Plenary 3

Access to Justice:
Opening the Door to Additional Protections in Arbitration

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Taking Advantage of the Arbitration Process: How to Customize it to Your Case

By Erica B. Garay

As arbitration becomes a much more common process used to decide commercial disputes, it is important for litigators to take advantage of the opportunities that arbitration provides to customize the process to the needs of a specific case and the litigants. All too often, even experienced litigators fail to recognize their ability to tailor an arbitration hearing and process to the case and the clients they represent. This article will explore what litigators need to consider and what opportunities there are for addressing these important concerns. The First Opportunity: The "Who, What, When" to Consider in Drafting the Clause Arbitration is a creature of contract. The parties have the opportunity in drafting their clause to provide the rules that will govern the arbitration. The "usual" arbitration clause will state what provider (such as the NCBA panels or the American Arbitration Association) will supply the arbitrator or panel, and which rules will govern (such as Commercial Rules or the Employment Rules). The clause might state what qualifications the arbitrator should have, such as "a former judge" or "a lawyer experienced with trade secrets law." The arbitration clause can select one provider's rules to govern the conduct of the arbitration and even use a different provider to administer the arbitration and supply the neutral; a clause can also dictate that the Federal Rules of Evidence will apply or that a particular state's law will apply to the conduct of the arbitration (and not just to the interpretation of a contract). Draftsmen should consider whether the parties want discovery to be conducted as though the case were in court. Remember, as discussed below, generally speaking, arbitration provides for document exchanges, but not for interrogatories, or notices to admit or depositions. If parties wish to include discovery in addition to document exchanges, then the clause should so provide. In making these choices, however, the draftsman should recognize that the party needs to anticipate whether it will be a plaintiff or a defendant. In other words, is it in the party's

interest to limit discovery? Merely making a knee-jerk choice to favor broad discovery might not be in your client's best interest in the subsequent dispute. It is important to recognize that the parties can contract as to their procedural and substantive rights. Another consideration is whether the parties want to include appellate arbitration in the clause. This relatively recent development allows for a three-arbitrator panel to sit as an appellate court to review an arbitration award. If you choose such an option, which could permit broader review of an award than is permissible under state or federal law, draftsman should consider what the appellate review will be, whether it is de novo or something else. Again, the contract will dictate. Counsel should also consider the number of arbitrators (one or three—three being much more expensive, since you are now requiring deliberation among the arbitrators) as well as the qualifications of the arbitrator(s). Do you want a former judge? An architect? A lawyer experienced with a particular type of claim or industry can help make the entire arbitration process much more efficient and effective. How to Tailor the Arbitration if the Clause Is Silent If the clause does not provide for the arbitrator's specific qualifications, counsel representing the claimant can state the qualifications that they are seeking when the arbitration is commenced. This can be raised in the demand, during the first administrative call held with the case manager, and in the selection process itself. Counsel should also consider conferring with the other side. For example, if the parties know that the case will involve a buy-out of an interest, having an appraiser or an attorney familiar with valuations would allow for an effective, efficient arbitration, since the neutral would be familiar with the issues and evidentiary matters. The Demand and Initial Administrative Call In the demand, the Claimant has the initial opportunity to advise the provider as to the qualifications of the arbitrator(s) for the particular case. The next opportunity is during the administrative call(s) with the provider. Counsel will be asked about what background (accountant, former judge, appraiser, or an attorney with a particular experience) the arbitrator(s) should have. This is an important opportunity to ensure that you are selecting the right person to decide the case. Preliminary Conference Call During the first

call with the selected arbitrator, the litigators have another important platform for customizing the arbitration process—both the prehearing discovery phase, as well as the hearing itself. If there are any legal issues that should be addressed at the outset, counsel should be prepared not only to frame the issue (and possible motions) but also the scheduling and tasks involved in such, and raise them with the arbitrator in the initial call. Examples of such motions are choice of law, scope of damages, and the scope of the arbitration clause. Planning to include time to address these at the outset will ensure that the arbitration will not run off course later. Similarly, one should consider at the start whether the case would benefit from a dispositive motion or bifurcation of issues, and plan for it accordingly. For example, the scheduling order could provide a deadline by which a party will either file a motion or submit a letter that seeks leave to move. Building in time for the briefing of such a motion before a hearing is an important way for the legal issues to be addressed in a time-sensitive manner and to permit the hearing to stay on schedule. Among the ways that the arbitration can be tailored to the needs of the case is to consider at the very earliest stages where evidence is, who has the evidence, where the witnesses are located, and whether there will be issues about obtaining such. Remember that there may be limitations on the ability of a party to obtain documents pre-hearing from non-parties, especially if the documents are out-of-state, or if a non-party is not cooperative. Counsel should give thought to whether non-party witnesses who are out-of-state will appear voluntarily or are willing to testify remotely. One should take time before this call to consider what one's needs are, how long the process will take, and to be prepared to make a proposal for handling such matters. For example, if the case is governed by the Federal Arbitration Act, then only arbitrators may issue subpoenas. In such a context, it would be advisable to make sure that there is time in the schedule for presenting the subpoenas, serving them and addressing any dispute regarding their scope. Counsel should also consider how remote witnesses will testify at the hearing. Will their testimony by telephonic, skype or video-conferenced? The arbitrator may prefer to see a witness testify. Also, given

thought to how exhibits will be presented to these witnesses and make sure that all counsel will have the ability and opportunity to have exhibits at the witness's locale. (It is also important to bear in mind that if you are using video or skype as the method to present the witness, to make sure you have tested the method in advance, for example, testing the link.) Counsel should not assume that the equipment will be available. The scheduling order will be set during the preliminary call. Counsel must be prepared to set hearing dates and the rest of the schedule. There are a myriad of ways that litigators can use this opportunity to customize the arbitration (and do not assume that just because you have always made an opening statement or provided a pre-hearing brief, that such is mandated or needed in every arbitration). To ensure efficiency and avoidance of unnecessary delays, it is advisable to ensure that the schedule you agree to takes into account the specific needs of your case, including: • Are there issues concerning arbitrability or the scope of the arbitration or whether a party named in the arbitration is a party to the arbitration clause? Is this an issue to be addressed by the arbitrator or a court? • Include time to address confidentiality stipulations and submission to the arbitrator to be so-ordered; if using a "court" form, have you edited it to be appropriate for an arbitration? • Include time to negotiate any ESI protocol (for search terms, for example) • Set a schedule to present (and argue) discovery disputes, including concerning privilege issues • Whether the case or hearing should be bifurcated, or whether the parties would benefit from certain issues being decided at an early stage (such as choice of law or scope of damages) • A schedule to present dispositive motions • Whether you need deadlines to add parties or claims • Do you need both opening statements and pre-hearing briefs? • Can the parties stipulate to any facts? Set a deadline. Stipulating to facts will shorten hearing time and reduce costs. • Counsel should carefully review the pleadings served and the arbitration clause. Has claimant followed the clause's requirements? For example, has the correct locale for the hearing been demanded? The preliminary conference call is also an opportunity to ask the arbitrator to require that the claimant amplify its demand so that there is more specificity as to the claims,

factual allegations, and damages sought. Counsel can ask the arbitrator to set a deadline for the amplification or to direct claimant explain its calculation of damages; or, if there are allegations of fraud without specificity, a respondent could ask to have a deadline set for providing such information. In an arbitration, the demand is deemed denied, even if there is no answer filed. If that is how respondent is proceeding, a claimant could ask to have included in the schedule a deadline for the respondent to serve an answer that specifies what defenses are being raised. This should not be overlooked, so that there are no surprises at the hearing and the discovery demands can address the defenses. This is an important opportunity to request an amplification of the claims, defenses and calculation of damages. Counsel should take the time to analyze what their needs are so as to ensure that there is notice of what claims or defenses are being heard and so that discovery is aimed at them. Similarly, if there are multiple parties and multiple claims, counsel should consider asking for a pleading to be filed that informs the adversary as to what claims are plead by which party and against whom, as well as what damages are sought from which party. Consideration as to the arbitrabililty is important, too. However, counsel should consider whether it is better to address all the issues in a single hearing rather than having piecemeal litigation/arbitration. Conclusion Advocates are advised that proper thought should be given at the outset (and in the drafting of the contractual provision) as to how to create the optimum process to arbitrate the claims and defenses that will be presented. Just doing what was done on a prior occasion is a sure way to miss out on an important opportunity to tailor the process to the particulars of the dispute at hand.

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OBTAINING PROVISIONAL RELIEF IN AID OF ARBITRATION

by Erica B. Garay, Esq.

Mr. Jones, head of sales to a manufacturing company, Fortune Corp, suddenly departs for the competition. In weeks before his resignation, Mr. Jones was emailing himself (to his home/personal email account) reports of historic sales and information about current discussions with customers and prospective customers. Customers have begun calling Fortune's president, advising that Mr. Jones has begun soliciting their business on behalf of his new employer, a competitor of Fortune. Mr. Jones was a party to an employment agreement containing an arbitration clause. Fortune would like to seek an injunction and obtain a temporary restraining order (TRO) against Mr. Jones.

First, because there is an arbitration clause, counsel for Fortune must prepare a Demand for Arbitration (which can be quite brief, or can look like a complaint, containing multiple causes of action and a statement of the claim) and commence an arbitration in accordance with the rules of the arbitration provider designated in the arbitration clause. The Demand must be served in accordance with the rules or contractual provisions. Filing fees are explained on the tribunal's website.

Counsel may seek a preliminary injunction and TRO from the arbitrator pursuant to the applicable rules, if the rules provide for such. An arbitrator has the power to issue such relief, upon a showing of entitlement. For example, the Rule 37 (Interim Measures) and Rule 38 (Emergency Measures of Protection) of the American Arbitration Association (AAA) (Commercial Rules), provide a mechanism to obtain interim or preliminary relief on an expedited basis. Similarly, National Arbitration and Mediation (NAM) Rule 10 (Interim Order), imbues the arbitrator with broad powers to issue interim relief that the arbitrator, in his discretion, deems appropriate.[1]

Alternatively, counsel may seek provisional relief from the court "in aid of arbitration." Seeking such interim or preliminary relief will not act as a waiver of the parties' arbitration clause if sought under CPLR 7502(c). Indeed this section provides extraordinary relief to ensure the effectiveness of a future arbitration award.

Pursuant to CPLR 7502(a), a special proceeding must be commenced to apply for provisional relief, if there is no action pending.[2] If there is an action pending, then the application can be made by motion.[3] CPLR 7502(a)(i)-(ii) is the governing venue provision for special proceedings in aid of arbitration. The signed Order to Show Cause will dictate how and by when the Order to Show Cause, Petition and supporting papers are to be served. "E-filing rules," including bringing a copy of the proof of e-filing and purchase of the index number, must be observed when counsel presents the order to show cause, supporting papers, and Request for Judicial Intervention (RJI) in court. If the case is a commercial case, it should be so designated on the RJI, and any applicable rules of the division must be followed.

CPLR 7502(c) requires the petitioning party to show that:

- the claim is arbitrable and there is a binding arbitration clause

- without the injunction or order of attachment the award rendered in the arbitration would be ineffectual

- and that the provisions of article 62 (attachment) and/or article 63 (injunctions) have been satisfied.

Courts have held that the petitioner must satisfy the three-prong test and show that the arbitral award would be rendered ineffectual without the injunction. In addition to the Order to Show Cause (and affidavit of emergency) and petition, the petitioner should present affidavits with exhibits and a memorandum of law in support of the extraordinary relief of injunction or attachment demonstrating entitlement to the extraordinary relief sought.

In *Ottimo v. Weatherly Securities Corp.*, the Second Department stated that in addition to showing that the "award to which the applicant may be entitled may be rendered ineffectual without such provisional relief," the applicant must demonstrate "traditional equitable criteria for the granting of temporary relief under CPLR article 63".[4] "Article 63 is a formulation of the traditional equitable criteria necessary for provisional relief: (1) irreparable harm; (2) a likelihood of success in arbitration; and (3) a balance of the equities in favor of the moving party."[5]

The failure of Petitioner to establish that the award would be rendered "ineffectual" is often a ground for denial of the requested relief. For example, in *Kadish v. First Midwest Securities, Inc.*, the First Department, affirmed the denial of an order of attachment finding that petitioner failed to provide record evidence establishing that the respondent would be unable to pay an award (as the certified financials established the qualifications of the company) and that petitioner had failed to rebut the evidence presented that it was likely that insurance would be available to fund the award.[6]

The denial of an injunction was also affirmed in *Advanced Digital Security Solutions, Inc. v. Samsung Techwin Co., Ltd.*, where the Second Department held that it was proper to deny an injunction because issues of fact existed that precluded petitioner from establishing the likelihood of success on the merits.[7] In *Richard Manno & Co., Inc. v. Manno,*, the trial court denied a preliminary injunction in aid of arbitration, since it is the same relief sought from the arbitrator as the ultimate award.[8] The Court held that the balancing of the equities favored the respondent, especially where an award of damages would make the petitioner whole.

There are more hurdles to obtaining an injunction in aid of arbitration than in any other application for an injunction.[9] However that does not mean that an injunction will not be awarded. This is especially the case where there are trade secrets to protect or the return of corporate property is sought,[10] to prevent the transfer of real property during the pendency of an arbitration, [11]or where the termination of an agreement to sell goods would cause irreparable harm during the pendency of the arbitration.[12] In *Rockwood Pigments NA, Inc. v. Elementis Chromium, LP*, for example, the First Department noted that, but for the award of injunction in aid of arbitration to require the continued performance of the contract (which allegedly had been terminated wrongfully), the ultimate remedy of specific performance would be unavailable, at the conclusion of the arbitration, where petitioner was in need of the subject goods for the company to function.[13]

The petitioning party must post an undertaking to support the injunction that you have obtained. CPLR 7502(c). Extensions on good cause shown can be given, if a deadline to file the bond cannot be met.

With respect to seeking a TRO in the Order to Show Cause, counsel should also consider what advance notice is required to be given to the respondent that such relief is being sought. Notice is unnecessary under 22 N.Y.C.R.R. § 202.7(f) where it would cause "significant prejudice to the party seeking the restraining order by giving of notice." This would apply to destroying evidence that trade secrets were taken or used, for example. The reasons for not providing the usually required notice should be set forth in the RJI and can be further explained in the affidavit of emergency.

Lastly, the petitioner must commence the arbitration within 30 days of the grant of the provisional relief (if not filed previously).[14] Otherwise, the order granting such provisional remedy is null and void, and the respondent can recover reasonable attorney's fees and costs.[15]

As noted above, the claimant may also seek preliminary relief from the arbitrator, if available under the provider's rules. Given the proviso that an arbitrator is not bound by the strictures of CPLR 7502(c) and its procedural requirements, a practitioner should consider seeking provisional or interim relief directly from the arbitrator, who is entitled to do justice, and where court review of such determinations is extremely limited.

If the high threshold to obtain an order of attachment cannot be met, counsel should consider entering a stipulation that restrains the respondent in certain ways. For example, the stipulation could limit the financial activities of the respondent or embody a "status quo" order. Or, instead of an injunction to protect petitioner, a stipulation could limit solicitation of certain customers, or agree to the return of corporate property (such as cell phones, laptops, documents and electronic data) and/or limit the use of confidential information or specific documents during the pendency of the arbitration.

As ADR becomes more prevalent, litigators need to be conversant in the provisional remedies available from the arbitration tribunals and from the courts in aid of arbitration. CPLR 7502(c) and the ADR tribunal's rules provide invaluable tools to protect the claimant.

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[1] See also JAMS Rule 24(e) (interim and provisional relief).

[2] *See also* CPLR Article 4 (special proceedings).

[3] *See* CPLR 7502(a).

[4] 306 A.D.2d 287, 760 N.Y.S.2d 364, 364 (2d Dep't 2003).

[5] *Tapimmune Inc. v. Island Capital Mgmt., LLC*, 2013 WL 1494681 (N.Y. S.Ct. N.Y. Cty, April 8, 2013), *citing Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839 (2005). *See also Winter v. Brown*, 40 A.D.3d 526, 527, 853 N.Y.S.2d 361, 362 (2d Dep't 2008).

[6] 115 A.D.3d 445, 446, 981 N.Y.S.2d 525, 526 (1st Dep't 2014), *citing Sojitz Corp. v. Prithvi Info. Solutions Ltd.*, 82 A.D.3d 89, 96, 921 N.Y.S.2d 14 (1st Dep't 2011); *Sullivan & Worcester LLP v. Takieddine*, 73 A.D.3d 442, 442, 899 N.Y.S.2d 609 (1st Dep't 2010).

[7] 53 A.D.3d 612, 613, 862 N.Y.S.2d 551, 552 (2d Dep't 2008).

[8] 34 Misc.3d 1225(A), 946 N.Y.S.2d 69 (N.Y.S. Ct. Suffolk Cty., Feb. 2012)(Whelan, J.).

[9] *See, e.g.*, CPLR Article 63 (injunction) CPLR Article 62 (attachment).

[10] S*ee, e.g., Earnick Enterps., Inc. v. Sterling Vision, Inc.* 1998 WL 35243182 (N.Y.S. Ct. Kings Cty, Feb. 3, 1998).

[11] S*ee, e.g., Astoria Equities 200 LLC v. Halletts A Devel. Co., LLC*, 47 Misc.3d 171, 183, 996 N.Y.S.2d 516, 524 (S.Ct. Queens Cty. 2014).

[12] S*ee, e.g., Rockwood Pigments NA, Inc. v. Elementis Chromium, LP*, 124 A.D.3d 509, 2 N.Y.S.3d 94 (1st Dep't 2015).

[13] *Id.*

[14] CPLR 7502(c).

[15] If you find yourself in federal court, the Federal Arbitration Act does not provide a specific section governing application for an injunction in aid of arbitration. However, the Second Circuit has found that the district court has the inherent power to issue such an injunction. *See, e.g., Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049 (2d Cir. 1990); *Roso-Lino Bev. Distribs, Inc. v. Coca-Cola Bottling Co. of N.Y., Inc.*, 749 F.2d 124 (2d Cir. 1984). The circuit courts are split on this issue, however.

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Arbitration

Assessing the Options: Go for an Interim Emergency Award? Or a Temporary Restraining Order Issued by a Court?

BY FAITH S. HOCHBERG

"Go to court? Or not to court?" Those are the questions, with apologies to the late great bard.

This is an unusual inquiry coming from a former U.S. District Court judge who retired from the bench just last year. But this author would be the first to say that courts can learn a lot from processes developed by arbitrators.

As just one example, litigation discovery in the U.S. is too cumbersome, burdensome and expensive. But when you need interim emergency measures to protect your client's interests in a matter before an arbitration panel can be convened, your first decision may be the most critical to protecting your client's interests.

In a rapidly evolving matter where, for example, speed is critical to prevent dissipation or removal of assets, are you better off going to court or seeking an emergency arbitral ruling?

A decade ago, the answer would have been clear: seek an emergency court order. Now, however, many arbitral institutions and rules can be quite nimble in emergent situations.

So which forum do you choose? There are many nuanced considerations; it is vital to consider them before an emergency arises.

This article sets forth the practical issues that counsel may face, in the order that this author believes they should be considered. The universal assumption is that the matters that should go before an emergency arbitration tribunal are those where the ultimate relief on the merits will be determined in arbitration.

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1. What Type of Relief Will You Be Seeking?

The first question is likely to be what kind of interim relief you anticipate. An asset freeze? An order preserving the status quo in a corporate dispute? An order to enjoin obstructive behavior? An order to prevent funds from leaving the jurisdiction?

The primary goal, of course, is to ensure that your client will have a collectible judgment at the end of the merits arbitration.

Once this is decided, there are many decisions that follow.

2. Is the Relief Measure Likely To Be Adverse to a Party or a Non-Party to the Arbitration?

If the relief will likely be sought from a party to the arbitration, it is essential to stay current with the sources of arbitral authority to grant interim relief. The applicable arbitral rules that govern the dispute may well have new or updated rules that permit an emergency arbitrator to grant interim relief. Even if you had

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Commentary

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- … That had a generally accepted method of enforcing its determinations …
- … And that had a sound basis for the traditional practice of binding private dispute resolution.

These attributes are essential to the very concept of arbitration as a method of non-judicial, consensual, final, and binding resolution of disputes. Yet many of them seem no longer to pertain to either mercantile or religious communities.

Just as the absence of the practice of Quaker arbitration—or some other clear, defined, final, authoritative and Spirit-led procedure for addressing disputes within Quaker congregations—may reflect a disinclination of contemporary Friends to join a truly covenanted faith community, so current trends of commercial arbitration might also reflect a similar departure from its mercantile origins of seeking accountability, authority and self-regulation for the advancement of the trade.

Modern theories of arbitration contemplate that the process—which originally relied on informed consent and participation in a defined body of users—may now bind employees, consumers, credit card users, software purchasers, and others who share few attributes of a community, and indeed may be unaware that they have agreed to participate in the arbitration process.

Quakers appear to have abandoned—even forgotten—a historic practice of arbitration. The eventual disuse of arbitration in the religious community may hold disquieting lessons for those questioning the integrity of commercial arbitration.

Generally applicable legal principles, rather than standards of behavior unique to a shared and intentional community, are now applied to the determination of these conflicts. No distinct practice or tradition of private adjudication has survived this evolution, and no distinct social, economic, or spiritual objectives are served by modern arbitration that the general law does not equally address.

Rather, the arbitration process is perceived merely as an alternative forum to vindicate the same rights deriving from the same standards and the same inter-relational behaviors as would be addressed by a public court in the application of broadly applicable legal principles.

COMMERCIAL DEVOLUTION

The study of the disuse of Quaker arbitration, then, leads us to reassess the devolution of modern arbitration itself. In any community—whether one sharing a common faith or one sharing a common mercantile practice—private arbitration among members of a close and dependent society is, ultimately, an exercise in mutual accountability.

In the absence of that accountability, and in light of the broadly accepted modern practice of disputants' engaging advocates to argue law, rather than directly and frankly engaging each other in a search for an outcome reflecting their shared values, an essential attribute of arbitration is missing and its practice is skewed.

At its core, arbitration over the centuries has relied upon a closed community with common goals, accepting that mutual accountability is essential to its welfare. The acknowledgement within the community of specific expectations for behavior—unique to that specific community—is an essential element of private dispute resolution and the key to the practice of arbitration as a means of the community's achieving its objectives.

The Quaker community changed, and as it lost those principles of mutual reliance, the practice of arbitration ceased to address its wounds or affirm its basic strengths. Might commercial arbitration have lost its essential character, as well?

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those rules committed to memory as recently as a year ago, check for updates, because this area of many arbitral institutions' rules is changing rapidly.

In addition to the arbitral rules that apply to your case under the arbitration clause, consider whether an international convention will apply. The convention will govern whether an emergency arbitrator's ruling will be enforced in a particular country where assets are located. Also, have at your fingertips the relevant national law of the country where you expect to either enforce an emergency arbitrator's ruling, or seek emergent relief directly from a court.

The trend of the conventions, laws and rules is generally not to prohibit interim measures, unless the arbitration clause itself prohibits them. Note that some arbitration clauses now specifically authorize such measures, but specific authorization may not be necessary to obtain that type of relief. (If interim measures are expressly prohibited in the arbitration clause or incorporated rules, the task will be monumentally more difficult.)

Nevertheless, be sure to take that extra step of researching the national laws of the country where you will need to enforce the interim measure. Some countries' laws prohibit arbitrators from granting provisional relief, even if the applicable arbitral rules permit it, so be aware of those laws from the start of the analysis.

United States law generally upholds the authority of arbitrators to order interim relief, if the arbitration agreement is silent and does not ban it. While there are a very few historical cases holding that express consent is required, this is a distinctly minority view.

By contrast, if the relief to be sought is from a third party who is not bound by the arbitration clause, you will almost always need to seek that relief in a court with jurisdiction over the person and/or the asset. If there is jurisdiction over the asset, but not the person, consider whether the national law of that country permits in rem proceedings.

For a discussion on the current caselaw, see Bruce E. Meyerson, "Interim Relief in Arbitration: What Does the Case Law Teach Us?" 34 *Alternatives* 131 (October 2016)(available at http://bit.ly/2eHITCI).

3. How Fast Will You Need a Ruling on the Interim Measure?

Historically, the general view was that courts can act faster than arbitrators, because courts have judges and rules in place to hear an emergency motion for a temporary restraining order, preliminary injunction, attachment request, and/or an emergency asset freeze.

Now that many arbitral institutions have procedures to appoint an emergency arbitrator before the merits panel is constituted, this view is changing, and the inquiry involves multiple factors.

It is important to stay current as the rules emerge. While I was a federal judge, I was always amazed that civil rules changes seemed to take forever to be fully known by the bar.

As a result, I often had to point out to counsel that rules had been adopted on issues such as claw-back of inadvertently produced privileged documents, or authentication of business records.

The need for interim relief moves too quickly to learn about rules from the judge or arbitrator. Counsel must not only keep abreast of new rules, but also have a plan in advance to move quickly if interim measures are required.

If your arbitration agreement is ad hoc, with no rules specified, seeking court relief is probably the better choice, unless there is a provision for interim measures in the agreement itself. And, of course, where your client has the ability to be involved in the drafting process, make sure that you consider whether to incorporate either a set of arbitration rules that have a procedure for interim relief, or incorporate that provision directly into the arbitration clause.

If speed is a core concern, to avoid dissipation or transfer of assets, or destruction of evidence, seeking relief directly from a court will usually be faster, because is it a one-step process rather than two steps. Even if there is clear authority for an arbitral award of interim relief, only a court can both award and enforce that relief.

Weighing Your Options

The arbitration dilemma: Where should you go for emergency relief?

Don't always follow your instincts: By definition, judges and courts are set up for timely intervention/preservation. But today's arbitration rules accept pre-hearing arbitration action as part of the full dispute resolution scheme. They are a solid option.

Have a game plan: Despite the ubiquity of interim procedures, the rules have been changing fast. This article provides you with the evaluation steps for getting help before your case is arbitrated.

The arbitral rules that govern the dispute may have new or updated provisions that permit an emergency arbitrator to grant interim relief. Even if you had those rules committed to memory as recently as a year ago, check for updates. This area is changing rapidly at many arbitral institutions.

4. What Will Be the Applicable Legal Standard To Win Interim Relief?

Although courts have the personnel and administrative ability to act with speed to assign a judge to hear emergent applications for relief, the legal standard necessary to convince a judge to grant the relief sought may be considerably more difficult than in an arbitral process.

The traditional legal standard to surmount in court is to demonstrate both a likelihood of success on the merits, and irreparable harm that is not compensable in damages. In addition, courts also consider factors such as a balancing of the harm to the party seeking the relief compared to the prejudice to the party whose assets may be frozen before it has a chance to be heard.

Historically, arbitrators have applied a more flexible standard, phrased in terms such as "necessary relief in the interest of justice," or "preserving the arbitral process." Standards using this language are set forth in many conventions and rules.

But there is a fairly recent trend of arbitral standards vectoring somewhat toward court legal standards. While arbitrators generally have shied away from using the standard of "likelihood of success on the merits" to avoid appearing to prejudge the case before the merits panel hears the evidence, the standard applied in some proceedings is whether there is a "reasonable possibility" of success on the merits.

This is a lesser burden than establishing "likelihood" of success. But it also is more demanding than the historically elastic standard of "necessary relief in the interest of justice" or "relief necessary to preserve the arbitral process."

5. If You Get an Interim Award, Can You Enforce It?

If the relief obtained is injunctive in nature, it will be necessary to obtain court enforcement of it, absent voluntary compliance by the adverse party. As stated above, be sure that you are familiar with the law and rules of the court with jurisdiction over the party and the asset.

Voluntary Compliance vs. Court-Enforced Compliance: Do not rule out the possibility of voluntary compliance, because the

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adverse party may not want to get on the wrong side of an arbitration panel before the case even begins.

And if you are defending an interim ruling, remember that arbitrators are human and the credibility of a party can be affected if it does not comply with the interim ruling. Counsel often advise compliance. A negative impression of credibility is hard to erase, especially with the tribunal that will be deciding whether to award damages for noncompliance. Additionally, consider whether the merits panel can make an adverse inference from the fact of noncompliance.

Enforcement via Court Action: The reality is that most interim awards will have to be enforced in a court of competent jurisdiction. If you are able to persuade an emergency arbitrator to grant interim relief, a court will almost always enforce the interim award. Courts apply a very different standard to review of arbitration awards than is applied to cases brought to it in the first instance. Therefore, the court will likely enforce the arbitrator's interim award even if that court might not itself have granted relief under the legal standard to be applied if the application had been made directly to the court.

Nomenclature Can Matter: Because enforcement of the interim award will require court action where a party does not voluntarily comply, make sure that the interim award is styled as a "Partial Final Award" and not a "Procedural Order."

This gives counsel the best chance to quickly convince a court that it is a final award of interim relief. Of course, the court will independently decide if the award is in fact really one that is final and enforceable, but the wording can create a strong first impression.

6. Will Advance Notice to the Other Party Trigger the Harm before Counsel Can Even Be Heard?

When dealing with a true scoundrel, it may be necessary to seek relief ex parte.

Regardless of the forum, an ex parte motion is always a challenge, but your chances are better in court than in arbitration. Arbitrators are hesitant to act without the consent of both sides in the process. Arbitration is premised on consent, and that core principal is deeply engrained in the process and the arbitrators themselves.

Counsel often advise compliance with interim rulings. A negative impression of credibility is hard to erase, especially with the tribunal that will be deciding whether to award damages for noncompliance.

7. As if this Wasn't Already Complicated Enough, What Else Must Be Considered?

Rules on Posting of Bonds by the Prevailing Party: The general rule in courts is to require the prevailing party to post a bond, to secure against any harm to the party who is enjoined or restrained. Courts require this, with rare exceptions, because a decision is being made to the detriment of one party without full knowledge of all the facts and evidence. If the injunction is improvidently ordered, there must be a secure way to redress the wrong to the adverse party.

Where an interim award is made by an emergency arbitrator, a bond also likely will be sought and often granted.

The Country Where the Interim Measure Would be Enforced: If enforcement will be sought in a foreign country, an arbitration award is a superior choice because of worldwide recognition and enforcement, even in countries that would not enforce a court order of the United States.

Choice of Law; Venue; Jurisdiction: These issues demand careful legal analysis in advance of the emergency to chart a smart path toward enforceable relief.

Jurisdiction is critical, and advance research should be conducted about whether the jurisdiction must be proper over the person or in rem over the asset. It is important to note that United States law has narrowed considerably about both general and specific jurisdiction over entities, especially foreign entities.

Choice of Law often is specified in the arbitration agreement. If it is not, be sure to know in advance what law will be applied. It could be the national law of the country where the entity or asset is located, or it may be the arbitral seat. If the measure is directed to a non-party, the law that applies will likely be the law of the forum where the party or asset is located.

* * *

The ability to obtain interim relief in advance of convening an arbitration merits panel is rapidly becoming the norm rather than the exception.

Whether and how to anticipate the fast-moving choices that need to be made about whether to proceed with an emergency arbitrator or a court is a true challenge. But that challenge is less daunting if advance research is done to develop a decision tree about the pros and cons of each, whether your client is the claimant or the potential respondent.

You will not have the luxury of time to chart your course through these decisions, so anticipation and advance research is key.

REVIEWING THE LAW

Once you are comfortable with the decision-making practice pointers for getting interim relief in arbitration, you need to align it with familiarity with the law. *Alternatives* covered the case law and statutes on interim measures in arbitration during the fall in an article by former Arizona state court judge and veteran practitioner Bruce E. Meyerson. See his article, "Interim Relief in Arbitration: What Does the Case Law Teach Us?" in the October 2016 issue, at 34 *Alternatives* 131 (available at http://bit.ly/2eHITCI). A sidebar features a guide to the state law adoptions of the latest version of the Revised Uniform Arbitration Act.

Interim, Provisional and Conservatory Measures in US Arbitration

PRACTICAL LAW LITIGATION AND PRACTICAL LAW ARBITRATION

Search the Resource ID numbers in blue on Westlaw for more.

This Practice Note outlines interim measures available in arbitration and provides guidance on where, when and how to apply for these measures.

SCOPE OF THIS NOTE

Interim, provisional and conservatory measures are remedies that can be granted before the arbitrators hear the merits and render their final award. They are designed to protect a litigant during the course of an arbitration to insure a meaningful final adjudication on the merits. These are extraordinary remedies that are usually granted only on the ground that the award to which the applicant may be entitled may be rendered ineffectual without interim relief. If the remedy is granted, the applicant may be required to post security to make the other party whole for any injury it sustains as a result of the remedy if it is determined that the applicant was not entitled to the remedy. Before advising a client to seek an interim remedy, counsel should consider the likelihood of obtaining relief and the value of that relief if obtained.

This Note addresses remedies that parties may seek before arbitrators and US courts to preserve the status quo so that the final award rendered by the arbitrators will be meaningful. Depending on the applicable law or institutional rules, the remedy may be referred to as "provisional," "preliminary," "interim," "conservatory" or "temporary." Regardless of the term, the effect is the same. Under the rules of most of the arbitral institutions, the arbitral tribunal can grant interim remedies, which include the ability to grant preliminary injunctive relief and orders of attachment in an appropriate case. A party may, for example, need to restrain an employee in possession of sensitive trade secrets from working for a competitor or may need to attach assets that would otherwise leave the jurisdiction.

This Note explains the:

- Relevant sources of law.
- Power of arbitrators.
- Role of the courts.
- Factors to consider when deciding to seek interim relief before arbitrators or a US state or federal court.
- Best ways to resist interim relief.

For an analysis of anti-suit injunctions in aid of arbitration, see Practice Note, Anti-Suit Injunctions and Anti-Arbitration Injunctions in the US Enjoining Foreign Proceedings (3-560-2848). For more information on interim, provisional and conservatory measures in international arbitration generally, see Practice Note Interim, Provisional and Conservatory Measures in International Arbitration (1-342-7952).

US LEGAL FRAMEWORK FOR ARBITRATION

Federal courts, state courts and arbitrators can grant interim relief such as preliminary injunctions and pre-judgment attachments in aid of arbitration. Most interim measures are granted at an early stage in the proceedings to preserve the status quo or prevent the dissipation of assets or evidence that could render an award ineffectual.

Arbitration in the US is governed by both federal and state law. The main source of US arbitration law is the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1-16, 201-208, 301-307), which applies in the state and federal courts of all US jurisdictions. The FAA applies to all arbitrations arising from maritime transactions or to any other contract "involving commerce," which is defined broadly (see *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037, 2040 (2003)). This effectively means that the FAA applies to all international arbitrations and most domestic arbitrations seated in the US.

The FAA does not cover "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" (9 U.S.C. § 1). Therefore, employees "actually engaged in the movement of goods in interstate commerce" are not covered by the FAA (*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001), quoting *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997)). The FAA's exemption for seaman's employment contracts, however, does not apply to international voyages, which are covered by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in 1958 (New York Convention) (see *Dumitru v. Princess Cruise Lines, Ltd.*, 732 F. Supp. 2d 328, 338 (S.D.N.Y. 2010)). In the areas the FAA covers,

the courts have stated that it generally pre-empts any state law that conflicts either with its express provisions or its intent of promoting arbitration.

The FAA permits parties to specify in their agreement state arbitration rules to govern their arbitration (see *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008)). All 50 US states and the District of Columbia have enacted arbitration laws of their own to address issues on which the FAA is inapplicable or silent.

Federal courts are courts of limited jurisdiction and can hear only certain types of cases. In controversies touching on arbitration, however, the FAA is "something of an anomaly" in the realm of federal legislation, in that it does not independently bestow federal jurisdiction (*Hall St.*, 552 U.S. at 581-582 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983)). Where the claims in the underlying arbitration are based on federal law, as long as the federal cause of action is not facially insubstantial, the district court may properly exercise subject matter jurisdiction over the application for provisional remedies (see *Fairfield Cty. Med. Ass'n v. United Healthcare of New England, Inc.*, 557 F. App'x 53, 55 (2d Cir. 2014)).

An action or proceeding falling under the New York Convention is deemed to arise under US laws and treaties (9 U.S.C. § 203). The FAA, which implements the New York Convention provides federal courts jurisdiction over actions to "compel, confirm, or vacate" an arbitral award (see *Holzer v. Mondadori*, 2013 WL 1104269, at *6 (S.D.N.Y. Mar. 14, 2013). Although the FAA does not explicitly grant federal courts jurisdiction, courts generally hold that they possess subject matter jurisdiction over requests for preliminary relief in aid of international arbitration (*Stemcor USA Inc. v. Cia Siderurgica do Para Cosipar*, 870 F.3d 370, 375 (5th Cir. 2017); see also *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990) (entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's powers pursuant to section 206 of the FAA), cert. denied, 500 U.S. 953 (1991); see also *Goel v. Ramachandran*, 823 F. Supp. 2d 206, 215–16 (S.D.N.Y. 2011)). Federal courts, therefore, have jurisdiction to grant preliminary relief even when the petition is not accompanied by a request to compel arbitration (see *Venconsul N.V. v. Tim Int'l N.V.*, 2003 WL 21804833, at *3 (S.D.N.Y. Aug. 6, 2003)).

Where the subject matter of an action or proceeding pending in a state court relates to an arbitration agreement or award falling under the New York Convention, the defendants may, at any time before the trial, remove the action or proceeding to the federal district court embracing the place where the action or proceeding is pending (9 U.S.C. § 205). (See Practice Note, Removal: How to Remove a Case to Federal Court (1-506-8452)).

For more information on the scope of the FAA, see Practice Note, Understanding the Federal Arbitration Act (0-500-9284).

SEEKING INTERIM RELIEF BEFORE COURTS AND ARBITRATORS

Arbitration governed by institutional rules such as the American Arbitration Association (AAA) Commercial Arbitration Rules (as amended on September 9, 2013, for arbitrations that commence on or after October 1, 2013) (AAA Rules) and the International Centre for Dispute Resolution (ICDR) International Arbitration Rules as amended and effective June 1, 2014 (ICDR Rules) specify that the arbitrators have the power to grant interim, provisional and conservatory measures and specify procedures for obtaining relief even before the tribunal is constituted (see AAA Rules 37 and 38 and Articles 6 and 24, ICDR Rules).

Provisional relief is often necessary before arbitration when:

- A party has evidence that is relevant to the dispute but this evidence is likely to be destroyed, damaged or lost absent an interim order protecting it.
- A dispute is concerned with the ownership of perishable goods that may deteriorate before the dispute can be determined. An interim order requiring the sale of the goods (with the sale proceeds to be held pending the final award), or requiring the goods to be sampled, tested or photographed before the sale is often granted in this case.

WHO MAY PROVIDE RELIEF

Interim, provisional and conservatory relief in aid of arbitration may be provided by:

- The arbitral tribunal.
- An "emergency arbitrator" appointed by an administering body.
- A federal or state court.

The precise scope of the powers of each of these to act depends on:

- The arbitration agreement.
- Applicable arbitration rules.
- Applicable federal and state law.

COURT-IMPOSED LIMITS

Some US courts have held that they lack power to grant interim relief where the underlying dispute is subject to an arbitration agreement governed by the New York Convention (see, for example, *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1037-38 (3d Cir. 1974) and *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981)). In *Merrill Lynch, Pierce, Fenner & Smith v. Hovey,* the Eighth Circuit held that a preliminary injunction was inappropriate in an arbitrable controversy where the parties did not specifically provide for it in their agreement (726 F.2d 1286, 1292 (8th Cir. 1984); see also see *Manion v. Nagin*, 255 F.3d 535, 538-39 (8th Cir. 2001); *RFD-TV, LLC v. MCC Magazines, LLC*, 2010 WL 749732, at *3-4 (D. Neb. March 1, 2010)). Other courts have declined to grant provisional relief where it is clear that the arbitrators have the power to grant the same provisional relief (see *TK Services, Inc. v. RWD Consulting, LLC*, 263 F.Supp.3d 64, 71 (D.D.C. 2017); *Burton Way Hotels, Ltd. v. Four Seasons Hotels Ltd.*, 2017 WL 2491595, at *1 (C.D. Cal. May 18, 2017)).

The prevailing view, however, is that under the FAA, a court may grant interim relief pending arbitration (see *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 (4th Cir. 2012), *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 365 (5th Cir. 2003); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 214-15 (7th Cir. 1993); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1051-54 (2d Cir. 1990); *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d at 826; *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v. Lauro*, 712 F.2d 50, 54-55 (3d Cir. 1983); and

Sojitz Corp. v. Prithvi Info. Solutions Ltd., 921 N.Y.S.2d 14, 17 (1st Dep't 2011)). In *Sojitz*, for example, the court held that a creditor can attach assets, for security purposes, in anticipation of an award that will be rendered in an arbitration seated in a foreign country, even where there is no connection between the arbitral dispute and the state, as long as there is a debt owed by a person or entity in the state to the party against whom the arbitral award is sought.

The question of whether a federal court should grant a preliminary injunction is generally one of federal law even in diversity actions, but state law issues are sometimes considered (see *AIM Int'l Trading LLC v. Valcucine SpA*, 188 F. Supp. 2d 384, 387 (S.D.N.Y. 2002)). For more information on seeking preliminary injunctive relief in federal court, see Practice Note, Preliminary Injunctive Relief: Procedure for Obtaining Preliminary Injunctive Relief (Federal) (3-520-9724).

The standard for an injunction pending arbitration is the same as for preliminary injunctions generally (see *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015)). The standard for granting preliminary injunctions, however, vary slightly by circuit. Some circuits apply a balancing test, allowing a weaker showing in one factor to be offset by a stronger showing in another. Other circuits apply the traditional factors sequentially, requiring sufficient demonstration of all four before granting preliminary injunctive relief. For more information on the standards used in each circuit, see Standard for Preliminary Injunctive Relief by Circuit Chart (8-524-0128).

The likelihood of success on the merits that a court considers when considering whether to grant a preliminary injunction is measured in terms of the likelihood of success in arbitration. Because arbitration is frequently marked by great flexibility in procedure, choice of law, legal and equitable analysis, evidence, and remedy, success on the merits in arbitration cannot be predicted with the confidence a court would have in predicting the merits of a dispute that it will determine on the merits. The court's assessment of the merits therefore has reduced influence. (*SG Cowen Sec. Corp. v. Messih*, 224 F.3d 79, 84 (2d Cir. 2000).)

Court-issued interim orders generally last only until the arbitrators have the opportunity to consider the request for emergency or injunctive relief (see *Fairfield Cnty. Med. Ass'n*, 557 F. App'x at 56; *Next Step Med. Co. v. Johnson & Johnson Int'l*, 619 F.3d 67, 70 (1st Cir. 2010); and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d at 215). In effect, restraints issued by courts often serve the same function as a temporary restraining order (TRO). In a recent decision, *Rodenstock GmbH v. New York Optical International, Inc.*, the court noted that the institution before which the dispute was pending made no provision for interim relief before constitution of the tribunal and therefore specified that the court-ordered injunction lasts only until thirty days after the institution notifies the parties of the tribunal's appointment (2018 WL 4445108 (S.D. Fla. Sept. 14, 2018)). Other courts allow provisional remedies to remain in place until the arbitral panel renders an award (see *Bailey Shipping Ltd. v. Am. Bureau of Shipping*, 2013 WL 5312540, at *18 (S.D.N.Y. Sept. 23, 2013) and *Amegy Bank Nat'l Ass'n v. Monarch Flight II, LLC*, 870 F. Supp. 2d 441, 452-53 (S.D. Tex. 2012) (collecting cases and noting the split of authority regarding how long the court-imposed relief should last)).

Where the arbitrators make permanent the provisional relief ordered by the court, the court will enter permanent relief when confirming the award (see *Benihana, Inc. v. Benihana of Tokyo, LLC*, 2016 WL 3913599, at *1, *5 (S.D.N.Y. July 15, 2016)). The confirming court retains jurisdiction to vacate the injunction if applying it prospectively is no longer equitable (see *Arkwright Advanced Coating, Inc. v. MJ Sols. GmbH,* 2017 WL 945086 (D. Minn. Mar. 10, 2017)). The arbitrator also has authority to dissolve a court-ordered injunction but the dissolution only becomes effective when confirmed by the court (*In re Sw. Ranching Inc.*, 2017 WL 4274309 (Bankr. S.D. Tex. Sept. 22, 2017)).

Where admiralty jurisdiction is invoked, federal law governs attachments of ships and other assets (see *Result Shipping Co. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394, 399 (2d Cir. 1995)). In proceedings begun by libel and seizure of vessels or other properties in admiralty proceedings, Section 8 of the FAA provides the federal courts with jurisdiction to direct the parties to proceed with arbitration and to enter a decree on the award. For more information on provisional relief in maritime cases, see Practice Note, Maritime Attachment and Vessel Arrest in the US (W-001-8160).

Counsel should clearly point out that the relief the petitioner seeks is pending arbitration and petitioner is not seeking ultimate relief from the court. In *Satcom Int'l Grp. PLC v. Orbcomm Int'l Partners, L.P.*, for example, a party filed an action for a jury trial on the merits and an award of damages and permanent injunctive relief. The court held that having made this choice, the plaintiff had no right to abandon litigation and start afresh with an arbitration. (*Satcom Int'l Grp. PLC v. Orbcomm Int'l Partners, L.P.*, 49 F. Supp. 2d 331, 338 (S.D.N.Y.), aff'd, 205 F.3d 1324 (2d Cir. 1999).)

The court will likely require the successful movant to post security, typically by bond. Judges set the bond in the amount they believe sufficient to pay any costs and damages sustained by the wrongly restrained respondent (FRCP 65(c)). The court may entertain an application for attorneys' fees and costs in connection with the judicial provisional remedy proceedings, notwithstanding the parties' agreement to have all disputes resolved by arbitration (see *Benihana Inc. v. Benihana of Tokyo, LLC*, 2016 WL 3647638, at *3 (S.D.N.Y. June 29, 2016)). More typically, the court will send the application for fees to arbitration (see *Doctor's Assocs., Inc. v. Repins*, 2017 WL 1745024, at *7 (D. Conn. May 4, 2017)).

For a sample application to a federal court for preliminary injunctive relief, with integrated drafting notes, see Standard Document, Petition for Preliminary Injunction in Aid of Arbitration (Federal) (W-003-3155).

PROCEDURE UNDER STATE LAW

Outside of admiralty, Federal Rules of Civil Procedure (FRCP) 64 dictates that state law governs the availability of attachment in federal court ("At the commencement of and throughout an action [for attachment in federal district court], every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment"). For more information on applying for attachments under state law, see, for example, Practice Note, Provisional Remedies in New York: Attachment (6-545-4846).

In state courts, most state laws authorize provisional remedies in aid of arbitration. Section 7502(c) of the New York Civil Practice Law and Rules (CPLR), for example, provides that to obtain provisional relief, the movant must demonstrate that "the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." CPLR 7502(c) provides that a showing of an ineffectual award is the "sole ground for the granting of the remedy" (compare *JetBlue Airways v. Stephenson*, 932 N.Y.S.2d 761 (Sup. Ct. N.Y. Co. 2010), aff'd, 931 N.Y.S.2d 284 (1st Dep't 2011) (denying motion for injunctive relief under CPLR 7502(c) because, although the movant presented arguments regarding the CPLR Article 63 criteria, it ignored the "ineffectual award" requirement) with *Winter v. Brown*, 853 N.Y.S.2d 361 (2d Dep't 2008) (lower court erred when it granted preliminary injunction in favor of seller in breach of contract action where seller failed to satisfy the traditional equitable criteria for preliminary injunctive relief)). CPLR 7502(c) also provides that if an arbitration is not commenced within 30 days of the granting of provisional relief, the order granting relief expires and costs, including reasonable attorneys' fees, are awardable to the respondent.

State court decisions have also recognized that interim orders should last only until the arbitrators are appointed where the applicable arbitral rules permit the arbitrators to entertain applications for provisional remedies (see *TIBCO Software, Inc. v. Zephyr Health, Inc.*, 32 Mass.L.Rptr. 637 (Super. 2015)).

Some state have adopted the UNCITRAL Model Law that expressly allows for applications for interim measures of protection in aid of an arbitration (see, for example, *Bahr Telecomms. Co. v. DiscoveryTel, Inc.*, 476 F. Supp. 2d 176, 184 (D. Conn. 2007) (federal court applying state law of attachment) and *Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 647 S.E.2d 102, 105 (N.C. App. 2007) (granting preliminary injunction under the Revised Uniform Arbitration Act (RUAA)). To date, 17 states and the District of Columbia have adopted the RUAA. For information on the RUAA and a list of the states that have adopted it, see Practice Note, Revised Uniform Arbitration Act: Overview (W-004-5167).

For a sample application to a state court for preliminary injunctive relief, with integrated drafting notes, see, for example, Standard Documents, Petition for Preliminary Injunction in Aid of Arbitration (NY) (W-003-6424) and Petition for an Attachment in Aid of Arbitration (NY) (W-003-8401).

WHETHER TO APPLY TO THE ARBITRAL TRIBUNAL OR THE COURT

Parties generally can apply either to a court or to arbitrators for interim relief. Parties should consider applying to the court when:

- The arbitral tribunal has not yet been constituted, and therefore cannot yet act. In these cases, unless the applicable arbitral rules contain emergency arbitrator provisions, an application to the court is necessary.
- The party seeking interim relief needs judicial compulsion. Although arbitrators can impose negative consequences on parties (for example, drawing adverse inferences if a party does not produce evidence), they have no ability to make a party carry out their orders and no power that can be applied to non-parties. An attachment, for example, concerns property often in the hands of non-parties and therefore applications to arbitrators for attachment are rare. For more information on the effect of preliminary injunctions on non-parties, see Practice Note, Preliminary Injunctive Relief: Initial Considerations (Federal): Circumstances When Courts Have Found Non-parties Bound by an Injunction or Restraining Order (9-521-5760).
- The moving party does not yet possess the evidence it needs to present an application for interim relief. Courts may be more likely to grant discovery in connection with an application for interim relief.
- The party needs ex parte relief. Under most institutional rules, a party seeking emergency measures of protection must notify the other parties (see AAA Rule 38(b) and Article 6, ICDR Rules). Notice of the application gives the party an opportunity to dissipate the evidence or assets that are the subject of the application. By the time the tribunal makes an order, it can be too late. By contrast, federal courts and most state courts (for example, California and New York) permit an applicant to proceed without notice in urgent cases. This usually happens where an attachment of assets is sought.
- The matter is urgent and the arbitrator does not act timely or does not provide an adequate remedy (see section 8 of the RUAA). Absent a showing of urgency, under the RUAA parties may seek relief only from the arbitrator after the arbitrator is appointed and is authorized and able to act.
- The arbitrator may not have the power to grant the relief sought. For example, arbitrators may not have the authority to appoint a receiver (compare *Stone v. Theatrical Inv. Corp.*, 64 F. Supp. 3d 527, 540 (S.D.N.Y. 2014), reconsideration denied, 80 F. Supp. 3d 505 (S.D.N.Y. 2015) (arbitrator has the power to appoint receiver as part of a final award) with *Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C.*, 839 A.2d 52, 57-58 (N.J. Super. Ct. App. Div. 2003) and *Pursuit Capital Mgmt., LLC v. Claridge Assocs., LLC*, No. 654301/12 (Sup. Ct. N.Y. Co. Mar. 21, 2013) (arbitrators may not appoint a temporary receiver as a provisional remedy)).

Parties should consider applying to the arbitral tribunal for interim relief when:

- The tribunal has been constituted and is available on short notice.
- The applicant is satisfied that the other party will respect orders issued by the tribunal.
- The application involves technical or industry expertise that a judge is not likely to have.
- The federal or state courts are reluctant to grant provisional remedies in aid of arbitration (see, for example, *SCL Basilisk AG v. Agribusiness United Savannah Logistics LLC*, 875 F.3d 609, 615-16 (11th Cir. 2017) (Fed. R. Civ. P. Supp. B security for costs cannot be obtained except as an adjunct to obtaining jurisdiction); *Smart Techs. ULC v. Rapt Touch Ireland Ltd*, 197 F. Supp. 3d 1204. 1205 (N.D. Cal. July 15, 2016) (declining to entertain motion for preliminary injunction in aid of arbitration in view of availability of emergency arbitrator); and *A & C Disc. Pharmacy, L.L.C. v. Caremark, L.L.C.*, 2016 WL 3476970, at *6 (N.D. Tex. June 27, 2016) (declining motion on the ground that the arbitrator, not the court, should rule on who has the primary power to decide whether the request for preliminary relief is arbitrable)).
- The parties' agreement or the applicable institutional rules empower the arbitral tribunal to grant broader interim relief than would be

available in court (see, for example, *CE Int'l Res. Holdings LLC v. S.A. Minerals Ltd. Pship*, 2012 WL 6178236, at *3-*5 (S.D.N.Y. Dec. 10, 2012) (asset freeze) and *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 263 (2d Cir. 2003) (pre-award security)).

- The respondent is a foreign state (or an agency, instrumentality, or political subdivision of a foreign state). Parties seeking judicial relief against foreign states must follow the procedures of the Foreign Sovereign Immunities Act (FSIA), which is the sole source of subject matter and personal jurisdiction over an action against a foreign sovereign (*Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96 (2d Cir. 2017)). The FSIA service of process provisions (set forth in Section 1608(a) (28 U.S.C. § 1608(a))) are tiered in a four-step hierarchical manner than can take months to complete.

INTERIM RELIEF FROM THE ARBITRAL TRIBUNAL

INSTITUTIONAL RULES

This section summarizes the interim relief available under the:

- AAA Rules.
- ICDR Rules.
- JAMS Arbitration Rules (effective July 1, 2014).
- The International Institute for Conflict Prevention & Resolution (CPR) Administered Arbitration Rules (effective July 1, 2013).

AAA Rules

Under the AAA Rules:

- The tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim award and the tribunal may require security for the costs of the interim measures.

(AAA Rule 37.)

AAA Rule 38 provides that where a party requires emergency relief before the tribunal has been formed, the AAA appoints an "emergency arbitrator." The emergency arbitrator has the power to order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case (AAA Rule 38(e)). The authority of the emergency arbitrator ceases once the tribunal has been constituted (AAA Rule 38(f)).

The rules also provide for parties to seek temporary relief in court, stating that:

> "A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate."

(AAA Rule 38(h).)

ICDR Rules

Under the ICDR Rules:

- At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim award and the tribunal may require security for the costs of the interim measures.

(Article 24, ICDR Rules.)

Furthermore, the rules expressly permit the tribunal to apportion the costs of the application in any interim award or in the final award (Article 24.4, ICDR Rules). In many cases it is preferable for costs to be dealt with globally at the end of the arbitration, rather than at the application itself.

The rules further provide that where a party requires emergency relief before the tribunal has been formed, the ICDR appoints an "emergency arbitrator" (Article 6(2), ICDR Rules). The emergency arbitrator has the power to order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case (Article 6(4), ICDR Rules). The authority of the emergency arbitrator ceases once the tribunal has been constituted (Article 6(5), ICDR Rules).

The rules also provide for parties to seek temporary relief in court, stating that:

> "A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate."

(Article 24(3), ICDR Rules.)

JAMS Rules

Under the JAMS Rules:

- The tribunal may take whatever interim measures it deems necessary including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim partial final award and the tribunal may require security for the costs of the interim measures.

(JAMS Rule 24(e).)

JAMS Rule 2(c)(iv) provides that where a party requires emergency relief before the tribunal has been formed, JAMS appoints an "emergency arbitrator." The emergency arbitrator can order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case. The authority of the emergency arbitrator ceases once the tribunal has been constituted (JAMS Rule 2(c)(v)).

The rules also provide for parties to seek temporary relief in court, stating that:

> "Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate."

(JAMS Rule 24(e).)

CPR Rules

Under the CPR Rules, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property

(CPR Rule 13.1). CPR Rule 14 provides that where a party requires emergency relief before the tribunal has been formed, CPR appoints a "special arbitrator." The special arbitrator can order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order. Once the tribunal has been constituted, the tribunal may modify or vacate the award or order rendered by the special arbitrator (CPR Rule 14.14).

The rules also provide for parties to seek temporary relief in court, stating that:

> "A request for interim measures by a party to a court shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement."

(CPR Rule 13.2.)

AD HOC ARBITRATION

In an ad hoc arbitration, there are three common scenarios:

- The parties have agreed to arbitrate under the 2013 UNCITRAL Arbitration Rules. Under those rules, the tribunal may:
  - maintain or restore the status quo pending determination of the dispute;
  - take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
  - provide a means of preserving assets out of which a subsequent award may be satisfied; or
  - preserve evidence that may be relevant and material to the resolution of the dispute.
- Apart from any arbitral rules, the arbitration agreement itself may confer power on the tribunal to grant interim relief. If so, the orders available depend on the scope of the arbitration agreement.
- The law that applies at the seat of the arbitration may itself confer powers on the arbitral tribunal to grant interim relief. For example, in states that have adopted the RUAA the arbitrator may issue orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action (RUAA § 8).

For more information on ad hoc arbitration in the US, see Standard Clause, US: ad hoc Arbitration Clause (5-519-2015).

WHEN TO APPLY

As a general principle, applications for interim and conservatory relief should be made as early as possible. This is because:

- Failure to apply early may prejudice the application for practical reasons. Evidence or assets may be disposed of or property may deteriorate.
- Delay in applying may be taken into account by the tribunal. If the matter is not urgent enough to cause a party to seek relief promptly, a tribunal may decide that the relief is not necessary.

HOW TO APPLY

The procedure for applying to the tribunal depends in the first instance on the arbitration agreement or any applicable rules. For example, an application under the AAA Rules for emergency relief must be made in writing to the AAA (preferably by electronic means), with a copy of the request or response delivered to all the other parties (AAA Rule 38(b)). However, the following points are generally applicable to arbitration under any institution's rules:

- **Apply in writing.** In the absence of any particular procedural requirements, most applications to the tribunal for interim measures should be made in writing.
- **Submit evidence.** The applicant should provide evidence in support of its position. For example, if a party is seeking conservatory orders in relation to property, it should identify the property and its whereabouts, and provide evidence that establishes why the relief sought is necessary. If the applicant is seeking to enforce an employee non-compete agreement, provide affidavits establishing the employer's business interest in enforcing the non-compete and the potential harm to the employer if the tribunal does not issue an order preserving the status quo. The applicant should also brief the applicable law regarding its entitlement to the relief sought.
- **Specify relief sought.** State the precise order sought clearly in the application. Do not apply for an order that is too broad in scope. Provide a carefully formulated draft order so that the tribunal can easily see what is being requested and why.

EX PARTE APPLICATIONS TO ARBITRATORS

The rules of the major arbitral institutions prohibit applications for interim relief being made without notice. In any event, proceeding before an arbitrator on an ex parte basis would be ill-advised because:

- Most arbitral tribunals are extremely reticent about proceeding without giving both parties an opportunity to address them.
- Any steps taken without notice may affect the enforceability of the ultimate award. Ex parte evidence submitted to an arbitration panel that disadvantages any of the parties in their rights to submit and rebut evidence violates the parties' rights and is grounds for vacatur of an arbitration award (see *Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1025 (9th Cir. 1991)).

In a recent dispute between President Trump and an adult film actress, however, a California emergency arbitrator issued an ex parte order (using pseudonyms) granting injunctive relief. It is doubtful that the order is enforceable.

NO POWER OF EMERGENCY ARBITRATOR TO BIND FULLY CONSTITUTED ARBITRAL TRIBUNAL

Under the institutional rules considered here, the emergency arbitrator does not have the power to bind the full arbitral tribunal. The fully constituted tribunal has the power to vacate, amend or modify any order, award or decision by the emergency arbitrator.

The usual default position is that the emergency arbitrator cannot become a member of the full arbitral tribunal unless the parties agree otherwise.

ENFORCING PRELIMINARY RELIEF AWARDED BY ARBITRATORS IN COURT

Courts have held that they do not have the power to review an interlocutory ruling by an arbitration panel (see *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980)). Courts have relaxed this rule, however, when parties seek confirmation of provisional remedies awarded by arbitrators (see *Sperry Int'l Trade v. Gov't of Isr.*, 532 F. Supp. 901, 909 (S.D.N.Y. 1982), aff'd, 689 F.2d 301 (2d Cir. 1982) (confirming an arbitrator's order to place a disputed $15 million letter of credit in escrow pending a decision on the merits, finding that the award would be rendered a meaningless exercise of the arbitrator's power if the order were not enforced); *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1059 (6th Cir. 1984) (upholding the confirmation of the award that preserved the status quo, reasoning that the injunction issued by the arbitral tribunal would be meaningless absent judicial confirmation of it) and *S. Seas Navigation Ltd. v. Petroleos Mexicanos*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985) (holding that if "an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made")).

Relying on *Sperry* and *Petroleos Mexicanos*, the court in *Yahoo! Inc. v. Microsoft Corp.* confirmed an award issued by an emergency arbitrator appointed under the AAA rules to grant emergency relief "until the matter can be fully and fairly decided by a three arbitrator panel of industry experts following discovery" (983 F. Supp. 2d 310 (S.D.N.Y. 2013)). The *Yahoo!* case shows how quickly interim relief can be obtained in arbitration. The emergency arbitrator held two days of evidentiary hearings starting 11 days after Microsoft commenced arbitration and issued a decision six days after conclusion of those hearings. The next day, Yahoo! moved in court to vacate the award and Microsoft cross-moved to confirm. The court ruled for Microsoft less than a week later. In going from commencement to judicial confirmation in just 25 days, the *Yahoo!* case demonstrates that even where the tribunal is not constituted, the use of emergency procedures provided by arbitral institutions can provide expeditious and effective relief. Moreover, the court respected the parties' agreement to keep proceedings confidential. The motion papers were filed under seal and the only part of the proceeding that was made public was the decision. (See also *Air Ctr. Helicopters, Inc. v. Starlite Inv.s Ireland Ltd.*, 2018 WL 3970478 (N.D. Tex. Aug. 15, 2018) (finding jurisdiction to enforce award of specific performance made by emergency arbitrator); but see *Footprint Power Salem Harbor Dev., L.P. v. Iberdrola Energy Prod., Inc.*, 2018 WL 2558468 (Sup. Ct. N.Y. Co. May 30, 2018) (questioning whether court could confirm award of emergency arbitrator and noting that it is "better practice" for the applicant to seek a temporary restraining order in aid of arbitration from the court).)

In *Companion Property & Casualty Insurance Co. v. Allied Provident Insurance, Inc.*, the arbitrators issued an interim award requiring the respondent to post security (2014 WL 4804466, at *3 (S.D.N.Y. Sept. 26, 2014)). When the respondent ignored the interim award, the claimant made a motion in court to confirm it. The court reviewed the case law that supports the court's power to confirm interim awards of security and noted that "[w]ithout the ability to confirm such interim awards, parties would be free to disregard them, thus frustrating the effective and efficient resolution of disputes that is the hallmark of arbitration." Having concluded that it had the power to confirm the interim award, the court noted that it should confirm as long as there is a "barely colorable justification." On that standard, the court confirmed the award because the agreement between the parties required that the respondent provide collateral for its obligations. See also *Zurich Am. Ins. Co. v. Trendsetter HR, LLC*, 2016 WL 4453694 (N.D. Ill. Aug. 24, 2016) (confirming interim award requiring insured to post security for insurance carrier's claims) and *Ecopetrol S.A. v. Offshore Exploration & Prod. LLC*, 46 F. Supp. 3d 327, 337 (S.D.N.Y. 2014) (enforcing interim awards requiring seller to tender certain amounts to purchaser with funds not derived from amounts in escrow).

Once the award is confirmed, it becomes a judgment of the district court and violation of the judgment may be punishable as a contempt of court under FRCP 70(e) (see *Cardell Fin. Corp. v. Suchodolksi Associates, Inc.*, 896 F. Supp. 2d 320, 328 (S.D.N.Y. 2012)). Where a party is found to be in contempt of court, the court has broad discretion in ordering a remedy to coerce future compliance and compensate the injured party for losses resulting from the contumacious conduct (see *Haru Holding Corp. v. Haru Hana Sushi, Inc.*, 2016 WL 1070849, at *2 (S.D.N.Y. Mar. 15, 2016)). Coercive measures include civil commitment and escalating financial sanctions (see *CE Int'l Res. Holdings LLC v. S.A. Minerals Ltd. P'ship*, 2013 WL 324061, at *3 (S.D.N.Y. Jan. 24, 2013)).

Where a court is asked to vacate an interim award issued by arbitrators, however, the court will not necessarily entertain the application. At least one US court has refused a request to vacate an emergency arbitrator's interim order for conservatory measures under the ICDR Rules (*Chinmax Med. Sys. Inc. v. Alere San Diego, Inc.*, 2011 WL 2135350 (S.D. Cal. May 27, 2011)). In *Chinmax*, the court in addressing a challenge to the interim order found that it did not have jurisdiction to vacate the order because it was not final and binding for the purposes of the New York Convention. The order itself stated that it would be subject to the consideration of the full arbitration tribunal, and on this basis the court refused to grant the motion to vacate. (See also *Great E. Sec., Inc. v. Goldendale Investments, Ltd.*, 2006 WL 3851159 (S.D.N.Y. Dec. 20, 2006) (denying a petition to vacate and granting a cross-motion to confirm an interim order of the arbitral tribunal requiring petitioner to place funds in escrow pending conclusion of the arbitration).)

Courts will only enforce that part of the interim relief that requires judicial intervention at that stage of proceedings. To determine whether to grant relief, a court must consider:

- The likelihood that the harm alleged by the party will ever come to pass.
- The hardship to the parties if judicial relief is denied at this stage in the proceedings.
- Whether the factual record is sufficiently developed to produce a fair adjudication of the merits.

(See *Draeger Safety Diagnostics, Inc. v. New Horizon Interlock, Inc.*, 2011 WL 653651, at *4 (E.D. Mich. Feb. 14, 2011).) In *Draeger*, the court confirmed the interim relief awarded by the emergency arbitrator regarding the turnover of the plaintiff's property but ruled that the emergency arbitrator's award of attorneys' fees should not be confirmed because it was subject to adjustment by the

merits arbitrator (see also *Bowers v. N. Two Cayes Co. Ltd.*, 2016 WL 3647339, at *3 (W.D.N.C. July 7, 2016) (confirming arbitrator's grant of injunctive relief ordering a percentage of the sale of certain real estate to be placed in an escrow account pending the outcome of the arbitration but denying confirmation of arbitrator's ruling that that the arbitration is binding on the parties)).

RESISTING INTERIM RELIEF

In response to a request for interim relief, a party should marshal its legal arguments and supporting evidence to convince the tribunal or a court not to grant the requested relief. The opposition should address whether the tribunal or court has the power to grant the request and should reasons why the application should be denied as a matter of discretion.

In addition to its main argument, the respondent should consider arguing in the alternative that if the relief sought by the applicant is granted, it should be conditioned on the applicant providing adequate security. The respondent should specify both the amount and the form of the security (see, for example, FRCP 65(c) and CPLR 6312(b)). Most institutional rules provide for security as a condition of interim relief granted by arbitrators.

BEFORE AN EMERGENCY ARBITRATOR

The respondent should check how long it has under the rules to object to the appointment of the arbitrator and make the relevant objections in the permitted time frame. There may be grounds to resist the granting of emergency relief if the respondent has not been given proper notice of the application, or if the application fails to establish that the award to which the applicant may be entitled may be rendered ineffectual without interim relief.

In its response to the application, the respondent may consider whether it can object to the:

- Jurisdiction of the emergency arbitrator.
- Application on these grounds, among others:
  - the emergency arbitrator provision of the relevant rules do not apply;
  - the applicant is unlikely to succeed on the merits;
  - there is no urgent need for the interim relief to be granted;
  - irreparable harm would be suffered by the respondent if the emergency relief were granted; or
  - greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

BEFORE THE ARBITRAL TRIBUNAL

The respondent should check the applicable rules regarding the power of the tribunal and the procedures for interim relief. In its response to the application, the respondent may consider whether it can object to the application on these, among other grounds:

- The applicant is unlikely to succeed on the merits.
- There is no urgent need for the interim relief to be granted.
- Irreparable harm would be suffered by the respondent if the emergency relief were granted.
- Greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

BEFORE A COURT

The respondent should consider whether:

- Federal or state courts in the state where the arbitration is seated have held that they lack power to grant the relief requested (see, for example, *McCreary Tire*, 501 F.2d at 1037-38).
- The application can be opposed on the ground that courts should intervene only until the arbitrators have the opportunity to consider the request for emergency or injunctive relief (see, for example, *Next Step Med.*, 619 F.3d 67 at 70). Where the arbitral tribunal is authorized to grant the equivalent of preliminary injunctive relief, some courts hold that it is inappropriate for the district court to do so (see, for example, *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999)).
- The applicant is unlikely to succeed on the merits (see, for example, *Discover Growth Fund v. 6D Glob. Techs. Inc.*, 2015 WL 6619971 (S.D.N.Y. Oct. 30, 2015)).
- There is no urgent need for the interim relief to be granted.
- Greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

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The Coming of Age of Interim Relief in International Arbitration: A Report from the 28th Annual ITA Workshop

Kluwer Arbitration Blog
July 20, 2016

Michelle Grando (White & Case LLP)

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"When Justice Delayed Would be Justice Denied: Emergency Arbitrators and Interim Measures in International Arbitration" was the subject of the 28th Annual Workshop of the Institute for Transnational Arbitration (ITA), which took place on 16 June 2016 in Dallas, Texas. Under the leadership of ITA's Chair, Abby Cohen Smutny (White & Case), and the conference co-chairs, Dr. Shahla Ali (University of Hong Kong), Jennifer Kirby (Kirby), and David Brynmor Thomas (39 Essex Chambers), the speakers addressed a variety of issues concerning applications for interim measures to arbitral tribunals and emergency arbitrators.

The stage for a mock interim measures hearing and five speaker panels was set by the keynote speeches of James Castello (King & Spalding) and Patricia Shaughnessy (University of Stockholm), who provided an overview of the evolution and current state of interim measures and emergency arbitrator rules. Several themes emerged from their speeches that recurred throughout the panel discussions, revealing the existence of a general consensus among the arbitral community about key aspects of interim relief in international arbitration. These are addressed in turn.

Increased use of arbitral interim measures

The possibility of arbitral tribunals granting interim measures has been recognized for many decades now. It was, for instance, expressly considered in the 1976 version of the UNCITRAL Arbitration Rules, which provided that "the arbitral tribunal may take any interim measures it deems necessary." For a long time, however, such power remained largely dormant as most parties preferred to seek interim measures from local courts instead of going to arbitral tribunals. This trend started to change in the late 1990s-early 2000s. The turning point became clear in the 2012 edition of the Queen Mary University and White & Case International Arbitration Survey, in which survey participants indicated that in their experience requests for interim measures to arbitral tribunals were more common than to courts.

The emergence of the emergency arbitrator, a special procedure to provide parties access to interim measures before the constitution of the arbitral tribunal, constitutes further evidence of the increased popularity and maturity of arbitral interim measures. The International Centre for Dispute Resolution (ICDR) was the first to adopt emergency arbitrator provisions in 2006, being followed by the Stockholm Chamber of Commerce (SCC) and the Singapore International Arbitration Centre (SIAC) in 2010, the International Chamber of Commerce (ICC) in 2012, the Hong Kong International Arbitration

Centre (HKIAC) in 2013, and the London Court of International Arbitration (LCIA) in 2014. As Shaughnessy observed, despite the relative novelty of the procedure, there have already been a significant number of applications for emergency measures. Her research revealed that as of June 2016, ICDR registered 67 emergency arbitrator requests, SIAC 50, ICC 34, SCC 23, and HKIAC 6 requests.

To be clear, although requests to arbitral tribunals for interim relief have increased, the speakers agreed that such requests are still not common, appearing in about one-quarter or less of arbitrations. This number reflects, at least in part, the fact that interim relief is not relevant to all cases.

What factors contributed to the increased use of arbitral interim measures?

The speakers discussed a variety of factors that have led to the increased use of arbitral interim measures. Such factors include:

– The lifting of restrictions in domestic legislation reserving the power to order interim measures to state courts. Castello observed that at some point in time such restrictions were found in the laws of most countries in continental Europe, including Austria, Germany, Greece, Italy, Spain, and Switzerland; only Italy maintains the restriction at present.

– The adoption by major arbitral institutions of rules that favor applications for interim measures to arbitrators, instead of courts, such as Article 28 of ICC Arbitration Rules, and Article 25.3 of the LCIA Rules.

– Experience has demonstrated that it might be better to request interim measures from arbitral tribunals instead of courts because arbitrators might be already familiar with the facts of the dispute; have the specialized legal or technical knowledge required to decide the application; know the language of the dispute; provide a neutral alternative to potentially unfriendly courts; and be in a better position to ensure the privacy of the proceedings. Moreover, interim measures ordered by an arbitral tribunal may cover many jurisdictions, while the effectiveness of a court order is limited to the territory of the court. This would also obviate the need to hire local counsel in multiple jurisdictions.

– The work of UNCITRAL, incorporated in the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration (Article 17) and the 2010 version of the UNCITRAL Arbitration Rules (Article 26). These rules, as Castello observed, have provided helpful guidance to arbitral tribunals as to the scope of interim measures and the conditions for granting them; to courts in deciding whether to enforce arbitral interim measures; and to national legislatures in passing legislation commanding the courts to enforce arbitral interim measures.

– Discussion of the subject and guidance provided by members of the arbitral community.

How is compliance ensured?

In light of the arbitrators' lack of coercive power to enforce their orders, several speakers discussed the issue of the enforceability of arbitral interim measures. The general conclusion was that in the vast majority of cases, enforcement issues do not arise because the parties voluntarily comply with the orders. This is supported by the results of the 2012 International Arbitration Survey, which revealed that the majority (62%) of interim measures orders are complied with voluntarily. Voluntary compliance seems to be encouraged by the potential for sanctions, such as cost awards, and the reputational effect of non-compliance.

Castello observed that despite calls from certain members of the arbitral community for the adoption of a "New York Convention" for the enforcement of interim measures, UNCITRAL has preferred to

focus on developing the Model Law, which if implemented or used as inspiration by States will produce the same effect. In this regard, Article 17H of the 2006 version of the Model Law provides that "[a]n interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued."

Prerequisites for granting interim measures

Most institutional arbitration rules, including the ICSID Arbitration Rules, have opted not to set forth specific criteria, but rather provide arbitrators broad powers to decide when and what kind of interim relief to grant. An example of this is Article 28 of the ICC Arbitration Rules, which provides that "the arbitral tribunal may … order any interim or conservatory measure it deems appropriate." The most significant exception to this approach is Article 26 of the 2010 version of UNCITRAL Arbitration Rules. As Costello observed, UNCITRAL chose to provide more precise guidance because of the general perception that the broad authority to grant "any interim measures it deems necessary," contained in the 1976 version of the Rules, was leaving some tribunals uncertain about the scope of their interim measures power, and thus leading them to decline to exercise such power.

Despite the absence of specific criteria in most institutional rules, the speakers converged that in practice arbitral tribunals, including investor-state tribunals operating pursuant to the ICSID Convention, require that four criteria be met for interim measures to be ordered: (i) reasonable possibility of success, that is, a *prima facie* case on jurisdiction and merits; (ii) risk of irreparable harm; (iii) urgency; and (iv) proportionality, i.e., balance of hardships in favor of interim relief. These are essentially the criteria contained in Article 26(3) of the 2010 UNCITRAL Arbitration Rules, which, the speakers concluded, reflect the practice of international arbitral tribunals.

It was also noted that these same criteria have been applied by emergency arbitrators, in which context "urgency" has played a crucial role. As Shaughnessy explained, the question is "Can this wait until the arbitral tribunal is constituted and until it is operating and able to consider interim relief?" The lack of urgency is apparently one of the major reasons for denying emergency relief.

New frontiers

In light of the relative novelty of the emergency arbitrator rules, many questions were raised concerning their application.

One question concerned the compatibility of emergency arbitration with pre-arbitral procedures such as cooling-off periods and multi-tiered clauses requiring the parties to engage in mediation, expert determination, or dispute board procedures prior to filing a request for arbitration. This question was apparently considered by emergency arbitrators in three SCC cases. They concluded that the cooling-off period requirement contained in certain investment treaties did not prevent emergency proceedings because of the nature of emergency relief. It was noted that this interpretation might eventually give rise to enforcement problems, because SCC emergency orders cease to be binding if the "case is not referred to an Arbitral Tribunal within 90 days" of their issuance. In the case of other rules, the requirement that the request for arbitration be filed within a brief period of time after the request for emergency arbitrator relief might also pose difficulties.

Another question regarded the enforcement of emergency arbitrator orders or awards. In this regard, a representative from HKIAC noted that Hong Kong has amended its legislation to provide for the enforceability of emergency arbitrator orders in proceedings seated in Hong Kong or abroad. It was also noted that Ukrainian courts have recently enforced a SCC emergency arbitrator award issued in the context of an investment treaty dispute between JKX Oil & Gas and Ukraine. Notably, the

UNCITRAL Model Law does not specifically address the enforcement of emergency arbitrator decisions because the last version of the Model Law was adopted in 2006, when the first emergency arbitrator rules had just been adopted by the ICDR. It will be interesting to see whether domestic courts will interpret provisions modeled on Article 17H of the Model Law as providing them authority to enforce such decisions.

A maturing system

In sum, the presentations and discussions evidenced the significant progress made in the past 30 years in establishing a coherent set of rules for arbitral interim relief. Having arbitral tribunals routinely dealing with interim measures, instead of the parties having to resort to local courts, is a significant development that has undoubtedly strengthened the arbitral system and allowed it to evolve into a more sophisticated and self-standing system of dispute resolution. It is a welcomed development for the users of international arbitration that are getting closer to the ideal of being able to resolve disputes entirely at the international level and avoiding the complexities, biases, and costs associated with having to deal with (often multiple) foreign court systems.

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

Applications for Interim Measures

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Applications for Interim Measures

Applications for Interim Measures

Introduction

This Guideline sets out the current best practice in international commercial arbitration in relation to the arbitrators' power to grant interim measures. It provides guidance on:

i. interim measures in general (Articles 1 to 6);

ii. *ex parte* applications (Article 7); and

iii. emergency arbitrators (Article 8).

Preamble

1. Historically, the power to grant interim measures in international arbitration was solely reserved to national courts. Today, many countries have modified their national arbitration laws to expressly recognise that courts and arbitrators possess concurrent jurisdiction to grant these types of measures.[1] Additionally, many arbitral institutions have also revised their rules to expressly give arbitrators power to grant interim measures. Both national laws and arbitration rules generally give broad powers to arbitrators to grant any measure that they consider necessary and/or appropriate.
2. One of the main challenges for arbitrators considering applications for interim measures is that the national laws and arbitration rules rarely provide any procedural rules or guidance on how an application for interim measures should be dealt with or what measures can be granted and in what circumstances. This is intended to give arbitrators a wide discretion as to the procedures they may adopt and the types of interim relief they may grant to suit the particular circumstances of each arbitration. When considering how to exercise this discretion, arbitrators should bear in mind that they are not bound to apply the procedures and principles developed in the national courts as these may not be relevant or suitable for arbitration. An alternative source of guidance may be found in arbitration practice sources developed by the international

arbitration community. These include scholarly commentaries, opinions, awards and orders.[2]

3. Applications for interim measures typically, but not exclusively, arise at the first procedural hearing attended by all the parties (and their representatives). Sometimes an application by one party in the absence of the other party (an *ex parte* application) may be required mainly because of the nature of the relief sought.
4. Additionally, the matter may be so urgent that a party needs to make an application for relief before an arbitral tribunal has been properly constituted. To cater for this situation some institutions have incorporated procedural provisions that enable a party to ask the institution to appoint an 'emergency arbitrator' to hear an emergency application for relief pending the formation of an arbitral tribunal.[3] Emergency arbitrators have substantially the same powers and responsibilities in relation to the grant of interim measures as the regular tribunal, even though they are appointed solely for the emergency application. Accordingly, all references to arbitrators' powers or responsibilities in this Guideline relating to interim measures are equally applicable to emergency arbitrators and arbitral tribunals.

Article 1 — General principles

1. **Arbitrators should deal with applications for interim measures promptly and expeditiously.**
2. **Arbitrators faced with an application for interim measures should establish whether they have both the jurisdiction to hear the dispute and the power to order the interim measure being applied for under the arbitration agreement, including any applicable rules and the law of the place of arbitration (*lex arbitri*).**
3. **Where the arbitration agreement, including any applicable rules and the *lex arbitri* contain provisions for granting interim measures,**

arbitrators should adhere to the stipulated requirements and limitations, if any.

4. **Although the circumstances may warrant a preliminary *ex parte* decision, before reaching a final decision on an application for an interim measure, arbitrators should ensure that both parties have been given a fair opportunity to present their case.**

Commentary on Article 1

Paragraph 1

Applications for interim measures

a) Interim measures usually arise out of an application by one of the parties.[4] An application may be made orally during a hearing or at any other time in writing supported by evidence. The application should provide sufficient detail to enable the other parties to respond to it and for the arbitrators to make their decision. More specifically, the application should identify (1) the right(s) to be protected; (2) the nature of the measure(s) that the party is seeking; and (3) the circumstances that require such a measure.[5] If the application does not specify all of these elements, arbitrators should consider requesting further information before deciding on the application.

Priority to be given to applications for interim measures

b) Arbitrators should give priority to applications for interim measures without disturbing the smooth progress of the arbitration. They should deal with the application as quickly as possible and in a manner that will, if possible, avoid adding costs and unnecessary delay to the proceedings. Sometimes applications for interim measures may be used as a delaying tactic or to harass the opposing party. In such cases, if the arbitrators consider that an application for interim measures is not made in good faith, they should reject it promptly.

Paragraph 2

Express powers

a) An important pre-condition for the granting of interim measures is the establishment of the arbitrators' power to grant the requested measure. Even though it is unusual for the arbitration agreement itself to include an express provision for granting interim measures, it is common for national laws and arbitration rules to include general powers to grant interim measures.

Implied powers

b) If there are no express provisions allowing the arbitrators to grant interim measures and provided that there is no prohibition under the arbitration agreement, including the applicable arbitration rules and/or the *lex arbitri*, arbitrators may conclude that they have an implied power to do so.[6]

Paragraph 3

Applicable law(s)

a) Arbitrators should take care to establish whether any aspects of the interim measures being requested are subject to any requirements or limitations imposed by law. They need to consider (1) the criteria for granting interim measures, (2) the types of interim measures that can be granted and (3) the procedure for granting such measures pursuant to the applicable law(s).[7]

b) Where there are specific requirements concerning the arbitrators' powers to grant interim measures and/or the procedure to be followed, these provisions should be complied with.

c) In the absence of any provisions in the applicable law(s), arbitrators may consider it appropriate to apply standards developed in international arbitration practice (see Article 2 below).

d) Arbitrators may also consider whether the interim measure requested may contravene the law of the place where the measure is likely to be performed or enforced (*lex loci executionis*).[8] In those circumstances the local courts may refuse to enforce the measure.[9] Arbitrators should therefore consider if there is an alternative relief that can be granted that will not contravene that law.

Paragraph 4

Fair opportunity to present their case

a) Interim measures are usually granted on an *inter partes* basis, i.e. after both the applicant and the opposing party are heard.[10] A party against whom a measure is sought should be notified of the application for the interim measure at the earliest opportunity, provided with copies of all evidence and/or documents relied on by the applicant, and given a fair opportunity to respond before any final decision on the application is made.

b) In the case of *ex parte* applications, the granting of an interim measure should be followed by submissions so that the parties have a fair and equal opportunity to present their case (see Article 7 below).

Article 2 — Criteria for granting interim measures

1. When deciding whether to grant interim measures arbitrators should examine all of the following criteria:

i) *prima facie* establishment of jurisdiction;

ii) *prima facie* establishment of case on the merits;

iii) a risk of harm which is not adequately reparable by an award of damages if the measure is denied; and

iv) proportionality.

2. Depending on the nature of the interim measure requested and the particular circumstances of the case, some of the criteria may not

apply or may be relaxed.

3. **When assessing the criteria, arbitrators should take great care not to prejudge or predetermine the merits of the case itself.**
4. **Arbitrators may require a party applying for an interim measure to provide security for damages as a condition of granting an interim measure.**

Commentary on Article 2

Paragraph 1

Criteria for granting interim measures

Arbitrators should follow a structured analysis that examines the criteria set out in Article 2, paragraph 1. If the applicant fails under any one element, arbitrators should refuse to grant the interim measure save for the requirement in item 3 (see Article 2, paragraph 2 below).

i) Prima facie establishment of jurisdiction

a) Before considering whether to grant an interim measure, arbitrators should determine whether they have *prima facie* jurisdiction over the dispute. This includes an examination of the evidence as to whether there is a valid arbitration agreement. This is usually satisfied by clear evidence of the existence of a written agreement to arbitrate between the parties.[11]
b) Even if there is a pending jurisdictional challenge to the arbitrators' authority, which they have not ruled on, arbitrators may still consider an application for interim measures and issue such measures, so long as they are satisfied that there is *prima facie* basis to assert jurisdiction.[12] If arbitrators consider there is need for an interim measure, for example, to protect the *status quo* and/or to preserve evidence, then they do not have to delay their decision on the interim measures application pending consideration of the full jurisdictional challenge. The reason for this is

that the decision as to whether to order an interim measure is not a final determination on jurisdiction.[13]

c) If, however, arbitrators consider that there is little or no chance that they will have jurisdiction, they should first consider the jurisdictional challenge before dealing with the application for interim measures.

ii) Prima facie establishment of case on the merits

Arbitrators considering an application for interim measures should be satisfied on the information before them that the applicant has a reasonably arguable case.[14] This means that arbitrators should be satisfied on a very preliminary review of the applicant's case that it has a probability of succeeding on the merits of its claim; however arbitrators should not prejudge the merits of the case (see Article 2, paragraph 3 below).

iii) A risk of harm which is not adequately reparable by an award of damages

Arbitrators need to be satisfied that the party applying for an interim measure is likely to suffer harm if the measure is not granted. They do not need to be satisfied that the harm will definitely occur, rather they need to be satisfied that there is a risk that the harm is likely to occur. If the harm can be adequately compensated for by an award of monetary damages (that is likely to be honoured) it may not be appropriate to grant the interim measure.[15] Arbitrators should therefore determine whether a given harm can be sufficiently and adequately compensated through damages on a case-by-case basis. The test to be applied to determine the level of harm that justifies an interim measure varies depending on the type of measure sought and the circumstances of the case.[16]

iv) Proportionality

a) Arbitrators need also to consider any harm likely to be caused to the opposing party if they grant the interim measure. Any harm caused by granting the measure should be weighed against the likely harm to the applicant if the measure is not granted. They should consider whether the circumstances of the case and the grounds supporting the granting of the relief outweigh the grounds favouring denial of the relief or vice versa.

b) Arbitrators may need to consider the relative financial position of the parties to ensure that a party will not be substantially disadvantaged if the interim measure is granted such that the arbitration is abandoned. In this situation, the likely financial hardship to be caused to both parties should be carefully weighed and considered.

Paragraph 2

Specific requirements for certain types of interim measures

While the requirements detailed in Article 2, paragraph 1 should all be considered, their precise application will depend to a great extent on the facts of the case and the type of interim measure which is sought. For example, requests for measures to preserve evidence may not need to satisfy the requirements for irreparable or serious harm (unless the preservation of evidence is costly or requires unusual efforts). In addition, when considering applications for security for costs, arbitrators should take into account their specific requirements.[17]

Paragraph 3

No prejudgment of the case

a) When deciding applications for interim measures, arbitrators should be careful not to prejudge or predetermine the dispute itself. They should not finally decide any issue in the dispute based on the evidence and

argument in support of, or in opposition to, an application for interim measures. This also means that arbitrators should keep an open mind when hearing later submissions and evidence. Where arbitrators consider that the interim measure cannot be granted without making a decision on the merits of the case as a whole, they may either refrain from granting such a measure[18] or proceed to an accelerated hearing on the merits.

b) Arbitrators should emphasise to the parties that, in reaching their decision on an application for interim measures, they have not prejudged or fully decided any issue in the dispute. Failing to do so may result in later challenges to the arbitrators' appointment on the basis of lack of impartiality.

Paragraph 4

Security for damages

a) Arbitrators may consider it appropriate to make the granting of interim measures conditional upon the applicant providing security for any damages that may be suffered by the opposing party as a consequence of the measure being granted. Some national arbitration laws and some arbitration rules expressly provide for such a condition.[19] Even without an express stipulation, it is common practice in international arbitration to attach conditions to the grant of interim measures to protect the interests of the opposing party in case the measure or measures turn out to have been unnecessary or inappropriate.

b) In practice, the opposing party will usually ask the arbitrators to require the applicant to provide security for any damage that may be caused by an interim measure. However, arbitrators may order security for damages on their own motion, for example, where an inexperienced party is involved and where the requested measure has the potential to cause damage to the opposing party.

c) Arbitrators should consider factors such as (1) the actual expense to be incurred by the opposing party in complying with the measure; (2) the potential damage to the opposing party if the measure is subsequently found to have been unnecessary or inappropriate; and (3) the financial capacity of the applicant to provide the security. They should be wary of not stifling a meritorious application by an excessive order for security.

d) Arbitrators have the discretion to decide on the amount of any security and the manner in which it is to be provided (e.g., bank guarantee, cash, cheque deposit, parent company guarantee, bond, payments into escrow account, liens on property, deposit with an independent stakeholder). The amount should cover any actual expenses incurred and damages likely to be suffered by the opposing party. Arbitrators should be wary of requiring security to be provided by taking possession of the opposing party's stock-in-trade or tools of trade as this could prevent that party from carrying on its lawful business.

Article 3 — Limitations on the power to grant interim measures

1. **Arbitrators cannot grant interim measures requiring actions by third parties.**
2. **Arbitrators do not have the power to directly enforce interim measures they may grant.**
3. **Arbitrators cannot impose penalties for non-compliance unless granted a specific power to do so by the arbitration agreement, including the applicable arbitration rules and/or the *lex arbitri*.**

Commentary on Article 3

Paragraph 1

Interim measures and third parties

Arbitrators' authority derives from the arbitration agreement and, as a result, their powers do not extend beyond the parties to the arbitration.

Arbitrators therefore cannot grant interim measures that are binding on third parties.[20] However, arbitrators can require a party to the arbitration to take steps in relation to a third party.[21] For example, a parent company can be required to direct its subsidiary to act in a particular manner. Nonetheless, arbitrators do not have power to order the attachment of assets which belong to, or are under control of, a third party.

Paragraph 2

Interim measures and national courts

Arbitrators lack coercive powers to enforce their decisions on interim measures. In most cases where enforcement is necessary, this has to be done through national courts. There is no general consensus as to whether arbitrators' decision granting interim measures should be issued in the form of a procedural order or an award capable of being enforced under the New York Convention. Some national courts consider that while an interim measure is only temporary in nature, it is, however, final for the purposes of enforcement.[22] Arbitrators should bear in mind that any state which has adopted Articles 17H and 17I of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) will have a regime for recognition and enforcement of interim measures issued in the form of an interim award.[23]

Paragraph 3

Penalties for non-compliance with measures ordered

a) Arbitrators cannot impose penal sanctions or punitive damages for non-compliance with a decision ordering an interim measure unless the parties' agreement, including the arbitration rules and/or the *lex arbitri* confer such a power on them.[24]

b) However, depending on the type of measure, arbitrators may impose different sanctions to promote compliance, including, among other things, the drawing of adverse inferences and taking into account the conduct of the recalcitrant party when allocating the costs of the arbitration.[25]

Article 4 — Denying an application for interim measures

1. **In addition to the limitations on the arbitrators' powers detailed in Article 3, arbitrators may decline an application for an interim measure in any of the following situations:**
   - **i) the measure sought is incapable of being carried out;**
   - **ii) the measure sought is incapable of preventing the alleged harm;**
   - **iii) the measure sought is tantamount to final relief; and/or**
   - **iv) the measure sought is applied for late and without good reason for the delay.**
2. **Arbitrators may deny a request for an interim measure where the opposing party declares, or undertakes, in good faith that it will take steps to render the interim measure unnecessary.**

Commentary on Article 4

Paragraph 1

When considering an application for interim measures, arbitrators should take into account the factors listed in Article 4, paragraph 1 and, if any of them apply, the request for the interim measure(s) may be denied.

i) Interim measures incapable of being carried out

Arbitrators should consider whether the interim measure is capable of being carried out.[26] Otherwise, it may be a waste of time and money to grant such a measure.

ii) Interim measures incapable of preventing the alleged harm

Arbitrators should only grant measures that are capable of preventing the alleged harm. If the specific measures applied for are not capable of preventing the alleged harm, arbitrators may, on their own motion, grant a different and effective type of interim measure that is more appropriate. In doing so arbitrators should be very careful not to go beyond what has been requested.

iii) Interim measures tantamount to final relief

Arbitrators should consider denying an application that is, in fact, a disguised application for a final award on the merits. For example, where the subject matter of the dispute between the parties relates to the storage charges of a warehouse where goods are kept and the main claim requests a transfer of such goods to a different place, an interim measure having the same effect (i.e. transfer of the goods), will be tantamount to a final relief because it will involve a decision on one of the main claims.[27]

iv) Timing of applications for interim measures

Arbitrators should consider denying applications for interim measures which are made late and without good reason being provided for the delay. Arbitrators need to be satisfied that the applicant has made the application promptly, i.e. within a reasonable time of becoming aware of the necessary facts.[28]

Paragraph 2

Undertaking in good faith

Instead of granting interim measures, arbitrators may decide it is more appropriate to accept an undertaking made in good faith by the party against whom the measures are sought. In such circumstances,

arbitrators may decide on the application solely based on the undertaking offered by the opposing party without considering whether or not the requirements for an interim measure have in fact been satisfied.

Article 5 — Types of interim measures

1. **As a general rule, arbitrators may grant any measure that they deem necessary and appropriate in the circumstances of the case.**
2. **Unless otherwise provided in the applicable national law and the applicable arbitration rules,[29] arbitrators may grant any or all measures which fall within, but are not limited to, one of the following categories:**
   - **i) measures for the preservation of evidence that may be relevant and material to the resolution of the dispute;**
   - **ii) measures for maintaining or restoring the *status quo*;**
   - **iii) measures to provide security for costs;[30] and**
   - **iv) measures for interim payments.**

Commentary on Article 5

Paragraph 1

Arbitrators can construe the term 'interim measures' as broadly as possible in the particular circumstances. It is important to note that the measures arbitrators can grant are not necessarily limited to measures available to state courts at the place of arbitration. However, arbitrators should look at the likely place of performance and align the relief granted with the relevant laws in that jurisdiction to ensure that the interim measure can be successfully enforced (see Article 1, paragraph 3 above).

Paragraph 2

In practice, the measures granted by arbitrators should aim to prevent damage to, or loss of, the subject matter of the dispute. Such measures should also facilitate the conduct of the arbitral proceedings and/or the enforcement of any final award.

i) Measures to preserve evidence and/or to detain property

a) Provided that the parties have not agreed to the contrary, arbitrators' powers are usually extensive, covering all forms of property, including shares and identifiable funds of money. Arbitrators have the powers to grant measures (1) for the inspection, preservation, custody or detention of evidence including property which is the subject matter of the dispute and (2) for samples and photographs to be taken from, or any observation be made of property, and/or to make the property available for expert testing.
b) Applications for the preservation or detention of property have the potential to cause the opposing party a greater degree of harm than an application for inspection of the property. This is because preservation or detention of property may have serious and adverse consequences for a party that needs to use or sell the property. Consequently, arbitrators should take particular care to avoid any injustice being caused in such cases.

ii) Measures to maintain or restore the status quo

Arbitrators may grant interim measures which require a party to take, or refrain from taking, specified actions. For example, arbitrators may order a party to continue the performance of contractual obligations, such as carrying out construction works, to continue shipping products or providing intellectual property. If perishable goods are the subject of a dispute, arbitrators may order that a party sells them and keeps the

proceeds of sale in an escrow account until a further decision or a final award is issued.

iii) Measures to provide security for costs

In international arbitration, where the costs may be considerable,[31] a party may be entitled to a level of costs protection from frivolous claims or claims brought by insolvent parties. Security for costs is a specific type of interim measure which requires the claiming party to provide security for the whole or part of the party's anticipated costs[32] where there is a risk that they will be unable to pay those costs if their claim fails. This particular interim measure raises complex issues which are dealt with in the *Guideline on Applications for Security for Costs*.[33]

iv) Measures for interim payments

Arbitrators may grant measures for interim payments where it is considered necessary to enable the applicant to remain in business or to facilitate the execution of a particular project.[34] Before granting such a measure, they should be satisfied that the receiving party is entitled to the amount of the payment. In addition, when making their final award, arbitrators need to take account of any interim payments that have been made.

Article 6 — Form of interim measures

1. **Unless otherwise specified in the *lex arbitri* and the applicable arbitration rules, arbitrators should grant interim measures in the form of a reasoned procedural order.**
2. **Depending on the circumstances of the case, however, arbitrators may consider it appropriate to grant interim measures in the form of an interim award.**
3. **Given the temporary nature of interim measures, if presented with**

new evidence justifying a change to interim measures previously granted, arbitrators may modify, suspend or terminate them.

Commentary on Article 6

Arbitrators should take into account specific provisions as to the form of interim measures in any relevant arbitration rules as well as any mandatory provisions of the *lex arbitri*. However, the majority of arbitration laws and arbitration rules do not specify the form in which an interim measure should be granted in which case it is for the arbitrators to decide the appropriate course.[35]

Paragraph 1

Procedural order

a) It is generally accepted that where an interim measure is needed as a matter of urgency, the quickest and simplest way of providing the relief is to issue a procedural order.[36] Procedural orders generally do not need to comply with any formalities.[37] However, it is advisable to expressly state that they may be varied upon further consideration of the application or if there is a change of circumstances that justifies the previous order being modified, suspended or terminated.
b) Time permitting, it is good practice to include in any order reasons for granting or rejecting an application for interim measures to avoid the decision being perceived as arbitrary and to provide guidance to any enforcing authority, unless the parties agree that they do not need a reasoned decision.

Paragraph 2

Matters to consider when deciding the form of the decision

a) Arbitrators should evaluate the advantages and disadvantages of the different forms of order including a procedural order and an interim

award. Matters arbitrators should take into account when deciding on the form for interim measures include (1) any potential savings of time and costs, (2) how best to achieve the objective for which the interim measure is applied, (3) the parties' specific requests and comments, (4) the likelihood of compliance with the measure, (5) any requirements imposed in the applicable arbitration rules and/or the *lex arbitri* and (6) whether the courts in the place where the interim measures will be implemented recognise and enforce, or do not recognise and enforce, a particular form of arbitral decisions.

b) Where a request for an interim measure has been refused, arbitrators should issue their decision in the form of an order.[38]

c) Finally, some institutional rules require that all draft awards be reviewed by the institution before they are issued and this may cause considerable delay.[39] Procedural orders do not require such scrutiny and can be issued more promptly.

d) Arbitrators should consider granting interim measures in the form of an interim award if there are concerns regarding compliance because it is generally accepted that this has a strong positive effect on persuading the party to comply.[40] Describing their decision as an 'interim award' reflects the fact that the award is provisional in nature and does not finally decide any issues between the parties.[41]

e) While the term 'award' generally has no clear definition, the national laws of certain jurisdictions provide that an award is final as to its decisions and interim measures can be granted only by way of procedural orders.[42] Therefore arbitrators should always check the applicable *lex arbitri* and/or arbitration rules and make sure that they have powers to grant interim measures in the form of an award (see Article 3, paragraph 2 above).

Paragraph 3

Modification, suspension or termination of interim measures

a) Where an interim measure is granted, arbitrators may subsequently modify, suspend or terminate the measure if presented with new evidence or argument that justifies the change. Ordinarily, arbitrators will do so upon request of one of the parties. In exceptional cases, for example, where the measure has been granted on an erroneous or fraudulent basis, arbitrators may do so on their own motion. When modifying an order on their own motion arbitrators need to consider carefully what change needs to be made and notify the parties of any changes.[43]

b) It is common practice, when granting interim measures, for arbitrators to expressly require any party to give prompt disclosure of any material change in the circumstances which formed the basis for granting the interim measures. Arbitrators should consider emphasising the temporal character of any interim measures by including wording in their decision such as 'during the course of the proceedings' or 'until a further decision or Final Award on the merits'.[44]

Article 7 — *Ex parte* applications

1. **Interim measures can be granted either *ex parte* or after receiving submissions from both parties.**
2. **Interim measures granted *ex parte* are subject to further review pending an *inter partes* hearing.**

Commentary on Article 7

Paragraph 1

Ex parte applications for interim measures

a) The majority of national laws and arbitration rules are silent as to whether an application for interim measures needs to be notified to all

the parties involved in the arbitration and whether arbitrators can grant such measures *ex parte*. What the laws and rules usually provide is that both parties should be given a fair and equal opportunity to present their case (see Article 1, paragraph 4 above), which has been interpreted as precluding *ex parte* applications.

b) However, in cases of extreme urgency or where an element of surprise or confidentiality is required to make the order effective, it may be appropriate for arbitrators to grant an interim measure on an *ex parte* basis, i.e. without notice to the party against whom the measure is sought and hearing initially submissions only from the party making the application,[45] so long as it is not prohibited under the arbitration agreement, including any arbitration rules and the *lex arbitri*.[46] In addition, the appropriate safeguards should be put in place to protect the interests of the party that is not heard, including making the necessary arrangements for that party (1) to be notified of any order made, (2) to be given copies of any evidence and documents submitted in connection with the application and (3) to be given a fair opportunity to be heard as soon thereafter as is reasonably practicable.[47] Finally, when faced with an *ex parte* application, arbitrators should also bear in mind that they are hearing one side only, and even though they will make a provisional order pending an *inter partes* hearing, it is appropriate to test the applicant's case and submissions more rigorously than might be normal, and to seek full and frank disclosure of points adverse to the applicant.[48]

c) Arbitrators should be satisfied (1) that all the criteria applicable to interim measures generally are present (see Article 2 above) and additionally (2) that the disclosure of the application to the other party may well frustrate the purpose for which the relief is sought and render it, if granted, ineffective. For example, if an application for an interim measure were made to restrain assets being moved, the arbitrators would need to be satisfied that there was a genuine risk that the opposing party,

upon notice of the application, would move the assets in order to defeat the purpose of any decision.

Paragraph 2

When granting interim measures on an *ex parte* basis, arbitrators should emphasise that any such measure is provisional in that it is effective only for a limited time and pending the hearing of all parties. This stresses the temporary nature of any *ex parte* measure granted and serves to remind the parties that arbitrators may decide that it is appropriate to modify, suspend or terminate any provisional measure once they have heard from the opposing party at an *inter partes* hearing (see Article 6, paragraph 3 above).

Article 8 — Emergency arbitrators

1. **If the parties' arbitration agreement, including any arbitration rules, so permits, applications for interim measures can be granted by an emergency arbitrator before a regular tribunal has been formed.**
2. **Once a regular tribunal has been formed, all requests for additional interim measures should be heard by that tribunal.**

Commentary on Article 8

Paragraph 1

Emergency arbitrator

a) The need for emergency interim measures often arises simultaneously with the dispute but before any arbitrators have been appointed. In practice, it can take weeks or months to appoint a regular arbitral tribunal. If a party needs emergency relief during this period, it can only apply to the local courts for relief, unless the arbitration agreement between the parties incorporates provisions for the appointment of an

emergency arbitrator.[49]

b) An emergency arbitrator is typically a neutral appointed by an arbitral institution specifically to deal with an application for urgent interim relief which cannot wait for the constitution of the arbitral tribunal. The power of an emergency arbitrator is limited to decisions on interim measures and does not extend to any decisions on the merits of the case. Moreover, the decision of an emergency arbitrator does not bind the regular arbitrators and they may modify, suspend or terminate any order or interim award granted by the emergency arbitrator.

Urgency

c) An emergency arbitrator should be satisfied (1) that all the criteria applicable to interim measures generally are present (see Article 2 above) and (2) that immediate or urgent measures are required which cannot wait for the constitution of the arbitral tribunal; otherwise, the emergency arbitrator may reject the application solely on the basis that it can wait.[50]

Ex parte applications for emergency relief generally not allowed

d) Most arbitration rules containing provisions for emergency arbitrators explicitly provide that both parties are to be notified of any application for emergency relief and given an opportunity to be heard and make submissions in relation to such an application.[51]

Paragraph 2

a) Arbitration rules typically provide that emergency arbitrators become *functus officio* once a regular tribunal has been composed and that once they have issued a decision on the applications for emergency relief, they cannot act as arbitrators in the subsequent arbitral proceedings, unless the parties agree otherwise.[52]

b) If the arbitral tribunal is constituted while the emergency arbitration proceedings are pending, the emergency arbitrator needs to consider whether they can still make a decision. In certain rules the emergency arbitrators may make their decision even if an arbitral tribunal has been constituted in the meantime,[53] whereas in other rules, the matter should be transferred to the arbitral tribunal because once constituted all requests for interim measure should be addressed to it.[54]

Conclusion

1. There is little controversy about the authority of arbitrators to grant interim measures. They are generally given very broad powers to grant any interim measure they consider necessary and/or appropriate in the circumstances of the case before them. Nevertheless, numerous issues arise concerning the nature of the relief arbitrators may grant as well as its form and effectiveness. Also, different laws may govern different aspects of the process for granting interim measures and therefore great care should be taken to consider the appropriate laws.
2. With this in mind, the present Guideline attempts to highlight best practice so as to assist arbitrators in dealing with applications for interim measures in an effective and efficient manner.

NOTE

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

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Endnotes

1. For a recent detailed overview of the availability of interim measures in support of arbitration in 43 different jurisdictions worldwide, see Lawrence W. Newman and Colin Ong (eds), *Interim Measures in International Arbitration* (Juris 2014). See also, IBA Arbitration Committee, Arbitration—Country Guides, which give further information on the law and practice of arbitration in more than 50 countries, available at <http://www.ibanet.org>.
2. Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005), p. 172; José Maria Abascal Zamora, 'The Art of Interim Measures' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13 (Kluwer Law International 2007), pp. 753-755; and John Beechey and Gareth Kenny, 'How to Control the Impact of Time Running Between the Occurrence of the Damage and its Full Compensation' in Filip de Ly and Laurent Lévy (eds), *Interests, Auxiliary and Alternative Remedies in International Arbitration* (ICC 2008), pp. 109-110.
3. Such institutions include, *inter alia*, the Charted Institute of Arbitrators (CIArb), the International Centre for Dispute Resolution (ICDR/AAA), the Australian Centre for International Commercial Arbitration (ACICA), the International Chamber of Commerce (ICC), the Stockholm Centre of Commerce (SCC), the Singapore International Arbitration Centre (SIAC), the Swiss Chambers' Arbitration Institution (Swiss), the Hong Kong International Arbitration Centre (HKIAC), the London Court of International Arbitration (LCIA). Certain arbitral institutions use procedures other than emergency arbitrator, which are analogous in their nature, see, for example, the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC at the UCCI),

emergency arbitrator functions are performed by the President of the Court.

4. See e.g., Article 26(1) UNCITRAL Rules (2010/2013), Article 17 UNCITRAL Model Law 1985 (with amendments as adopted in 2006), Article 25(1) LCIA Rules (2014) and Article 23 ICC Rules (2012). Arbitrators should be wary of granting interim measures, on their own motion, even though exceptional circumstances may apply. They should only grant provisional relief without the previous request of one of the parties if any rules governing the arbitration expressly permit it and it is not contrary to the law of the place of the arbitration.
5. David D. Caron and Lee M. Caplan, 'Chapter 17: Interim Measures', *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed, Oxford University Press 2013), p. 517.
6. See ICC Case No. 7589 and ICC Case No. 7210 in Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014), p. 2454 (where the arbitral tribunals assumed they had the power to grant interim measures even though the ICC Rules 1988 did not expressly provide for such a power). See also Julian D. M. Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), pp. 593-594.
7. Born, n 6, pp. 2457 and 2463 ("Relatively little attention has been devoted to the question of what law applies to determine an arbitral tribunal's power to grant provisional measures in an international arbitration. Preliminarily, the law governing the tribunal's power to grant provisional measures is to be distinguished from the law governing the standards applicable to a grant of provisional measures.") See generally Christopher Boog, 'The Laws Governing Interim Measures' in Franco Ferrari and Stephan Kröll (eds),

Conflict of Laws in International Arbitration (Sellier 2011), pp. 409-458.

8. Boog, n 7, p. 432.
9. Beechey and Kenny, n 2, p. 116. See, for example, Article 17I UNCITRAL Mode Law.
10. See Article 25(1) LCIA Rules (2014) which expressly states that "the arbitral tribunal shall have the power upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application […]."
11. See generally CIArb Guideline on Jurisdictional Challenges.
12. See e.g., ICC Case 12361 (2003), (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 61.
13. Born, n 6, pp. 2481-2483. This was the approach adopted in a number of arbitral cases, e.g., *Biwater Gauff (Tanzania) Ltd v United Repub. Of Tanzania*, Procedural Order No. 1 (ICSID Case No. ARB/05/22 of 31 March 2006) at para. 70 ("It is also clear…that a party may be exposed to provisional measures even though it contends that ICSID has no jurisdiction.".) See also Ibrahim F. I. Shihata and Antonio R. Parra, 'The Experience of the International Centre for Settlement of Investment Disputes', (1999) 14 ICSID Review 326.
14. ICC Interlocutory Award 10596 (2000) (unpublished) and Order for Interim Measures and Arbitral Award 2002 in SCC Case No. 096/2001 in Yesilirmak, n 2, p. 180. See also, Julian D. M. Lew, 'Commentary on Interim and Conservatory Measures in ICC Arbitration Cases' (2000) 11 ICC Bulletin, p. 27.
15. Yesilirmak, n 2, p. 180; Caron and Caplan, n 5, p. 537.
16. Certain arbitral tribunals require an "irreparable harm", see Born, n 6, p. 2470 citing ICSID and Iran-United States Claims Tribunal

awards. However the establishment of such a high barrier is not widely accepted in international commercial arbitration where tribunals only require a showing of a grave, serious or substantial harm. See e.g., Interlocutory Award in ICC Case No. 10596 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration,* vol. XXX (Kluwer Law International 2005); Interim Award in ICC Case No. 8786 (2000) and Interim Award in ICC Case No. 8786 in (1990) 11(1) ICC Bulletin.

17. See CIArb Guideline on Applications for Security for Costs.
18. See e.g., ICC Case No. 6632, ICC Second Partial Award 8113 of 1995 and ICC First Partial Award 8540 of 1999 in Yesilirmak, n 2, pp. 183-184.
19. See e.g., Article 28(1) of the ICC Rules (2012), Article 24 ICDR/ AAA Rules (2014), Article 23(6) HKIAC Rules (2013), Article 25 (1) LCIA Rules (2014), Article 26(6) UNCITRAL Rules (2010/2013).
20. See ICC Case 10062 (2000) in (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 31 ("[a]ny award made by an arbitral tribunal, be it final or interim, may only address the parries of the arbitration agreement and any award involving third persons is a domain strictly reserved to state courts and, may, consequently, not be awarded by this arbitral tribunal.") See also, ICC Case 14287 in (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 78.
21. Born, n 6, pp. 2445-2446.
22. Amir Ghaffari and Emmylou Walters, 'The Emergency Arbitrator: The Dawn of a New Age?' (2014) 30(1) Arbitration International, pp. 159-163 and Guillaume Lemenez and Paul Quigley, 'The ICDR's Emergency Arbitrator Procedure in Action: Part II' (2008)

Dispute Resolution Journal, p. 3. But see the Note of the Secretariat on the Possible Future Work in the Area of International Commercial Arbitration, UN Doc A/CN.9/460, para. 121 ("The prevailing view, confirmed…by case law in some States, appears to be that the [New York] Convention does not apply to interim awards.")

23. See Status of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, available at <http://www.uncitral.org/>. However, there is no case law reported under this Section of the UNCITRAL Model Law, see UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 93.
24. Rufus Rhoades and others, *Practitioner's Handbook on International Arbitration and Mediation* (2nd ed, Juris 2007), p. 228. This is namely the case of France, Belgium and the Netherlands.
25. See CIArb Guideline on Managing Arbitral Proceedings (Forthcoming).
26. See e.g., ICC Case No. 7210 (1994) and ICC Case No. 5835 (1992) in Yesilirmak, n 2, pp. 185-186. See also, *Burlington Resources Inc. et al. v Republic of Ecuador and Empresa Estatal Petroleos del Ecuador* (ICSID Case No ARB/08/05), Procedural Order 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009.
27. Yesilirmak, n 2, pp. 183-185.
28. Yesilirmak, n 2, pp. 185-186 citing a case where the claimant did not do anything for more than two years and then requested an interim measure.
29. English Arbitration Act 1996 is unusual in the sense that arbitrator's powers to grant interim measure depend to a great extent on the parties' agreement. The Act provides that the arbitrator may only

grant certain interim measure without the express agreement of the parties. These include measures for the preservation, detention, inspection or sampling of "property which is the subject matter of the dispute" and the preservation of evidence. For any other type of measure parties' agreement is required. Section 38 Arbitration Act 1996. In the case of both UNCITRAL Model Law and UNCITRAL Arbitration Rules, the relevant provisions provide a generic list which groups the interim measures into broad categories describing their functions. A more detailed list has been provided by the UNCITRAL Working Group, see Note by the Secretariat (30 January 2002), UN Doc. A/CN.9/WG.II/WP.119.

30. See CIArb Guideline on Applications for Security for Costs.
31. See CIArb Costs of International Arbitration Survey 2011.
32. For the purposes of security for costs, costs in arbitration should be understood as the legal costs of the parties as well as the arbitrators' fees and expenses, fees and expenses of the arbitral institutional and other costs (non-legal) of the parties. See Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (5th ed, Wiley 2014), p. 199.
33. See CIArb Guideline on Applications for Security for Costs.
34. See e.g., ICC Case No. 7544 (1996), (2000) 11(1) ICC Bulletin, p. 56.
35. See e.g., Article 24(2) ICDR/AAA Rules (2014) ("interim order or award"), Article 32 SCC Rules (2012) ("an order or an award"), Article 30(1) SIAC Rules (2016) ("an order or an Award") and Article 23(3) HKIAC Rules (2013) ("an order or an award or in another form") .
36. See e.g., ICC Case 14287 in (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 79 (explaining that the ICC Commission

reached a conclusion that "decisions on requests to issue an interim measure should not be taken in the form of arbitral awards" due to the related practical problems with recognition and enforcement of awards containing an interim award under the New York Convention.)

37. See CIArb Guideline on Managing Arbitral Proceedings (Forthcoming).
38. ICC Case 14287 in (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 79.
39. This is the notably the case of the ICC where the Court must review all draft awards pursuant to Article 33 ICC Rules (2012).
40. Melissa Magliana, 'Commentary on the Swiss Rules: Article 26 Interim Measures of Protection' in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International 2013), p. 526.
41. See generally CIArb Guideline on Drafting Arbitral Awards Part I—General. See also, UNCITRAL Report of the Working Group on Arbitration on the work of its thirty-sixth session, UN Doc. A/CN.9/508 (12 April 2002), para. 66 ("One suggestion was that the words "arbitral award" should be replaced by the words "partial or interim award". In support to that proposal it was stated that the words "arbitral award" were often understood as referring to the final award in the arbitration proceedings, whereas an order of interim measures, even if issued in the form of an award, was typically an interlocutory decision. Some support was expressed for that proposal, although most speakers objected to the use of the words "partial award", since those words typically referred to a final award that disposed of part of the dispute, but would not appropriately describe an interim measures.")

42. See e.g., Articles 12 and 19B Singapore International Arbitration Act 2012.
43. Christopher Boog, 'Interim Measures in International Arbitration' in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International 2013), p. 1363 and Marianne Roth, 'Interim Measures' (2012) Journal of Dispute Resolution, p. 431.
44. Kaj Hobér, 'Interim Measures by Arbitrators' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13 (Kluwer Law International 2007), p. 739.
45. UNCITRAL, Report of the Working Group on Arbitration on the Work of its Thirty-third session (22 September 2000), UN Doc. A/CN.9/WG.II/WP.110, para. 69 ("[…] such measures may be appropriate where an element of surprise is necessary, i.e. where it is possible that the affected party may try to preempt the measure by taking action to make the measure moot or unenforceable. For example, when an interim order is requested to prevent a party from removing assets from the jurisdiction, the party might remove the assets out of the jurisdiction between the time it learns of the request and the time the measure is issued; […].")
46. UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the Work of its Forty-Seventh Session (25 September 2007), UN Doc. A/CN.9/641, para. 57 ("After discussion, the Working Group was generally of the view that, unless prohibited by the law governing the arbitral procedure, bearing in mind the broad discretion with which the arbitral tribunal was entitled to conduct the proceedings under article 15(1), the [UNCITRAL] Rules, in and of themselves, did not prevent the arbitral tribunal from issuing preliminary orders.")
47. See e.g., Articles 17B and 17C of the UNCITRAL Model Law which set a specific regime for *ex parte* preliminary orders and

Article 26(3) Swiss Rules (2012).

48. See e.g., Article 17F(2) UNCITRAL Model Law and UNCITRAL, Report of the Working Group on Arbitration on the Work of its Thirty-sixth session (12 April 2002), UN Doc. A/CN.9/508, para. 78.
49. Emergency Arbitration Rules as an opt-out regime, i.e. they apply automatically to parties' arbitration agreement unless otherwise agreed by the parties. See Grant Hanessian, 'Emergency Arbitrators' in Lawrence W. Newman and Richard D. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd ed, Juris 2014), pp. 346-347.
50. Johan Lundstedt, SCC Practice: Emergency Arbitrator Decisions 1 January 2010-31 December 2013, available at <http:// www.sccinstitute.com/>
51. See e.g., Article 1(5), Appendix V, ICC Rules (2012); para. 6, Schedule 1, SIAC Rules (2016); Article 3, Appendix II, SCC Rules (2012); Article 9B, para. 9.5 LCIA Rules (2014). See also, Bernd Ehle, 'Emergency Arbitration in Practice' in Christopher Muller and Antonio Rigozzi (eds), *New Developments in International Commercial Arbitration* (Schulthess 2013), pp. 97-98. But see the Swiss Rules (2012) which allow the emergency arbitrator to order emergency relief ex parte pursuant to Article 43(1) which makes reference to Article 26(3). See generally, Christopher Boog and Bertrand Stoffel, 'Preliminary Orders and the Emergency Arbitrators: Urgent Interim Relief by an Arbitral Decision Maker in Exceptional Circumstances', Nathalie Voser (ed), *Ten Years of Swiss Rules of International Arbitration*, ASA Special Series No. 44 (JurisNet 2014), pp. 71-82.
52. See e.g., Article 2(5), Appendix I CIArb Rules (2015); Article 6(5) ICDR/AAA Rules (2014); para. 6, Schedule 1 SIAC Rules (2016).
53. See e.g., Article 13, Schedule 4 HKIAC Rules (2013); Article 2(2),

Annex V, ICC Rules (2012) and Article 43(7), Swiss Rules (2012).

54. See e.g., para.10, Schedule 1 SIAC Rules (2016) and Article 6(5) ICDR/AAA Rules (2014).