has already seized the matter.	Yes	Any of the parties	Where the tribunal finds necessary	Any interim measure in respect of the subject-matter in dispute	Security for costs may be required
Court of International Commercial Arbitration at the Chamber of Commerce and Industry of Romania-AR 1994, Art. 30	Parties are authorised by the Rules to seek interim or conservatory measures from a competent court before and during the arbitral proceedings	Yes	-	-	Any interim or conservatory measures or statements with respect to facts	-
Court of Arbitration of the Slovak Chamber of Commerce and Industry- AR, Sec. 21	-	Upon the commencement of the proceedings, the Arbitration Court has a power order a preliminary measure	Upon a request from a party	-	Any preliminary measure	-

Court of Arbitration for Sport-Arbitration Rules 1994 as amended in 1995, Article R37	No judicial provisional measures before the request for arbitration or the statement of appeal (before the exhaustion of internal remedies)	Yes	A request from a party	-	-	The measure may be made upon a condition to provide a security
Croatian Chamber of Commerce-Rules of International Arbitration 1992, Article 34	A request to a court shall not be deemed incompatible with and waiver of the arbitration agreement	Yes	At the request of a party	Where the tribunals deems necessary	recommendation	Any interim measures in respect of a subject-matter of the dispute
CPR Institute for Dispute Resolution, New York Non-Administered Arbitration of International Disputes- AR 1992, Rule 13	An application to a court is not incompatible with or a waiver of the arbitration agreement	Yes	At the request of a party	Where the tribunal deems necessary	Any	Any measure with respect to the subject-matter of the dispute
Danish Institute of Arbitration-Rules of Procedure (Copenhagen Arbitration) 1995, Article 8(2)	Arbitration agreement shall continue to be binding despite the fact that an application for a provisional measure was made to a court	-	-	-	-	-
Dubai Chamber of Commerce & Industry Arbitration Centre- AR, Article 42	Concurrent Jurisdiction, duty to inform the tribunal of the request to a court	-	-	-	-	-

Estonian Chamber of Commerce and Industry- Regulations of the Arbitration Court 1998	-	-	-	-	-	-	-	-	-
Euro-Arab Chambers of Commerce- Rules of Arbitration 1983	-	-	-	-	-	-	-	-	-
European Court of Arbitration- AR 1997, Article 21	A request to a court is acceptable, the tribunal shall be informed and it may review interim decision of state courts under the award on merits	Yes provided that the applicable law or <i>lex fori</i> permits the grant of such measure	-	Where there is urgency and necessity	-	Conservatory measures and interlocutory injunctions	Post of a security	-	-
European Development Fund- AR, Article 27	-	Yes	At the request of a party	Where the tribunal deems necessary	The decision may take the form of an interim award	Any measure in respect of the subject matter of the dispute	Security to cover whole or the part of the amount in dispute and security for costs of measures	-	-
European Network for Dispute Resolution- AR	-	-	-	-	-	-	-	-	-
Federal Economic Chamber, Vienna- Rules of Arbitration and Conciliation 1991	-	-	-	-	-	-	-	-	-
Federation of Oils, Seeds and Fats Associations Ltd.- Rules of Arbitration and Appeal 1997	-	-	-	-	-	-	-	-	-

French Arbitration Association 1980-AR, Article 11	-	Yes	At the request of a party	-	Any measures in cases of urgency No prejudice the claim on the merits
Rules of Arbitration and Appeal of the GAFTA, Article 8.2	No	Yes	-	Order	Any relief which the Tribunal would have power to grant in a final award Any interim measure of protection in respect of the subject-matter of a dispute
German Arbitration Institution DIS- AR 1998, Article 20	A request to a court in respect of the subject matter of a dispute during or before the arbitral proceedings is compatible with arbitration agreement	Unless otherwise agreed by the parties, yes	At a request of a party	Where the tribunal consider necessary	The tribunal may require an appropriate security in connection with such measure
GCC Commercial Arbitration Centre- AR 1994, Article 27	-	Yes	At the request of either party	-	Interim measures in respect of the subject-matter of the dispute Any provisional measure in order to preserve the respective rights of either party
ICSID Convention, Art. 47-ICSID AR, Rule 39	No court jurisdiction unless otherwise agreed by the parties before or during the proceedings The same as above	Yes	A party or the tribunal upon its own initiatives	Recommendation	-
ICSID Additional Facility- AR, Article 47	-	Yes	A party or the tribunal upon its own initiatives	order	Any provisional measure in order to preserve the respective rights of either party
Indian Council of Arbitration- AR 1998	-	-	-	-	-

Indonesian National Board of Arbitration- Rules of Arbitral Procedure 1977 as revised 1980	-	-	-	-	-	-	-
Institute of Arbitrators Australia- Rules for the Conduct of Commercial Arbitration 1981, Rule 6	-	Limited to security for costs	-	-	Order	Security for costs	Security for costs
IACAC Rules of Procedure 2002, Article 23	A request to a court for interim measure shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement.	Yes	Upon a party request	Where the tribunal deems necessary	Decision may take the form of an award	An interim measures including security for costs	-
International Arbitral Centre of the Federal Economic Chamber Vienna- Rules of Arbitration 2001, Article 14a	Arbitral power for the grant of a provisional measure does not restrict a part to apply to a court for interim protection	Yes	Upon application of a party	Where the tribunal considers appropriate	-	any	The tribunal may condition upon the ordering of a provisional measure to providing appropriate security
ICC AR 1998, Article 23	An application to a court is compatible with and not a waiver of arbitration agreement	Unless the parties agreed otherwise, yes	At the request of either party	Where the tribunal finds the circumstances appropriate	Order with reasons or award	Any interim or conservatory measure	Subject to appropriate security furnished by the requesting party

	No	Yes	At the request of a party	Where the tribunal considers necessary	The measure may take the form of an interim award	Any measure in respect of the subject-matter of the dispute	The tribunal may require the grant of adequate security in connection with such measures
International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation- AR 1995, Section 30	-	-	-	-	-	-	-
International Energy Dispute Settlement Centre- Procedures for Arbitration and Additional Rules 1981	-	-	-	-	-	-	-
Istanbul Chamber of Commerce Arbitration Rules	-	-	-	-	-	-	-
Italian Association for Arbitration- Rules for International Arbitration 1994, Articles 18-19	Protective measures may be obtained from a court	Within the limits imposed by law, the tribunal is empowered to adopt urgent measures	At the request from a party	-	order	Any urgent measures shall be "on matters' within the parties' power"	The petitioning party shall be asked to provide a guaranty
Japan Commercial Arbitration Association-AR 1997	-	-	-	-	-	-	-
Japan Shipping Exchange, Inc. Rules of Maritime Arbitration- AR 1962 as revised	-	-	-	-	-	-	-

Korean Commercial Arbitration Board-Commercial AR 1983 as revised in 1993, Articles 40 and 41	-	Yes	With an application from a party	Where it is deemed necessary	Order	A measure for safeguarding the property which is the subject matter of the arbitration the tribunal is also empowered to request production of evidence	-
LCIA, AR 1998, Article 25	Concurrent jurisdiction before or, under exceptional circumstances, during the arbitral proceedings no application for security for costs to judiciary	Unless otherwise agreed in writing, yes	Upon application of any party	-	Order	Any relief which the Tribunal would have power to grant in an award	Security for costs and security for claim
LMAA-Terms 1997, Article 6	-	-	-	-	-	-	-
NAFTA - Article 1134	-	Yes	Either a request from party or upon its on initiative	In order to preserve the rights of a disputing party	Order	Any measure for protecting a party's rights or making the tribunal's jurisdiction effective	-
NAI AR 1993, Articles 37 and 38	Concurrent jurisdiction. An application to a tribunal for provisional measures does not forfeit parties' right to apply to a court for such measures	Yes, at any stage of arbitral procedure	At the request of a party	As the tribunal considers necessary and desirable	Provisional decisions or interim measures. These decisions or measures may take the form of an interim arbitral award or an order	Any measures as to the matters in dispute	-

Permanent Court of Arbitration Attached to the Chamber of Economy of Slovenia-Rules of Procedure 1993 as amended, Article 32	A request to a court is not incompatible with and a waiver of the arbitration agreement.	Yes	At the request of either party	Demonstration of the probability of the existence of the claim and of the danger that obtaining of the relief or remedy sought would otherwise become impossible or considerably more difficult	Order	Any measure for satisfying the purpose of protection
Permanent Court of Arbitration of the Mauritius Chamber of Commerce and Industry-AR 1995	-	-	-	-	-	-
Quebec National and International Commercial Arbitration Centre-AR 1988	-	-	-	-	-	-
Serbian Chamber of Commerce The Rules of the Foreign Trade Court of Arbitration 2002, Article 42 SIAC AR 1997, Rule 25	Agreement to arbitrate does not affect to apply to a court for interim measure	No	-	-	-	-
Society of Maritime Arbitrators, Inc.-AR 1994	-	Unless otherwise agreed and subject to mandatory provisions of applicable law, yes	Upon an application of any party or upon a tribunal's own motion	-	Order	Any interim measure Security for costs

Thai Commercial Arbitration Committee- AR 1968	-	-	-	-	-	-
UNECAFE- AR 1966, Article VI/6-7	-	Yes	-	Where a measure is necessary	-	Any interim measure in respect of the subject matter in dispute Any measure for conservation of goods forming the subject matter in dispute
UNECE- AR 1966, Article 27-28	-	Subject to applicable national law, yes	-	-	-	Security for costs of arbitration proceedings and fees of the tribunal The tribunal is empowered to require security for costs of arbitration proceedings Security for costs of measures granted
UNCITRAL-AR 1976, Article 26	A request to a judicial authority for a provisional measure is neither a waiver of nor incompatible with the arbitration agreement.	Yes	At the request of a party	Where the tribunal deems necessary	Order or an interim award	Any interim measure in respect of the subject-matter of the dispute
WIPO AR 1994, Article 46	A request to a court for PM is not incompatible with or a waiver of the arbitration agreement	Yes	At a request from a party	Any necessary interim measure	Any provisional orders or interim measures. These orders may take the form of an interim award	Any provisional orders or other interim measures
ZCC International AR 1989, Article 28	-	Unless otherwise agreed, yes in accordance with Art. 183 of the Swiss PILA	On motion of a party	-	Order	Any
						Grant of PM may be subject to security furnished by the requesting party (including security for costs)

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