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Interim Measures

Marianne Roth*

I. INTRODUCTION

A final award may be of little value to the successful party if, in the meantime, the behavior of the other party renders the outcome of the proceedings largely ineffectual—such as when the recalcitrant party dissipates its assets or places them in a jurisdiction where enforcement is cumbersome or otherwise impossible. To avoid this type of harm, the precautionary claimant may request interim relief; this relief might take the form of an order restricting a party from transferring money to a less favorable enforcement regime or an order appointing an administrator of assets. Interim measures being employed in arbitral proceedings—such as orders, attachments, and/or injunctions—vary widely, with international trade practice continuing to generate new kinds of remedies according to the needs of the parties and the increasing complexity of cases.

Requests for interim relief typically seek some kind of protection of assets or property during the time when the ultimate determination of the facts and law of the case is still being made.¹ The rationale for interim relief is to preserve both assets and property throughout the entirety of the arbitration process, thus preventing an arbitrator's final ruling from being meaningless due to the actions of the parties involved.² Thus, such measures are having huge practical importance and are often an indispensable part of the arbitral process.

Traditionally, requests for interim relief have been a construct of courts.³ However, arbitrators are increasingly being asked to make such rulings themselves.⁴ Requesting interim relief from an arbitrator, as opposed to the court, is particularly appealing in international arbitration, where parties often engage in arbitration as a way of avoiding local courts and any home court advantage that

* Marianne Roth is a professor of law and chairperson of the academic senate at Salzburg University, Austria. She also practices as an arbitrator under institutional and *ad hoc* rules, and has worked as a legal advisor and visiting professor for various institutions around the world (e.g., Thai Ministry of Justice, Ukrainian Cabinet of Ministers, University of the Pacific McGeorge School of Law, CA, University of Puerto Rico). Professor Roth held chairs at Humboldt University Berlin and Christian Albrechts University Kiel, Germany. She completed her doctor's degree and habilitation at Kepler University Linz, Austria and holds an LL.M. from Harvard Law School. For her numerous writings Prof. Roth received several academic awards (e.g., the Albert S. Pergam Prize of the New York State Bar Association). She may be contacted at marianne.roth@sbg.ac.at. Many thanks to Mag. Claudia Reith for her assistance in preparing this article.

1. STEVEN P. FINIZIO & DUNCAN SPELLER, A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION: ASSESSMENT, PLANNING AND STRATEGY 220 (2010).

2. Alan Redfern, *Interim Measures*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 203, 209 (Lawrence W. Newman & Richard D. Will eds., 2008); Richard W. Naimark & Stephanie E. Keer, *Analysis of UNCITRAL Questionnaires on Interim Relief*, 16 MEALEY'S INT'L ARB. REP. 1, 1 (2001).

3. Naimark & Keer, *supra* note 2, at 1.

4. *Id.*; Andreas Reiner, *Les mesures provisoires et conservatoires et L'Arbitrage international, notamment l'Arbitrage CCI*, 4 JOURNAL DU DROIT INT'L 854 (1998).

may be associated with them.⁵ Sometimes, though, interim relief may be unavailable from the arbitral tribunal; for example, when coercion is associated with the requested measure. In such situations, the powers to grant interim measures are shared between arbitral tribunals and courts. Yet, it appears necessary to draw boundaries between their respective areas of jurisdiction.

II. DEFINITION AND FUNCTIONS

Interim measures provide a party to arbitration with immediate and temporary protection of rights or property during the period of time when a decision on the merits by the arbitral tribunal remains pending.⁶ These measures vary widely according to the needs of the parties and the complexity of the cases in international trade practice.⁷

Article 17(2) of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter “MAL”) lists four functions of interim measures: maintenance of the status quo; protection of the arbitral process itself; preservation of assets; and preservation of evidence.⁸ This list is not exhaustive and an interim measure may, of course, serve more purposes at the same time.⁹

A. Maintenance of the Status Quo

According to MAL Article 17(2)(a), an interim measure should maintain the status quo until a final decision on the merits of the case is rendered.¹⁰ For example, one may think of an international construction dispute where the tribunal requests the general contractor to continue working even though it claims it is entitled to suspend the work unless the customer makes payments in addition to the amount owed under contract. At the same time, the customer is usually ordered to continue making those payments it undoubtedly owes under the contract. Obviously, such an interim measure prevents the costly standstill of construction work on a building site while a final decision on the merits of the case is pending.¹¹ Maintaining the status quo is widely accepted in many legal systems as one important purpose of interim measures.¹²

5. Naimark & Keer, *supra* note 2, at 3; Raymond J. Werbicki, *Arbitral Interim Measures: Fact or Fiction*, in AAA HANDBOOK ON INTERNATIONAL ARBITRATION AND ADR 89, 90 (Thomas Carbonneau & Jeanette A. Jaeggi eds., 2010).

6. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1942 (2009).

7. Grégoire Marchac, *Note & Comment: Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules*, 10 AM. REV. INT'L ARB. 123, 123 (1999).

8. UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, 18th Sess., Annex 1, U.N. Doc. A/40/17 (June 21, 1985), revised by Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, 39th Sess., Annex, U.N. Doc. A/61/17 (July 7, 2006), art. 17(2), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html [hereinafter UNCITRAL Model Arbitration Law].

9. Marianne Roth, *UNCITRAL Model Law on International Commercial Arbitration*, in PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 14.282 (Frank-Bernd Weigand ed., 2d ed. 2010).

10. UNCITRAL Model Arbitration Law, *supra* note 89, art. 17(2).

11. Marchac, *supra* note 6, at 132.

12. U.N. WORKING GROUP ON ARBITRATION, ¶ 23, U.N. DOC A/CN.9/545 (2012); Roth, *supra* note 8, ¶ 14.284.

B. Protection of the Arbitral Process Itself

MAL Article 17(2)(b) empowers the arbitral tribunal to prevent a party from taking any actions that may cause obstruction or delay of the arbitral process.¹³ An example in this category is the issuance of anti-suit injunctions.¹⁴ These are interim measures by which an arbitral tribunal orders a party not to pursue parallel court proceedings or other separate legal proceedings in the same matter.¹⁵ Accordingly, such a measure aims to avoid contradictory results.

C. Preservation of Assets

MAL Article 17(2)(c) entitles the arbitral tribunal to issue interim measures preserving party assets so as to secure the enforcement of the final award.¹⁶ Hence, under this provision, the tribunal may be asked to issue an interim measure aimed at securing the assets out of which a subsequently rendered award may be satisfied. Measures in this category include those interim efforts used to avoid loss or damage.¹⁷ For example, such measures might include an order restraining a party from transferring money to a less favorable enforcement regime—such as some islands in the Caribbean Sea that are not parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter New York Convention)—an order appointing an administrator of assets, or an order to safeguard goods.

D. Preservation of Evidence

Pursuant to MAL Article 17(2)(d), the arbitral tribunal can “preserve evidence that may be relevant and material to the resolution of the dispute” in order to secure the proper conduct of the proceedings.¹⁸ This can be done, for example, by appointing an independent expert who evaluates the quality of perishable goods. The arbitrators might also require a party to grant the opposing party an opportunity to inspect the premises in question in order to seek out and preserve evidence. “The purpose of this preservation is to facilitate the proper conduct of the arbitral process.”¹⁹

13. UNCITRAL Model Arbitration Law, *supra* note 7, art. 17(2).

14. Sundaresh Menon & Elaine Choa, *Reforming the Model Law Provisions on Interim Measures of Protection*, 6 ASIAN INT'L ARB. J. 1, 5 (2006).

15. BORN, *supra* note 6, at 2010; Louis Flannery, *Anti-suit Injunctions in Support of Arbitration*, 12 EUR. BUS. L. REV. 143 (2003).

16. UNCITRAL Model Arbitration Law, *supra* note 8, art. 17(2).

17. U.N. Secretary-General, *Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes*, ¶ 63, U.N. DOC. A/CN.9/WG.II/WP.108 (Jan. 14, 2000); Roth, *supra* note 9, ¶ 14.285.

18. UNCITRAL Model Arbitration Law, *supra* note 8, art. 17(2)(d).

19. Roth, *supra* note 9, ¶ 14.287.

III. THE POWER OF THE ARBITRAL TRIBUNAL TO GRANT INTERIM MEASURES

The power of the arbitral tribunal to order interim measures must be established under the applicable procedural law, which is the law chosen by the parties or, in absence of such choice, the law of the place of arbitration.²⁰ The major sets of arbitral rules provide for provisions which expressly empower the arbitrator to order interim measures.²¹ The UNCITRAL MAL, which serves as a model for national legislators drafting their own arbitration acts, was amended in 2006 and has provided detailed rules regarding interim measures since that time.²²

The relevant provisions under the Arbitration Rules of the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), the London Court of International Arbitration (LCIA) and the United Nations Commission on International Trade Law (UNCITRAL) are more or less detailed and vary as to the scope of interim measures: whereas most arbitral regimes give broad powers to arbitrators, who may grant any measures they deem appropriate or necessary, under some rules, such as the LCIA Rules, the tribunal may only take measures it deems necessary in respect to the subject matter of the dispute.²³ Thus, the scope of interim measures under the LCIA Rules seems to be more limited compared to other rules because the measure has to be in direct relation to the subject matter of the dispute. None of the many arbitral rules limit arbitrators to the traditional remedies provided in the procedural law of the place of arbitration. However, it should be noted that the enforcement of innovative measures could prove difficult if the state where enforcement is sought is not familiar with these kinds of interim measures.²⁴ Generally, arbitrators have “wide discretion in deciding whether the requested measure is appropriate or necessary.”²⁵ Nonetheless, in practice arbitrators tend to use their authority to grant interim measures reluctantly because they do not want to appear as if they have already decided the merits of the case before the facts are firmly established or in favor of one party.²⁶ The recent trend of arbitral rules and national arbitration acts is to vest the arbitrators with express powers to order interim awards.²⁷ As an exception to this general tendency, however, some national laws still accord the

20. Grant Hanessian & Jürgen Mark, *Provisional Relief*, in INTERNATIONAL ARBITRATION CHECKLISTS 61 (Grant Hanessian & Lawrence W. Newman eds., 2009).

21. International Chamber of Commerce (ICC) Rules of Arbitration, art. 28, effective January 1, 2012, 2011, available at <http://www.iccwbo.org/court/arbitration/id4199/index.html> [hereinafter ICC Rules]; International Centre for Dispute Resolution (ICDR) International Arbitration Rules, art. 21(1), effective June 1, 1999, available at <http://www.adr.org/icdr> [hereinafter ICDR Rules]; UNCITRAL Model Arbitration Law, *supra* note 8, art. 26(1), (2); London Court of International Arbitration (LCIA) Arbitration Rules, art. 25, effective Jan. 1, 1998, available at http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx [hereinafter LCIA Rules].

22. Roth, *supra* note 9, ¶ 14.270.

23. LCIA Rules, *supra* note 21, art. 25(1)(b).

24. Marchac, *supra* note 7, at 128.

25. See ICC Rules, *supra* note 21, art. 28(1); ICDR Rules, *supra* note 21, art. 21(1); see also Marchac, *supra* note 7, at 129.

26. Marchac, *supra* note 7, at 129.

27. BORN, *supra* note 6, at 1966; Hanessian & Mark, *supra* note 20, at 61; Redfern, *supra* note 2, at 209.

exclusive jurisdiction to order interim measures to their domestic courts, such as Finland, Greece, Italy, and Thailand.²⁸

A. *Conditions of Interim Measures*

Most sets of arbitral rules are silent on the precise conditions under which interim measures may be ordered.²⁹ In practice, however, arbitral tribunals have developed standards for granting interim measures.³⁰ The usual requirements include imminent harm and the likelihood of success on the merits on the part of the applicant.³¹ The MAL, as amended in 2006, adopted these practices and expressly sets forth the conditions for granting interim measures.³² According to MAL Article 17A, the requesting party has to demonstrate to the tribunal that there is, on the one hand, the necessity of irreparable harm and, on the other hand, a reasonable possibility of the applicant's success on the merits of the case.³³ "Both conditions have to be satisfied equally."³⁴ Additionally, MAL Article 17A requires that the imminent harm outweigh the harm caused by the interim measure against the other party.³⁵ Thus, the arbitral tribunal should take the effect of the interim measure on the arbitrating parties into account to ensure that the harm caused by the measure is not out of proportion to the benefit gained by applicant.³⁶ The conditions set out in MAL Article 17A(1) are comparable to the "balance of convenience test," which is often applied by courts in common law jurisdictions.³⁷ As to the burden of proof, the applicant has to meet the burden of convincing the arbitral tribunal that both conditions are fulfilled.³⁸ For the preservation of evidence, MAL Article 17A(2) provides that the tribunal may apply less onerous conditions than set forth in MAL Article 17A(1) if it considers preservation of evidence important.³⁹ "This seems a sensible solution since the preservation of evidence is a matter of direct interest to the entire arbitral process, which should not be hindered by strict conditions."⁴⁰

B. *Form of Interim Measures*

Regarding the form of interim measures, they can either be rendered as a procedural order or as an interim award.⁴¹ Where the former can be described as more

28. Hanessian & Mark, *supra* note 20, at 61; Werbicki, *supra* note 5, at 96.

29. NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 5.28 (5th ed. 2009).

30. BORN, *supra* note 6, at 1980; BLACKABY ET AL., *supra* note 29, ¶ 5.28.

31. BORN, *supra* note 6, at 1980.

32. UNCITRAL Model Arbitration Law, *supra* note 8, art. 17A.

33. *Id.*

34. Roth, *supra* note 9, ¶ 14.289.

35. UNCITRAL Model Arbitration Law, *supra* note 8, art. 17A.

36. Redfern, *supra* note 2, at 229; KLAUS PETER BERGER, 2 PRIVATE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS ¶ 21-13 (2006).

37. Menon & Chao, *supra* note 14, at 7-8.

38. Roth, *supra* note 9, ¶ 14.288; Menon & Chao, *supra* note 14, at 8.

39. UNCITRAL Model Arbitration Law, *supra* note 8, art. 17A(2)(d).

40. Roth, *supra* note 9, ¶ 14.293.

41. Redfern, *supra* note 2, at 236; Hanessian & Mark, *supra* note 20, at 61.

informal, the latter is more formal.⁴² The various sets of rules give the arbitrators broad discretion whether to issue an interim measure in the form of a procedural order or in the form of a more formal interim award. In exercising its discretion whether to render an award or an order, the tribunal will consider the kind of measure being invoked—whether procedural or contractual in nature—as well as the applicable procedural law.⁴³ However, arbitrators are usually in favor of issuing an informal procedural order because a more formal interim award may appear too similar to a decision on the merits of the dispute.⁴⁴

C. Ex Parte Interim Measures

Ex parte interim measures are interim measures ordered without granting a prior hearing to the party against whom the measure is directed.⁴⁵ Some authors argue that *ex parte* interim measures run counter to the principles of fairness and equality, which are particularly important in arbitral proceedings since there is usually no appeal process.⁴⁶ In contrast, the opposing view is that the nature of an interim remedy—ordered under urgency—requires the element of surprise in order to avoid potential harm.⁴⁷ Usually, arbitral rules are silent on this issue.⁴⁸ In practice, however, it seems that the latter view is prevailing. Under such a view, the arbitral tribunal should be able to grant interim measures without first holding a hearing in order to ensure that the interim measures are effective and not frustrated by a party acting in bad faith.⁴⁹ Proponents of this view emphasize that arbitrators can later amend or withdraw their decision at the request of a party in a subsequent hearing.⁵⁰

The MAL acknowledges *ex parte* measures in the form of so called preliminary orders.⁵¹ Preliminary orders are orders on an *ex parte* basis without a hearing of the party against whom the requested interim measure is directed.⁵² They are designed to prevent this party from frustrating the requested interim measure until such point where the arbitral tribunal has a chance to hear this party and rule on

42. BORN, *supra* note 6, at 2014.

43. *Id.* at 2014 (deciding upon the form of the provisional measures falls under the discretion of the tribunal); Reiner, *supra* note 4, at 898.

44. Marchac, *supra* note 7, at 130.

45. BORN, *supra* note 6, at 2016; Roth, *supra* note 9, ¶ 14.295.

46. See generally Hans Van Houtte, *Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration*, 20 ARB. INT'L 89 (2004); see also BERGER, *supra* note 36, ¶ 21-13.

47. See KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 337 (1993). See Reiner, *supra* note 4, at 864; Jan K. Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared*, 2 ELECTRONIC J. COMP. L. (Aug. 1998), <http://www.ejcl.org/22/art22-2.html>; Carole Malinvaud, *The Amendment to the UNCITRAL Model Law on Interim Measures: A Compromise on Ex Parte Measures*, in THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: 25 YEARS 103 (Association for International Arbitration ed., 2010).

48. See, e.g., ICC Rules, *supra* note 21, art. 28; ICDR Rules, *supra* note 21, art. 21; UNCITRAL Model Arbitration Law, *supra* note 9, art. 25. All of these rules include provisions regarding interim measures, but none of them deal with *ex parte* measures. See Marchac, *supra* note 7, at 131.

49. Marchac, *supra* note 7, at 131.

50. *Id.*; see also James E. Castello, *Arbitral Ex Parte Interim Relief: The View in Favor*, DISP. RESOL. J., Feb.-Apr. 2003, at 68; Menon & Chao, *supra* note 14, at 11-12.

51. UNCITRAL Model Arbitration Law, *supra* note 8, art. 17B.

52. Roth, *supra* note 9, ¶ 14.295.

the application of the interim measure formally.⁵³ However, preliminary orders are subject to strict time limits: they expire after twenty days.⁵⁴ The arbitral tribunal may issue an interim measure, adopting or modifying the preliminary order, after the party against whom the order is directed is given an opportunity to present his or her case.⁵⁵ A preliminary order is binding on the parties but is not subject to enforcement by a court since they do not constitute awards.⁵⁶

D. Safeguards Against the Abuse of Interim Measures and Preliminary Orders

To address concerns that requests for interim measures and preliminary orders may be subject to abuse, the MAL explicitly provides for a number of safeguards. The MAL, and most arbitral rules, empower the tribunal to order appropriate security in connection with an interim measure or a preliminary order.⁵⁷ In the case of a preliminary order, the tribunal shall, as a principle, require the requesting party to provide security; whereas, in case of an interim measure, the order for security is left to the tribunal's discretion.⁵⁸ Only if the arbitral tribunal considers it inappropriate or unnecessary may it refrain from requiring security from the party applying for a preliminary order.⁵⁹ Additionally, the MAL expressly empowers the tribunal to modify, suspend, or terminate an interim measure or a preliminary order upon application of a party.⁶⁰ In exceptional circumstances, such as when the measure appears to have been granted on an erroneous or fraudulent basis, the arbitral tribunal may modify, suspend, or terminate the measure on its own initiative.⁶¹ In such a case, it must notify the parties of the envisaged modification, suspension, or termination beforehand.⁶² Further, MAL Article 17F codifies the parties' obligation to disclose a material change of circumstances on the basis of which an interim measure or a preliminary order was requested or granted.⁶³ Finally, the MAL, and some arbitral rules, expressly acknowledge the requesting party's liability as to costs and damages caused by the interim measure or provisional order if the measure or order later proves to be unjustified.⁶⁴

53. *Id.* ¶ 14.299.

54. UNCITRAL Model Arbitration Law, *supra* note 8, art. 17C(4); BLACKABY ET AL., *supra* note 29, ¶ 5.30.

55. UNCITRAL Model Arbitration Law, *supra* note 8, art. 17C(4).

56. *Id.* art. 17C(5).

57. ICC Rules, *supra* note 21, art. 28(1); ICDR Rules, *supra* note 21, art. 21(2); LCIA Rules, *supra* note 21, art. 25(1), (2); UNCITRAL Arbitration Rules, G.A. Res. 65/22, U.N. Doc. A/RES/65/22, art. 26(6) (Jan. 10, 2011), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> [hereinafter UNCITRAL Arbitration Rules]; UNCITRAL Model Arbitration Law, *supra* note 8, art. 17E(1).

58. UNCITRAL Model Arbitration Law, *supra* note 8, art. 17E.

59. Roth, *supra* note 9, ¶ 14.322.

60. UNCITRAL Model Arbitration Law, *supra* note 8, art. 17D.

61. U.N. Working Group on Arbitration, *Report of the Working Group on Arbitration on the Work of its Thirty-Ninth Session*, ¶ 38, U.N. Doc. A/CN.9/545 (Nov. 10-14, 2003); Roth, *supra* note 9, ¶ 14.311.

62. Roth, *supra* note 9, ¶ 14.315.

63. UNCITRAL Model Arbitration Law, *supra* note 8, art. 17F.

64. UNCITRAL Arbitration Rules, *supra* note 57, art. 26(8); UNCITRAL Model Arbitration Law, *supra* note 8, art. 17G.

E. Emergency Relief

Any interim relief granted by an arbitral tribunal requires the tribunal to already be constituted.⁶⁵ In situations where the tribunal has not yet been established, parties traditionally turn to local courts to apply for interim measures.⁶⁶ However, in recent years, an alternative has emerged and is becoming increasingly popular: the emergency arbitrator.⁶⁷ Today, various rules provide for a mechanism under which a party seeking urgent interim relief before the arbitral tribunal has been constituted can apply for the appointment of an emergency arbitrator. Emergency procedures give parties the option to stay within arbitration and to maintain the privacy of the proceedings.⁶⁸ One of the first set of rules that introduced this possibility was the International Arbitration Rules of the International Centre for Dispute Resolution (ICDR), followed by a number of other rules such as the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the Arbitration Rules of the Singapore International Arbitration Centre (SIAC), both of 2010.⁶⁹ Also, the new Arbitration Rules of the International Chamber of Commerce (ICC), which came into force on January 1, 2012, provide for emergency measures of protection issued by an emergency arbitrator.⁷⁰ Each of these rules contain strict time limits for the issuance of the emergency decision and, in order to accelerate proceedings, expressly acknowledge modern means of communication such as telephone conferences.⁷¹ An emergency decision will not bind a tribunal later appointed.⁷² Moreover, an emergency decision terminates if the arbitration is not commenced or if the arbitral tribunal is not constituted within a certain time period.⁷³

65. See W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION CASES AND MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 754 (1997); Ben H. Sheppard Jr. & John M. Townsend, *Holding the Fort Until the Arbitrators Are Appointed: The New ICDR International Emergency Rule*, DISP. RESOL. J., May-July 2006, at 75; Patricia Shaughnessy, *Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules*, 27 J. OF INT'L ARB. 337, 337 (2010).

66. See Lindsey Chaffetz et al., *Emergency Measures of Protection: Creeping Consensus or a Passing Fancy?*, (June 27, 2012), <http://www.chaffetzlindsey.com/wp-content/uploads/2011/04/00070460.PDF>.

67. See Marianne Roth & Claudia Reith, *Emergency Rules*, in 2 YEARBOOK ON INTERNATIONAL ARBITRATION 65 (Marianne Roth & Michael Geistlinger eds., 2012).

68. Werbicki, *supra* note 5, at 90.

69. ICDR Rules, *supra* note 21, art. 37; Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules 2010, app. II, available at http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf [hereinafter SCC Rules]; Singapore International Arbitration Centre Rules 2010, sch. 1, available at http://www.siac.org.sg/index.php?option=com_content&view=article&id=210&Itemid=130#siac_schedule1 [hereinafter SIAC Rules].

70. ICC Rules, *supra* note 21, art. 29, app. V.

71. See, e.g., ICC Rules, *supra* note 21, arts. 4(2), 6(4), app. V (providing for video conference, telephone or similar means of communication); SIAC Rules, *supra* note 69, sch. 1.5 (providing for proceedings by telephone conference or on written submissions); ICDR Rules, *supra* note 21, art. 37(4) (providing for proceedings by telephone conference or on written submissions); SCC Rules, *supra* note 69, art. 8(1) app. II.

72. See, e.g., SCC Rules, *supra* note 69, app. II art. 9.5; SIAC Rules, *supra* note 69, sch. 1.7; ICDR Rules, *supra* note 21, art. 37(6); ICC Rules, *supra* note 21, art. 29(3).

73. Roth & Reith, *supra* note 67, at 73.

IV. CONCURRENT JURISDICTION OF COURTS

The parties need the intervention of local courts in two situations: when the arbitral tribunal is not yet constituted and emergency procedure is unavailable, and when highly coercive measures involving the exercise of public authority are requested, such as attachments directed against third parties holding assets in dispute.⁷⁴

Therefore, according to the prevailing tendency, the powers of courts and arbitrators to order interim measures in support of arbitral proceedings are shared in most developed countries.⁷⁵ The MAL and the arbitral rules generally recognize that recourse to courts is not deemed to be an infringement or a waiver of the arbitration agreement.⁷⁶ Under the MAL, a party may request an interim measure from the competent court in any country, regardless of where the arbitration takes place.⁷⁷ Quite often, the party will turn to the courts where the property in dispute or the evidence is located. The four sets of rules expressly provide that the power of arbitrators to order interim measures is not exclusive and that the recourse to judicial authorities is not deemed to be a waiver of the right to arbitrate under the arbitration agreement.⁷⁸ Hence, the application to a state court for an interim measure is not incompatible with the agreement to arbitrate.

However, some arbitral rules set forth conditions for the application to state courts.⁷⁹ Under the ICC Rules, parties may apply to local courts only in "appropriate circumstances" after the file has been transmitted to the tribunal.⁸⁰ The LCIA Rules are narrower still, as they require "exceptional cases" in order to apply to state courts after the formation of the arbitral tribunal.⁸¹ The ICDR Rules, the UNCITRAL Rules, and the MAL abstained from further requirements for the application to a state court.

To avoid contradictory decisions, some rules impose an obligation of disclosure on the party requesting an interim measure from a court.⁸² Under the ICC Rules, the party must communicate both any application and any measure ultimately taken to the ICC Secretariat, which in turn has to inform the arbitral tribunal thereof.⁸³

74. See BLACKBAY ET AL., *supra* note 29, ¶ 7.16; see also JUDD EPSTEIN ET AL., A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION 64 (2000)

75. See BORN, *supra* note 6, at 1972; PHILIPPE FOUCHARD & BERTHOLD GOLDMAN, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 1305, (Emmanuel Gaillard & John Savage eds., 1999); Werbicki, *supra* note 5, at 102.

76. ICC Rules, *supra* note 21, art. 28(2); ICDR Rules, *supra* note 21, art. 21(3); LCIA Rules, *supra* note 21, art. 25(3); UNCITRAL Arbitration Rules, *supra* note 57 art. 26(9); UNCITRAL Model Arbitration Law, *supra* note 8, arts. 9, 17J.

77. UNCITRAL Model Arbitration Law, *supra* note 8, art. 17J; Roth, *supra* note 9, ¶ 14.357.

78. ICC Rules, *supra* note 21, art. 28(2); ICDR Rules, *supra* note 21, art. 21(3); LCIA Rules, *supra* note 21, art. 25(3); UNCITRAL Arbitration Rules, *supra* note 57 art. 26(9); UNCITRAL Model Arbitration Law, *supra* note 8, arts. 9, 17J; see also EPSTEIN, *supra* note 74, at 64.

79. See BORN, *supra* note 6, at 2064.

80. ICC Rules, *supra* note 21, art. 28(2).

81. LCIA Rules, *supra* note 21, art. 25(3).

82. See, e.g., ICC Rules, *supra* note 21, art. 28(2); LCIA Rules, *supra* note 21, art. 25(3).

83. ICC Rules, *supra* note 21, art. 28(2).

V. RECOGNITION AND ENFORCEMENT OF INTERIM MEASURES

In terms of the recognition and enforcement of interim measures, court intervention is ultimately needed since arbitrators lack coercive powers and cannot exercise public authority.⁸⁴ It is controversial whether interim awards qualify for recognition and enforcement under the New York Convention since such awards are not final, but provisional in nature, and may therefore be reconsidered during the procedure.⁸⁵ Additionally, national laws vary widely as to recognition and enforcement of interim measures.⁸⁶ Therefore, the MAL provisions, as amended in 2006, aim at harmonizing the various national laws by providing a common regime for recognition and enforcement of interim measures.⁸⁷ The UNCITRAL Secretariat explained the necessity of the revision explicitly under the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures.⁸⁸ Twelve countries have already enacted legislation based on these MAL provisions, among them are countries such as Australia, China, Hong Kong, Florida, Ireland, and New Zealand.⁸⁹

MAL Article 17H(1) provides that an interim measure shall be recognized as binding and enforceable upon application to the competent court, irrespective of the country in which it was issued.⁹⁰ Taking into account the fact that arbitrators often grant interim measures “in ‘neutral’ places where the parties do not have assets,” this provision is particularly important.⁹¹ The MAL provides safeguards in order to protect the party against whom the interim measure is to be enforced. MAL Article 17H(2) imposes an obligation on the party seeking enforcement to inform the court of any termination, modification, or suspension of the measure.⁹² This is important since, for example, the termination of an interim measure is recognized as a possible ground for refusing recognition and enforcement.⁹³ Further, the court of the state where recognition and enforcement is sought may order the requesting party to provide appropriate security.⁹⁴ However, the power of the court to order security is limited to cases where the tribunal has not already rendered a respective decision or where it is necessary to protect the rights of third parties.⁹⁵

Further, the MAL enumerates a number of limited grounds for refusal of recognition and enforcement of interim measures.⁹⁶ MAL Article 17I mentions a

84. See BORN, *supra* note 6, at 2019.

85. *Id.* at 2021.

86. UNCITRAL Model Arbitration Law, *supra* note 8, Explanatory Note B.8; Marchac, *supra* note 7, at 136.

87. UNCITRAL Model Arbitration Law, *supra* note 8, Explanatory Note A.2; Roth, *supra* note 9, ¶¶ 14.19, 14.333.

88. UNCITRAL Model Arbitration Law, *supra* note 8, Explanatory Note B.2.

89. See Status, UNCITRAL Model Law on International Commercial Arbitration, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Mar. 12, 2012).

90. UNCITRAL Model Arbitration Law, *supra* note 8, art. 17H(1).

91. Roth, *supra* note 9, ¶ 14.337.

92. UNCITRAL Model Arbitration Law, *supra* note 8, art. 17H(2).

93. *Id.* art. 17I(1)(a)(iii).

94. *Id.* art. 17H(3).

95. Roth, *supra* note 9, ¶ 14.343.

96. See UNCITRAL Model Arbitration Law, *supra* note 8, art. 17I.

number of familiar defects, which also qualify as grounds for resisting enforcement of a final award under Article V of the New York Convention.⁹⁷ Such grounds include severe failures regarding the arbitral process as well as the substantive grounds such as the lack of arbitrability and violation of public policy.⁹⁸ Additionally, the MAL names specific grounds for refusal of recognition and enforcement of interim measures.⁹⁹ These specific grounds include non-compliance with the tribunal's security order, termination or suspension of the interim measure by the arbitral tribunal or court, and incompatibility of the interim measure with the powers conferred upon the enforcement court.¹⁰⁰ However, the court may reformulate the interim measure to adapt it to its own powers and procedures without modifying its substance.¹⁰¹ Common to all of these grounds is the fact that the court will not review the decision-making of the arbitral tribunal that led to the issuance of the measure.¹⁰²

VI. CONCLUSION

Interim measures provide a party to arbitration with an immediate and temporary protection of rights or property. Because parties usually agree to arbitration in order to avoid litigating their dispute before national courts, the possibility to obtain interim relief from the arbitral tribunal is particularly important. Thus, arbitrators are generally vested with broad powers to order interim relief. However, in certain circumstances, the arbitral tribunal's ability to grant interim measures may be limited. First, arbitrators may ordinarily issue interim measures only after their constitution. However, in order to secure the availability of interim relief before the arbitral tribunal has been properly constituted, some arbitral rules have recently promulgated so called emergency provisions. Emergency provisions provide for a mechanism under which a party seeking urgent interim relief before the arbitral tribunal is in place can apply for the appointment of an emergency arbitrator. Second, arbitrators lack coercive powers. Consequently, the arbitral tribunal is neither empowered to order interim measures against third parties nor to directly enforce the interim measures. In such cases, the assistance of local courts is needed to ensure the effectiveness of an interim measure. Accordingly, national courts play an important complementary role where they order and enforce interim measures. All in all, MAL Article 17 *et seq.* fosters the harmonization of the varying national laws on interim measures and thereby helps to establish a reliable and efficient system of interim relief in international commercial arbitration.

97. See *id.* arts. 17I(1)(a)(i), (b)(ii); see also *id.* arts. 36(1)(a)(i), (ii), (iii), (b)(i), (ii); See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, art V, available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

98. Roth, *supra* note 9, ¶ 14.572.

99. See *id.* ¶ 14.350; see also UNCITRAL Model Arbitration Law, *supra* note 8, arts. 17I(1)(a)(ii), (iii), (b).

100. UNCITRAL Model Arbitration Law, *supra* note 8, arts. 17I(1)(a)(ii), (iii).

101. *Id.* art. 17I(1)(b)(i).

102. *Id.* art. 17I(2).